

ICTR-98-41-T
11-04-2007

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

(34698-34696)

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 11 April 2007

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. ICTR-98-41-T

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DECISION ON BAGOSORA MOTION TO EXCLUDE PHOTOCOPIES
OF AGENDA

The Prosecution

Barbara Mulvancy
Drew White
Christine Graham
Rashid Rashid
Gregory Townsend
Kartik Murukutla

The Defence

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

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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;

CONSIDERING the Bagosora "Urgent Motion to Exclude Photocopies of the Agenda", filed on 19 February 2007;

CONSIDERING the Prosecution Response, filed on 26 February 2007, and the Bagosora Reply, filed on 2 March 2007;

HEREBY DECIDES the motion.

INTRODUCTION

1. The report of Prosecution Witness Antipas Nyanjwa, a handwriting expert, was admitted as Exhibit P-278. One of its annexes is a twenty-six page document which has been referred to as Colonel Bagosora's agenda (or diary).

2. The Defence now requests that this document be excluded, arguing that it lacks sufficient indicia of reliability under Rule 89 (C) of the Rules of Procedure and Evidence. Furthermore, keeping it in evidence would be antithetical to, and would seriously damage the integrity of the proceedings pursuant to Rule 95. The Prosecution submits that the authenticity of the agenda has been proven through the testimony of experts and by Colonel Bagosora himself. It argues that the only remaining issue for the Chamber to consider is the precise weight to be accorded to the evidence.

DELIBERATIONS

3. During the testimony of Prosecution Expert Witness Alison Des Forges, the Prosecution sought to tender the agenda. The Bench denied the request but indicated that the admissibility problem could possibly be solved by a comparison between the proposed exhibit and samples of the Accused's handwriting.¹ When a Prosecution investigator Maxwell Nkole testified about the agenda, the Chamber ruled that the admissibility of the document should be considered in connection with the testimony of the Prosecution handwriting expert.² It was subsequently admitted as an annex to the Nyanjwa report.³

4. Pursuant to Rule 89 (C), the Chamber has discretionary authority to admit any relevant evidence which it deems to have probative value. The probative value of a document is determined by its authenticity.⁴ At the admissibility stage, relevance and probative value are threshold standards; a *prima facie* showing that evidence meets these standards is sufficient.

¹ T. 17 September 2002 pp. 89-96, particularly p. 95. See also the Chamber's rulings of 19 September 2002 p. 19 ("There are other means by which there can be an admission of the document.") and of 26 November 2002 p. 27.

² T. 8 June 2004 pp. 27-37.

³ T. 21 June 2004 pp. 49-50.

⁴ *Bagosora et al.*, Decision on Admission of Tah 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole (TC), 13 September 2004, para. 8; *Bagosora et al.*, Decision on the Request to Admit United Nations Documents into Evidence Under Rule 89 (C) (TC), 25 May 2006, para. 4.

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On the basis of the Nyanjwa report, which concluded that the handwriting was that of the Accused, the Chamber admitted the document into evidence.

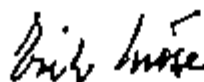
5. The Defence submissions concerning the missing original agenda and the chain of custody of the twenty-six pages of photocopies are not a sufficient basis to reconsider the Chamber's decision of 21 June 2004 to admit the document.⁵ The ruling was based on handwriting expertise. Subsequently, the Accused has testified that the excerpts in fact are in his handwriting. He questioned, however, whether they originated from a diary kept on a daily basis and indicated the possibility of manipulation.⁶ This goes to the weight of the exhibit and will be considered in connection with the Chamber's evaluation of the totality of the evidence.⁷

6. The Defence is also drawing the Chamber's attention to a visit by Co-Counsel at the ICTR Evidence Unit on 12 February 2007. She discovered that eighteen of the original photocopied pages of the agenda tendered had been removed, and replaced by second generation photocopies. The Evidence Unit stated that the Prosecution had withdrawn these copies on 23 June 2004 and that attempts to retrieve them had been unsuccessful.⁸ The Chamber takes note of the concerns raised by the Defence regarding the integrity of the agenda.⁹ However, these subsequent developments do not affect the previous ruling of the Chamber and cannot now form the basis for exclusion of evidence under Rule 95. Again, such submissions go to the weight to be accorded to the evidence.

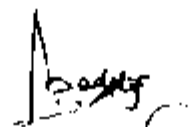
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 11 April 2007



Erik Mose
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]



⁵ Motion, paras. 11, 12, 14, 17-20.

⁶ T. 27 October 2005 pp. 65, 67.

⁷ It is established jurisprudence that the admissibility of evidence should not be confused with the assessment of weight to be accorded to that evidence, which will be decided by the Trial Chamber at a later time when assessing the totality of the evidence. *Nyiramasuhoko*, Decision on Pauline Nyiramasuhoko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, paras. 6-7.

⁸ Motion, paras. 4-7.

⁹ For instance, the Accused denied that the words "Kanama = 100" were written by him on the entries for the 2 to 3 February 1993. T. 27 October 2005 p. 72.



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