



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

ORIGINAL: ENGLISH

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 19 March 2007

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No.: ICTR-98-41-T

**DECISION ON NTABAKUZE MOTION TO DEPOSIT CERTAIN UNITED
NATIONS DOCUMENTS**

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence

Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
Marc Nerenberg
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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

BEING SEIZED OF the “Ntabakuze Motion to Deposit Certain United Nations Documents”, filed on 12 October 2006;

HEREBY DECIDES the request.

INTRODUCTION

1. The Ntabakuze Defence requests that the Chamber admit 25 sets of documents into evidence under Rule 89 (C) of the Rules of Procedure and Evidence. Since the motion was filed, thirteen of them have been admitted during the proceedings.¹ The remaining twelve documents can be divided into three categories: (i) UN documents relating to the UNAMIR peace-keeping mission in Rwanda between January and August 1994;² (ii) UN and other documents concerning a report written by Robert Gersony between September and October 1994;³ and (iii) a newspaper article written by Shaharyar Khan in 1998.⁴

DELIBERATIONS

2. Pursuant to Rule 89 (C), the Chamber has the discretionary power to admit any relevant evidence which it deems to have probative value. At the admissibility stage, the moving party need only make a *prima facie* showing that the document is relevant and has probative value.⁵ The proposed evidence must be relevant to the charges against the Accused and serve to prove (or disprove) an element of a crime which the Accused is charged.⁶ Documents need not be recognized by a witness in order to have probative value.⁷ However, as an initial matter, the moving party must explain what the document is, and further, there must be indications that the document is authentic – that is, that the document is actually what the moving party purports it to be.⁸

3. In order for a document to be considered authentic, the Chamber must be satisfied that there are “sufficient indicia of reliability” to warrant its admission.⁹ There are no formal requirements for establishing authenticity, but a number of factors have been considered important in previous decisions. Such factors have included the extent to which the document’s content is corroborated by other evidence; the place where it was obtained;

¹ Motion, Documents 1-9, 13-14, 18, 20.

² Motion, Documents 11, 12, 16, 17, 19, 21-25.

³ Motion, Document 10.

⁴ Motion, Document 15.

⁵ *Prosecutor v. Bagosora et al.*, Decision on Request to Admit United Nations Documents into Evidence Under Rule 89 (C) (TC), 25 May 2006, para. 2; Decision on the Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole (TC), 13 September 2004, para. 7.

⁶ *Bagosora et al.*, Decision on Admissibility of Proposed Testimony of Witness DBY (TC), 18 September 2003, para. 4.

⁷ *Bagosora et al.*, Decision on Request to Admit United Nations Documents into Evidence Under Rule 89 (C) (TC), 25 May 2006, para. 4.

⁸ *Bagosora et al.*, Decision on the Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole (TC), 13 September 2004, para. 7.

⁹ *Id.*, para. 8.

whether it is an original or a copy; if it is a copy, whether it is registered or filed with an institutional authority; whether it is signed, sealed, stamped, or certified in any way.¹⁰

(i) UNAMIR Documents

4. The Chamber is of the opinion that the authenticity of the documents relating to the UNAMIR peace-keeping mission has been adequately established. Those documents, apparently obtained from the archives of United Nations Headquarters, are reliable as they originate from correspondence arising from the 1994 peace-keeping mission in Rwanda and have received verification via institutional stamps and signatures.

5. The relevancy requirement is satisfied. The correspondence to and from high-ranking UN officials serves as a contemporaneous record of events during the UN peacekeeping mission in Rwanda. The Chamber follows its prior decision of 25 May 2006 concerning the relevance of UN documents, where they “reflect the views of United Nations officials as to the political and military context of Rwanda in 1994”. Consequently, Documents 11, 12, 16, 17, 19, 21-25 are admissible.¹¹

(ii) Gersony Report and Related Documents

6. Documents in the second category are concerned with the content, official awareness and political reception of a UNHCR report authored by Mr. Robert Gersony which detailed the refugee situation in Rwanda in the aftermath of the 1994 conflict between RPF and Rwandan government forces. The only document in this group which has not been admitted since the motion was filed is Document 10. It includes a fax of 18 June 2003 from a Defence counsel in the Media trial to the Court Management Section. Appended to that fax are a letter of 11 October 1994 from UNHCR, with a written summary of an oral presentation given by Mr. Gersony during a briefing on 10 October 1994, and a UNHCR field report from a border crossing point on 14 and 15 May 1994.

7. The fax from Defence counsel is not contemporaneous and not relevant. The second and third documents relate to the events in 1994 but several pages are missing in both documents. The Chamber has previously determined that there was an insufficient nexus between the subject matter of the Gersony report and the charges under the Ntabakuze Indictment for it to be considered relevant pursuant to Article 28 of the Statute for the issuance of a subpoena.¹² In the absence of any submission from the Defence explaining the specific relevance of events mentioned in these two incomplete documents, the Chamber does not find a sufficient basis to admit them under Rule 89 (C).

¹⁰ *Bagosora et al.*, Decision on the Request to Admit United Nations Documents into Evidence Under Rule 89 (C) (TC), 25 May 2006, para. 4.

¹¹ *Id.*, para. 3.

¹² *Bagosora et al.*, Decision on Ntabakuze Motion for Information from the UNHCR and a Meeting with One of its Officials (TC), 6 October 2006, para. 8 ([T]he Defence submission that Mr. Gersony’s knowledge extends to massacres “for which the Accused is being held responsible” is surprising. On the contrary, all indications suggest that Mr. Gersony’s information concerns events that occurred after the departure of any troops potentially under the command of the Accused ... Descriptions of crimes committed by RPF forces against civilians in geographic areas physically distant from combat between the opposing armed forces in 1994 would not suggest the innocence or mitigate the guilt of the accused. The impact of such events on the criminal conduct with which the accused are charged is too remote and indirect).

(iii) Newspaper Article

8. Document 15 is a newspaper article written in February 1998, by Shaharyar Khan, the former Special Representative to Rwanda of the UN Secretary-General. The article contains the author's opinions on the conflict in Rwanda in 1994. The Defence requests its admission in order to show that there was absence of warnings of plans for genocide prior to April 1994.

9. The Chamber has previously denied a similar Defence request to issue a subpoena for Mr. Khan, who was Special Representative from July 1994 to March 1994, finding that other witnesses were in a better position to testify to the knowledge of a plan.¹³ Document 15 is not contemporaneous with the 1994 events but written about four years later. It is akin to a witness statement. Rule 90 (A) provides that "[w]itnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71". Under Rule 92 *bis*, written statements in lieu of oral testimony may be admitted, but only "those that go to proof of a matter other than the acts and conduct of the accused as charged in the indictment". Admissibility of this document is therefore not confined to an analysis of relevancy under Rule 89 (C) but extends to the requirements of Rule 92 *bis*.¹⁴ The Defence has not shown that the article complies with Rule 92 *bis*, or that any other provision justifying admission is applicable. The Chamber rejects the admission of this document into evidence.

¹³ *Bagosora et al.*, Decision on Request for Subpoenas of United Nations Officials (TC), 6 October 2006, para. 10 ("The Chamber does not consider that any of the information supposedly in the possession of Mr. Khan justify the issuance of a subpoena. The state of contemporaneous knowledge of a plan to commit genocide has been addressed in the previous section in relation to the DPKO witnesses, who appear to be in a better position than Mr. Khan to respond to this inquiry. Indeed, the Defence has not indicated that Mr. Khan has knowledge of this issue other than his retrospective review of the documents which are already in the possession of the Defence").

¹⁴ The Chamber has previously examined the interrelationship between these two rules and noted that the ICTY Appeals Chamber "'has described Rule 92 *bis* as *lex specialis* which takes the admissibility of written statements of prospective witnesses and transcripts of evidence out of the scope of the *lex generalis* of Rule 89 (C), although the general propositions which are implicit in Rule 89 (C) – that evidence is admissible only if it is relevant and that it is relevant only if it has probative value – remain applicable to Rule 92 *bis*.' Therefore, statements sought to be admitted under Rule 92 *bis* must also comply with the requirements of relevance and probative value required by Rule 89 (C)". *Prosecutor v. Serugendo*, Decision on Defence Motion for the Admission of Written Witness Statements under Rule 92 *bis* (TC), 1 June 2006, para. 3.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Defence motion in part and allows Documents 11, 12, 16, 17, 19, 21 through 25, to be admitted into evidence;

INSTRUCTS the Registry to mark these documents as exhibits for the Ntabakuze Defence;

DECLARES MOOT the Defence request to admit Documents 1-9, 13, 14, 18, 20;

DENIES the remainder of the motion.

Arusha, 19 March 2007

Erik Møse
Presiding Judge

Jai Ram Reddy
Judge

Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]