



**ICTR-98-41-T**  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
**13-09-2004**  
**(21815-21811)**

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OR: ENG

**TRIAL CHAMBER I**

**Before:** Judge Erik Møse, presiding  
Judge Jai Ram Reddy  
Judge Sergei Alekseevich Egorov

**Registrar:** Adama Dieng

**Date:** 13 September 2004

**THE PROSECUTOR**

**v.**

**Théoneste BAGOSORA**

**Gratien KABILIGI**

**Aloys NTABAKUZE**

**Anatole NSENGIYUMVA**

*Case No. : ICTR-98-41-T*

JUDICIAL RECORDS/ARCHIVES  
ICTR  
2004 SEP 13 P 4: 20  
[Signature]

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**DECISION ON ADMISSION OF TAB 19 OF BINDER PRODUCED IN  
CONNECTION WITH APPEARANCE OF WITNESS MAXWELL NKOLE**

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*[Handwritten signature]*

21814

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** ("the Tribunal"),

**SITTING** as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

**BEING SEIZED** of an oral request by the Prosecution on 7 June 2004 to tender a document appearing at Tab 19 of a binder submitted to the Chamber in association with the testimony of Witness Maxwell Nkole;

**HAVING CONSIDERED** the oral submissions of the parties on 7 June 2004;

**HEREBY DECIDES** the request.

**INTRODUCTION**

1. On 7 and 8 June 2004, Prosecution investigator Maxwell Nkole testified before the Chamber. During the first day of testimony, the Prosecution elicited information from the witness concerning a document appearing at Tab 19 of a binder of documents distributed to the Chamber and the parties. On the basis of explanations by the Prosecution and Witness Nkole, three distinct sets of documents appear at Tab 19 of the Prosecution binder. One set of documents is a report by the Federal Bureau of Investigation (FBI) of an interview with a Rwandan official who describes a series of twenty-two documents which are annexed to the report. A second set of documents consists of two other situation reports, without any annexes attached. A third set of documents, bearing identification numbers L0008633 through L0008648, appears to be a series of telephone directories from 1994 for high government officials, UNAMIR, and the media.

2. The Prosecution withdrew the second set of documents, but tendered the first and third set of documents for admission as evidence.<sup>1</sup> The Defence objected. After hearing the oral arguments of the parties, the Chamber reserved its decision.

**SUBMISSIONS**

3. Witness Nkole testified that he believed that the report had been prepared by investigators of the FBI, which had been active in Rwanda before the creation of the investigative section of the Tribunal. The document, including the twenty-two annexes, was thereafter given to Tribunal investigators by the Department of State of the United States of America.<sup>2</sup> The witness testified that the fifteen additional pages bearing identification numbers L0008633 through L0008648 were not meant to be part of the report, but had also been collected by FBI agents and handed over to the Tribunal.<sup>3</sup>

4. The Prosecution submitted that the FBI report and its annexes should be admitted as evidence.<sup>4</sup> The annexes speak for themselves and their content corroborates other evidence

<sup>1</sup> T. 7 June 2004 pp. 69, 70.

<sup>2</sup> T. 7 June 2004 pp. 62-65.

<sup>3</sup> *Id.* pp. 65-68.

<sup>4</sup> At one point during its submissions, the Prosecution appeared to also withdraw its effort to tender the FBI report. T. 7 June 2004 p. 77 ("Mr. President: But what I hear you saying now is really that you are not insisting on the report itself, because that is, in fact, an interview with – with a person who is not being called for cross-examination, so what is left for us to decide is the 22. Ms. Mulvaney: And that's absolutely correct.") But later the Prosecution seemed to retract this submission. *Id.* p. 80 ("[O]ne thing I wanted to say is that one of the counsel had said that I agreed that the report is not admissible, and that's not what I said. I think it's really

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that has already been heard by the Chamber. The FBI report itself provides an indication of the source of the annexes and should be admissible for that reason.<sup>5</sup> The Prosecution also argued that the fifteen pages of telephone information should also be admitted. Though not formally an annex, it may have been referred to in the FBI report. Further, it was a matter that should be of interest to the Chamber.<sup>6</sup>

5. The Ntabakuze Defence argued that, in its present form, the FBI report and its annexes have none of the indicia of reliability that could give it any probative value. Its author is not present to testify. Nor could the report be admitted under Rule 92*bis* as the relevant formalities had not been fulfilled. Further, the author of the FBI report does not describe how the documents were originally obtained, but rather recapitulates her interview with an official of the Government of Rwanda. Accordingly, the report itself provides only hearsay evidence of the provenance of the documents. Hearsay evidence is particularly unreliable where, as here, the hearsay speaker may be biased. Given the absence of the minimum requirements of reliability and probative value, the document should not be admitted.<sup>7</sup>

6. The Bagosora Defence argued that there appeared to be discrepancies between the description of the documents given in the FBI report and the documents themselves. These discrepancies undermined the reliability of the report. It also argued that the Prosecution should have disclosed the document to the Defence earlier under Rule 67 (A). For both of these reasons, the document should not be admitted.<sup>8</sup>

## DELIBERATIONS

7. Rule 89(C) defines the standard for admission of evidence before the Chamber, including documents: "A Chamber may admit any relevant evidence which it deems to have probative value." At the admissibility stage, relevance and probative value are threshold standards. The moving party need only make a *prima facie* showing that the document is relevant and has probative value. A finding in favour of admission in no way determines what weight, if any, should be accorded to the document in the Chamber's ultimate findings of fact.<sup>9</sup> The purpose of the standards set forth in Rule 89 (C) is to ensure that the Chamber is not burdened by evidence for which no reasonable showing of relevance or probative value has been made.

8. In offering a document for admission as evidence, the moving party must as an initial matter explain what the document is. The moving party must further provide indications that the document is authentic – that is, that the document is actually what the moving party purports it to be. There are no technical rules or preconditions for authentication of a

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important that we follow the rules of the Tribunal and that we err on the side of admission as opposed to omission.") The Chamber will assume that the Prosecution wishes the admission of the report.

<sup>5</sup> T. 7 June 2004 pp. 75-77.

<sup>6</sup> *Id.* pp. 69-70.

<sup>7</sup> *Id.* pp. 73-75, 77.

<sup>8</sup> *Id.* pp. 70-72.

<sup>9</sup> *Musema*, Judgement (TC), para. 56 ("The admission of evidence requires, under sub-Rule 89 (C), the establishment in the evidence of *some* relevance and *some* probative value. Accordingly, the standard of proof required for admissibility should be lower than the standard of proof required in the final determination of the matter at hand through the weighing up of the probative value of all the evidence before the Chamber. The admission of evidence does not require the ascertainment of the exact probative value of the evidence by the Chamber; that comes later. Admission requires simply the proof that the evidence has *some* probative value.") *Delalic et al.*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), para. 17 ("At the stage of admission of the evidence, the implicit requirement of reliability means no more than that there must be sufficient indicia of reliability to make out a *prima facie* case.")

document, but there must be "sufficient indicia of reliability" to justify its admission. Indicia of reliability which have justified admission of documents in the jurisprudence of the *ad hoc* Tribunals include: the place in which the document was seized, in conjunction with testimony describing the chain of custody since the seizure of the document; corroboration of the contents of the document with other evidence; and the nature of the document itself, such as signatures, stamps, or even the form of the handwriting.<sup>10</sup> Authenticity and reliability are overlapping concepts: the fact that the document is what it purports to be enhances the likely truth of the contents thereof. On the other hand, if the document is not what the moving party purports it to be, the contents of the document cannot be considered reliable, or as having probative value.

9. The Prosecution has submitted that the twenty-two annexes are accurately identified in the FBI report appearing at Tab 19 of its binder. In summary, the report states that the annexes are lists of names of people who wished to join the army or militia, or who wished to train in the use of firearms; lists of people responsible for roadblocks, and locations where the roadblocks should be set up; lists of people to whom weapons should be distributed; and the minutes of a "crisis committee" meeting after the crash of the President's plane. The basis for this description is information given to the author of the FBI report during an interview with a Rwandan government official who was part of a team charged with discovering and archiving documents "concerning the planning of the war". The FBI report further states that the twenty-two documents were photocopied by the FBI official on 27 September 1994 and constitute the annexes to the report. The Rwandan official was unable to say where the documents had been discovered or by whom. The twenty-two documents are hand-written, and no authorship is ascribed to them by the FBI report itself, or by the Prosecution.

10. The Prosecution has not provided any indication of where the documents were found, by whom they were found, or the chain of custody between discovery and production in court. Even assuming that the FBI report itself could be considered in the absence of live testimony by its author, the report indicates that the interviewee was unable to verify the manner in which the documents were obtained. While the absence of such proof does not necessarily render a document inadmissible, the place and manner of discovery are important factors in assessing the authenticity of a document.<sup>11</sup> Nor has the Prosecution attempted to establish the authorship of the documents, another possible indicium of reliability.<sup>12</sup> Although the Prosecution attempted to correlate the contents of the documents with other evidence in the case, it did not do so with sufficient particularity to suggest that the documents are, indeed, authentic and reliable. Most of the documents are undated.

11. For these reasons, the Chamber finds that the twenty-two hand-written documents appearing at Tab 19 are not admissible. As the Prosecution argued that the FBI report was ancillary to the admission of the twenty-two document, the Chamber finds that the report itself is also inadmissible.<sup>13</sup> Finally, the Chamber finds that the fifteen pages of telephone directories are also inadmissible, in the absence of reliable information verifying their origin.

<sup>10</sup> *Delalic*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998, para. 18; *Kordic and Cerkez*, Decision on Prosecutor's Submissions Concerning 'Zagreb Exhibits' and Presidential Transcripts (TC), 1 December 2000, paras. 43-44; *Brdanin and Talic*, Order on the Standards Governing the Admission of Evidence (TC), 15 February 2002, para. 20.

<sup>11</sup> See e.g. *Delalic et al.*, Decision on the Motion of the Prosecution for the Admissibility of Evidence (TC), 19 January 1998, para. 31; *Delalic et al.*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998, para. 18.

<sup>12</sup> *Kordic and Cerkez*, Decision on Prosecutor's Submissions Concerning 'Zagreb Exhibits' and Presidential Transcripts (TC), 1 December 2000, para. 44.

<sup>13</sup> T. 7 June 2004 p. 77 ("The report to me is just a guide to get you through the documents.")


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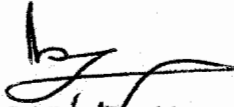
**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** the Prosecution application for admission into evidence of portions of Tab 19 of the binder relating to Witness Maxwell Nkole.

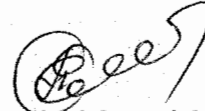
Arusha, 13 September 2004



Erik Mose  
Presiding Judge



Jai Ram Reddy  
Judge



Sergei Alekseevich Egorov  
Judge

[Seal of the Tribunal]

