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(09-02-2012)
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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Mwamp

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 9 February 2012

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The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

**DECISION ON DEFENCE MOTION FOR
ADMISSION OF DOCUMENTARY EVIDENCE**

Office of the Prosecutor

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

Defence Counsel

Mr. Peter Herbert
Ms. Mylène Dimitri
Mr. Deogratias Sebureze
Ms. Anne-Gaëlle Denier
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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 “Defence Motion for Admission of Documentary Evidence”, filed confidentially on 15 August 2011 (the “Defence Motion”);

CONSIDERING:

- (a) the “Prosecutor’s Reply (sic) to Defence Motion for Admission of Documentary Evidence”, filed on 1 September 2011 (the “Prosecution Response”); and
- (b) the “Defence Reply to Prosecution “Reply” to Defence Motion for Admission of Documentary Evidence”, filed confidentially on 9 September 2011 (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 73 and 89(C) of the Rules.

INTRODUCTION

1. On 15 August 2011, the Defence filed confidentially the Defence Motion.
2. On 22 August 2011, the Chamber heard oral submissions on the Prosecution Motion for Extension of Time. The Chamber granted the same, giving the Prosecution until 31 August 2011 to file its Response to the Defence Motion, and the same period to the Defence to file a Reply.¹
3. On 1 September 2011, the Prosecution filed its Response to the Defence Motion.²
4. On 9 September 2011, the Defence filed confidentially its Reply.

SUBMISSIONS OF THE PARTIES

Defence Motion

5. The Defence seeks the admission of 56 documents directly from the bar table. These documents fall within five categories: (1) UNAMIR documents; (2) Radio Rwanda

¹ T. 22 August 2011, pp. 29-31.

² 31 August 2011 was a holiday at the Tribunal, and therefore the Prosecution Response was timely filed.



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broadcasts; (3) Judicial records from Rwanda; (4) Documents in support of the Accused's alibi; and (5) Other documents.

6. The Defence submits that documentary evidence may be submitted directly from the bar table under Rule 89(C). The Chamber should evaluate whether the evidence is *prima facie* credible, bearing sufficient indicia of reliability. Moreover, the relevance criterion under Rule 89(C) is satisfied when there is a link between the evidence and the allegations in the Indictment. Evidence bears probative value when it tends to prove or disprove an issue in the case.³

UNAMIR Documents

7. The Defence seeks admission of two groups of UNAMIR documents: (1) 13 situation reports from various dates in March and April 1994 furnished by the UN Department of Peacekeeping and Operations ("DPKO") in New York; and (2) a bundle of seven documents obtained by the Defence, consisting of situation reports ("sitreps") and code cables. The Defence submits that these documents are of an exculpatory nature, as these tend to contradict the occurrence of crimes that the Accused allegedly committed, and the testimonies of Prosecution Witnesses ANAL, ANAJ, ANAN, ANAT, ANAS, ANAO, DAK, and ANAW.⁴

8. The Defence contends that these documents bear sufficient indicia of reliability. In particular, they bear dates, times and official stamps which support their authenticity. The first group of UNAMIR documents was furnished directly by the DPKO, while the second collection of UNAMIR documents all bear K- or L- numbers, indicating that they are available in the Office of the Prosecutor's Electronic Disclosure Suite ("EDS").⁵

Radio Rwanda Broadcasts

9. The Defence submits that the ten Radio Rwanda broadcasts⁶ sought to be admitted support the Accused's alibis for April and May 1994, corroborate the testimony of the Accused, DWAN-122, DWAN-55, and DWAN-151, and several Defence exhibits. In addition, these documents contradict the testimonies of Prosecution Witnesses AFS, ANAE, ANAL, ANAW, DAK, ANAM, ANAG, ANAN, and ANAJ.⁷

10. In support of its Motion, the Defence cites the Chamber's Decision of 1 April 2011 which found that the Defence *prima facie* established that the Radio Rwanda broadcasts of 9, 10, 11, 16 and 17 April 1994 may pertain to the Accused's whereabouts during these time periods and could be potentially exculpatory. The Chamber thereby ordered the Prosecution to disclose these materials to the Defence under Rule 68(A).⁸

³ Defence Motion, paras. 6-13.

⁴ *Id.*, paras. 15-166.

⁵ *Id.*, paras. 164-165.

⁶ *Id.*, paras. 2, 168. The Chamber notes that the Defence seeks to have both the audiocassette recordings of the Radio Rwanda broadcasts and their transcripts admitted into evidence.

⁷ *Id.*, paras. 167-229.

⁸ *Id.*, paras. 169-172.

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11. The Defence submits that it was repeatedly prevented from tendering transcripts of Radio Rwanda broadcasts during the examination-in-chief of the Accused on the basis that there was an insufficient link to him. According to the Defence, the Chamber nevertheless indicated that there were other avenues through which the Defence could file the audio records.⁹

Judicial Records from Rwanda

12. The Defence seeks to tender five judgements into evidence, three from *gacaca* courts and two from the regular Rwandan courts. The Defence submits that these judgements contradict certain allegations against the Accused and the testimonies of Prosecution Witnesses ANAM, ANAL, ANAD, ANAK, AFS, ANAJ, and ANAO. These records, according to the Defence, likewise corroborate the testimony of Defence Witnesses DWAN-3 and DWAN-25, and will corroborate the testimonies of DWAN-127, DWAN-133, DWAN-39, and DWAN-145.¹⁰

13. The Defence contends that Rwandan judicial records may be relevant and have probative value insofar as these relate to allegations against the Accused. The Defence further submits that these materials may assist in the assessment of the credibility of witnesses.¹¹

14. According to the Defence, these five judgements all bear stamps indicating that these are official documents from the Rwandan authorities, and one of these judgements bears K-numbers.¹²

Documents in Support of the Alibi

15. The Defence seeks to tender five documents¹³ into evidence in support of some of the Accused's alibis, four of which the Defence identifies as official correspondence from States and one of which the Defence submits is a page from a Gabonese newspaper.¹⁴

Other Documents

16. Finally, the Defence seeks to tender into evidence a category of 15 miscellaneous documents.

Cable dated 14 October 1993 from US Secretary of State to the American Embassy in Kigali

17. The Defence submits that this cable corroborates the testimony of the Accused that he accompanied President Habyarimana on official mission to Washington, D.C. in October 1993 and counters the Prosecution suggestion that the Accused never

⁹ *Id.*, paras. 167, 173.

¹⁰ *Id.*, paras. 230-283.

¹¹ *Id.*, paras. 232-235.

¹² *Id.*, paras. 245, 256, 266, 275, 283.

¹³ The Chamber notes that some of these documents have a number of attachments thereto.

¹⁴ Defence Motion, paras. 284-314.

participated on any subcommittees on refugees and displaced persons. The Defence further submits that the letter is an official document from the US government and bears K-numbers.¹⁵

Letter dated 28 March 1994 to Prime Minister Agathe Uwilingiyimana

18. The Defence submits that this letter corroborates the testimony of the Accused, and two Defence exhibits. According to the Defence, this document further rebuts the Prosecution assertion that the Accused did not support Prime Minister Agathe Uwilingiyimana's government.¹⁶

Excerpts of Ambassador Johan Swinnen's testimony in the Bizimungu et al. Trial

19. The Defence submits that Ambassador Swinnen testified in the *Bizimungu et al.* trial that he met with three Ministers, including the Accused, on 9 April 1994. The three Ministers were said to have manifested their desire to put an end to the violence and restore peace and security in Rwanda. They took heed of Ambassador Swinnen's request that the RTLM's inflammatory broadcasts be halted. The Defence submits that the relevant portions of the transcript of Ambassador Swinnen's testimony corroborate the Accused's testimony that he sought to stop the RTLM from broadcasting incendiary speech.¹⁷

Situation of Rwandan Army Officers on 1 March 1994

20. The Defence seeks to tender into evidence what is alleged to be an official document from the Rwandan Ministry of Defence dated 5 March 1994, which lists the positions of all officers of the Rwandan Army as of 1 March 1994. The Defence submits that this document directly contradicts the testimonies of Prosecution Witnesses ANAN and DAK and impeaches their credibility. The Defence further submits that Prosecution Witness ANAN alleged that Colonel Nubaha was involved in the massacre at Muhororo church and presbytery on 13 April 1994, while this document confirms that Colonel Nubaha was Commander of the army camp in Kigali on said date. Similarly, the Defence contends that Prosecution Witness ANAN alleged that Colonel Mudacumura was part of a company of soldiers involved in killings in Gitarama in April 1994, whereas this document establishes that he was posted at the "OPS Byumba" as "Commandant Bn" of the 31st Battalion.¹⁸

Documents with signatures of the Accused and his Director of Cabinet Anne-Marie Mukakayange

21. The Defence seeks to tender into evidence three documents in order to contradict the Prosecution's assertion that the Accused's signature appears in a document dated 28 June 1994. According to the Defence, the Prosecution sought to discredit the Accused's

¹⁵ *Id.*, paras. 316-319.

¹⁶ *Id.*, paras. 320-327.

¹⁷ *Id.*, paras. 328-334.

¹⁸ *Id.*, paras. 335-346.

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testimony that he was in Italy on this date by pointing to the said signature, and the Accused explained that the signature was not his but that of his Director of Cabinet Anne-Marie Mukakayange. The Defence submits that these three documents will conclusively establish the signatures of the Accused and Ms. Mukakayange.¹⁹

10 April 1994 Speech of Sindikubwabo

22. The Defence seeks to tender into evidence the text of the 10 April 1994 speech of President Sindikubwabo to counter the Prosecution assertion that the Interim Government, of which the Accused was a member, did nothing to stop the massacres in Rwanda in 1994.²⁰

List of Members of Broad-Based Transitional Government as of 19 March 1994

23. The Defence seeks to tender into evidence a list of members of the Broad-Based Transitional Government as of 19 March 1994 to contradict Prosecution Witness ANAN's testimony that Ferdinand Nahimana was a member of the CDR party.²¹

Wikipedia article on Pascaline Ondimba

24. The Defence seeks to tender into evidence a Wikipedia article on Pascaline Ondimba, daughter of former Gabonese President Omar Bongo, to rebut the Prosecution assertion that she was the Gabonese Foreign Minister when the Accused visited Gabon in 1994.²²

Excerpts of General Roméo Dallaire's testimony in the *Bagosora et al.* case

25. The Defence seeks to tender into evidence the transcripts of General Dallaire's testimony in the *Bagosora et al.* case to bolster its contention that individuals other than the intended recipients of UN code cables were privy to their contents. According to the Defence, this rebuts the Prosecution assertion that the Accused could not have had access to several UN code cables in 1994.²³

Excerpts of General Dallaire's testimony in the *Ndindiliyimana et al.* case

26. The Defence seeks to tender into evidence the transcripts of General Dallaire's testimony in the *Ndindiliyimana et al.* case to establish that UNAMIR's capacity to report on events taking place outside Kigali was significantly diminished after the death of President Habayrimana on 6 April 1994.²⁴

¹⁹ *Id.*, paras. 347-353.

²⁰ *Id.*, paras. 354-359.

²¹ *Id.*, paras. 360-362.

²² *Id.*, paras. 363-365.

²³ *Id.*, paras. 366-371.

²⁴ *Id.*, paras. 372-375.



Telexes to/from Belgian embassies in Nairobi and Kigali

27. The Defence seeks to tender into evidence Telex No. 843 of 14 August 1993 to the Belgian embassy in Nairobi and Telex No. 892 of 2 September 1993 from the Belgian embassy in Kigali to refute the Prosecution submission that the Accused never participated in any subcommittees on refugees and displaced persons following the Kihira meeting which took place around 13 December 1993.²⁵

Marriage certificate

28. The Defence seeks to tender into evidence a marriage certificate to establish that Faustin Bagango was *bourgmestre* of Nyamyumba commune in July 1993. According to the Defence, this contradicts the testimonies of several Prosecution witnesses that Bagango was appointed *bourgmestre* only in late December 1993 or 1994. The Defence submits that the *bourgmestre* is the authority at the commune level who can sign marriage certificates.²⁶

Letter dated 17 March 1993 of the RPF

29. The Defence seeks to tender into evidence a letter dated 17 March 1993 from Patrick Mazimaka, member of the RPF Executive Committee, to the Rwandan Foreign Minister requesting the Rwandan government to remove, *inter alia*, Égide Karemera as *bourgmestre* of Nyamyumba commune. The Defence submits this corroborates some exhibits already in evidence,²⁷ establishes that some *bourgmestres* were replaced after an evaluation conducted by the Kabanda Commission, and confirms that Faustin Bagango was elected *bourgmestre* of Nyamyumba commune in March 1993, contrary to the testimonies of several Prosecution witnesses who alleged that he attained this position in late 1993 or 1994. Moreover, the Defence submits that this letter corroborates the Accused's reference to this letter from the RPF in his testimony.²⁸

Death certificate of Jean Safari

30. The Defence seeks to tender into evidence a death certificate indicating that Jean Safari died on 23 December 1997. The Defence submits that this directly contradicts the allegation in paragraph 60 of the Indictment that Safari was among those Tutsis killed in April 1994 by *Interahamwe* members instigated by the Accused.²⁹

Death certificate of Venantie Karwera

31. The Defence seeks to tender into evidence the death certificate of Venantie Karwera, Cenge's mother, which indicates that she died several years before the death of the Accused's father, Paul Buzazi. According to the Defence, this directly contradicts the

²⁵ *Id.*, paras. 376-381; T. 18 November 2010, pp. 65-66.

²⁶ Defence Motion, paras. 382-383.

²⁷ Defence Exhibits 115 and 117.

²⁸ Defence Motion, paras. 384-387.

²⁹ *Id.*, paras. 388-393.

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testimony of Prosecution Witness ANAE, who testified that Karwera was still alive at the time of Buzazi's funeral.³⁰

Prosecution Response

32. The Prosecution points out at the outset that three documents tendered by the Defence have already been admitted into evidence.³¹

33. The Prosecution submits that three documents subject of the Defence Motion were already previously denied admission into evidence by the Chamber, and that therefore the Defence is precluded from seeking their admission anew.³²

34. As regards the two excerpts from transcripts in the *Bagosora et al.* and *Ndindiliyimana et al.* cases that the Defence seeks to tender into evidence, the Prosecution submits that Rule 92 *bis* (D) applies and the Defence did not comply therewith.³³

35. The Prosecution further takes exception to the Defence tendering a Wikipedia article on Pascaline Ondimba into evidence, and submits that any user can input data into Wikipedia without due regard to the authenticity or accuracy thereof.³⁴

36. While the Prosecution concedes that documents may be admitted directly from the bar table, it submits that it is preferable to do so through a witness. According to the Prosecution, doing so promotes fairness and the interests of justice as a witness can: (1) lay a better foundation for a piece of evidence; (2) speak more suitably than counsel on the proposed evidence; (3) contextualize the evidence; and (4) be cross-examined as regards the document sought to be admitted.³⁵

37. The Prosecution submits it is prejudiced by the Defence's wholesale tender of a large quantity of documents directly from the bar table. The Prosecution contends that it is forced to review and evaluate numerous documents out of context, and to decide which Defence witnesses to cross-examine on particular documents rather than simply cross-examining the witness through which a document is tendered.³⁶

38. The Prosecution cites three ICTY Trial Decisions in the *Karadžić* case in support of this contention. According to the Prosecution, the ICTY Trial Chamber in two of these Decisions stated that admission of documents directly from the bar table is appropriate where both parties agreed on such admission, and where various portions of the documents were expected to be used numerous times throughout trial with different witnesses.³⁷

³⁰ *Id.*, paras. 394-397.

³¹ Prosecution Response, para. 7, referring to Defence Exhibits 140, 141 and 142, and Prosecutions Exhibits 29A and 29B.

³² Prosecution Response, para. 8, referring to: (1) Excerpts from Ambassador Swinnen's testimony in *The Prosecutor v. Casimir Bizimungu et al.*; (2) Agreement protocol between Rwanda and its partners on the utilization of the counterpart funds of 29 July 1992; and (3) Speech of Sindikubwabo on 10 April 1994.

³³ *Id.*, para. 9.

³⁴ *Id.*, para. 10.

³⁵ *Id.*, para. 14.

³⁶ *Id.*, para. 15.

³⁷ *Id.*, paras. 16-20.



39. As regards the UNAMIR documents, the Prosecution submits that the Defence has not indicated that it intends to make reference thereto in the remainder of the trial. The Prosecution also submits that there is one upcoming Defence witness who could testify on some, if not all, of these documents.³⁸

40. The Prosecution maintains that with respect to some non-UNAMIR documents, the Defence itself has identified some of its witnesses who can testify thereon. There were also four potential Defence witnesses, according to the Prosecution, who could testify on the category of judicial records from Rwanda.³⁹

Defence Reply

41. The Defence concedes that three documents subject of the present Motion, namely, the Radio Rwanda broadcasts of 9 and 10 April 1994, and the letter dated 28 March 1994 to Prime Minister Agathe Uwilingiyimana, were admitted into evidence through Defence Witness Jérôme-Clément Bicomumpaka. The Defence points out, however, that while the Prosecution was able to admit the first two pages of the 20 January 2004 transcript of General Dallaire's testimony in the *Bagosora et al.* case, the Defence now seeks to admit page 5 thereof into evidence.⁴⁰

42. The Defence disputes the Prosecution assertion that the former is now precluded from seeking admission of three documents which were previously denied admission by the Chamber during trial. The Defence submits that these documents were denied admission as these were tendered during re-examination rather than examination-in-chief, and that the Chamber may still admit these documents under Rule 89(C).⁴¹

43. As regards the Prosecution argument that the Defence failed to comply with the requirements of Rule 92 *bis* (D) with respect to the excerpts of transcripts in the *Bagosora et al.* and *Ndindiliyimana et al.* cases, the Defence submits that the Chamber admitted portions of General Dallaire's testimony in the *Bagosora et al.* case during the cross-examination of the Accused without requiring compliance with Rule 92 *bis* (D). The Defence adds that the portions of Ambassador Swinnen's and Dallaire's testimonies sought to be admitted into evidence, while relevant, do not go directly to challenge an allegation in the Indictment. The Defence contends that given the limitation of the number of its remaining witnesses, it will not be able to call either individual to testify.⁴²

44. The Defence contends that the Wikipedia article it seeks to admit into evidence contains information which is unchallenged, and therefore is admissible in spite of its provenance.⁴³

45. The Defence reiterates that there is nothing inappropriate about the admission of documents directly from the bar table, and that it is an established practice before the *ad*

³⁸ *Id.*, paras. 21-23.

³⁹ *Id.*, paras. 26, 32.

⁴⁰ Defence Reply, para. 6.

⁴¹ *Id.*, paras. 7-9.

⁴² *Id.*, paras. 10-15.

⁴³ *Id.*, para. 16.

hoc tribunals. The Defence adds that it is not required to make a *prima facie* showing of a document's authenticity and reliability before it can be admitted from the bar table.⁴⁴

46. The Defence submits that the *Karadžić* ICTY Trial Decisions cited by the Prosecution are not applicable as there was already a case management framework in place therein which provided that the use of bar table motions was to be kept to a minimum. Moreover, according to the Defence, the Prosecution therein sought to tender numerous documents into evidence which directly related to the charges against the Accused, even before the commencement of the case. In contrast, the Defence is the movant herein and the Defence case has been ongoing since November 2010.⁴⁵

47. The Defence submits that while there may be one Defence witness who can testify on some of the UNAMIR documents, he was neither the maker nor the recipient thereof. Furthermore, the Defence adds that it has yet to meet with this individual given certain logistical difficulties, and that these documents cover dates and places which have already been referred to by numerous witnesses.⁴⁶

48. Similarly, the Defence disputes the Prosecution assertion that the former's witnesses who were *gacaca* judges can testify on any *gacaca* records.⁴⁷

49. Finally, the Defence submits that the Prosecution never challenged the relevance or probative value of any of the documents it seeks to admit into evidence.⁴⁸

DELIBERATIONS

Preliminary Matters

50. The Chamber considers that the Prosecution Response should be reclassified as confidential as it provides information which may identify a Defence witness.⁴⁹

51. The Chamber further notes that the Defence Motion is moot with respect to five documents which have already been admitted into evidence: the audio recordings of the 9 and 10 April 1994 Radio Rwanda broadcasts and the transcripts thereof (Documents 22 and 23 in the Defence Motion),⁵⁰ the *gacaca* judgements of 21 July 2006⁵¹ and 10 August 2010⁵² on the death of Safari Nyambwega (Document 33), the *gacaca* judgement dated 7

⁴⁴ *Id.*, paras. 17-19.

⁴⁵ *Id.*, paras. 23-28.

⁴⁶ *Id.*, paras. 30, 32.

⁴⁷ *Id.*, para. 47.

⁴⁸ *Id.*, paras. 50-51.

⁴⁹ Prosecution Response, para. 23.

⁵⁰ Defence Exhibits 141-142 are extracts of audio recordings of Radio Rwanda broadcasts, and Defence Exhibits 90-91 are portions of transcripts of such broadcasts.

⁵¹ Defence Exhibit 149. The Chamber recalls that this exhibit was admitted into evidence on 26 September 2011, after the submissions on the Defence Motion were already complete.

⁵² Defence Exhibit 150. The Chamber recalls that this exhibit was admitted into evidence on 26 September 2011, after the submissions on the Defence Motion were already complete.



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December 2006 of the trial of Mukarugambwa's assassination (Document 36),⁵³ and a letter dated 28 March 1994 written by 12 ministers to Prime Minister Agathe Uwilingiyimana (Document 43).⁵⁴

Admission of Documents from the Bar Table

52. Under Rule 89(C), the Chamber may admit any relevant evidence which it deems to have probative value. If the Chamber is able to appreciate the relevance and probative value of a document independent of any witness, with due regard to the principles referred to in Rule 89(B)⁵⁵ and to the applicability of Rule 92 *bis*, then the document may be admitted under Rule 89(C). The admission of evidence from the bar table is in fact a well-established practice before the *ad hoc* Tribunals.⁵⁶ The Chamber recalls that it has previously admitted some documents which were not tendered through witnesses.⁵⁷

53. The Appeals Chamber has held that in order for evidence to be admissible under Rule 89(C), it must bear sufficient indicia of reliability. The Appeals Chamber has further noted that admission of evidence does not constitute a binding determination as to the authenticity or trustworthiness of the document, which will be determined at a later stage of the proceedings when the Trial Chamber assesses the probative weight to be attached to the evidence.⁵⁸

⁵³ Defence Exhibit 151. The Chamber notes that although the Defence Motion refers to a 10 August 2010 *gacaca* judgement on the death of Safari Nyambwega, the document itself indicates the date to be "10/08/06" and is identical to Defence Exhibit 150.

⁵⁴ Defence Exhibit 140.

⁵⁵ *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness (AC), 21 July 2000, para. 20.

⁵⁶ See generally *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T ("*Nzabonimana*"), Decision on Defence Motion for the Admission of Documentary Evidence (TC), 15 June 2011 ("*Nzabonimana* Trial Decision of 15 June 2011"); *Nzabonimana*, Decision on Defence Motion for the Admission of Documentary Evidence: "Le Château – The Lives of Prisoners in Rwanda" by Carina Tertsakian (TC), 13 May 2011; *Nzabonimana*, Decision on Defence Motion for the Admission of Documentary Evidence: "Official Government of Rwanda Comments on the Draft UN Mapping Report on the DRC" (TC), 31 March 2011; *The Prosecution v. Édouard Karemera et al.*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on Joseph Nzirorera's Motion to Admit Documents from the Bar Table: Public Statements and Minutes (TC), 14 April 2009; *The Prosecutor v. Arsène Shalom Ntahobali*, Joint Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for Admission of Documents into Evidence (TC), 30 September 2008 ("*Ntahobali* Trial Decision"); *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Admission of UNAMIR Related Documents (TC), 28 November 2007 ("*Karemera et al.* Trial Decision of 28 November 2007"); *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T ("*Bagosora et al.*"), Decision on Request to Admit United Nations Documents into Evidence under Rule 89(C) (TC), 25 May 2006. See also *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on the Prosecution's First Bar Table Motion (TC), 13 April 2010; *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution's Motion to Re-Open the Case and Exceed the Word Limit and Second Motion to Admit Exhibits from the Bar Table (TC), 7 December 2009; *The Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Admission of Evidence (TC), 13 July 2006.

⁵⁷ Decision on Prosecutor's Motion for Judicial Notice of Facts of Common Knowledge (TC), 15 July 2010; Decision on Defence Motion for Admission of Documentary Evidence (TC), 25 November 2010.

⁵⁸ *Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7.

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54. Jurisprudence of this Tribunal provides that while there are no formal requirements for establishing the reliability and authenticity of documents, some factors to consider include the extent to which their content is corroborated by other evidence; their provenance; whether the documents submitted are originals or copies; if copies, whether these were registered or filed with an institutional authority; and whether these are signed, sealed, stamped or certified in any way.⁵⁹

55. While Rule 89(D) provides that a Chamber may request verification of the authenticity of evidence obtained out of court, the ICTY Appeals Chamber has held that this is not a prerequisite to admission under Rule 89(C).⁶⁰

UNAMIR Documents

56. The Defence seeks to tender into evidence 21 UNAMIR code cables and sitreps, 14 of which were said to have been furnished by the DPKO, and the remaining seven were said to have been obtained from other sources. While the Defence cites various *Notes Verbales* sent by the Tribunal's Registrar to DPKO in New York and a letter from the Assistant Secretary-General for Legal Affairs of the UN, these are not attached to the Defence Motion. There is therefore no indication in the documents themselves that these were obtained from DPKO.

57. The Chamber notes that UNAMIR documents have been admitted into evidence directly from the bar table on several occasions before this Tribunal.⁶¹ The Chamber has likewise admitted various UNAMIR documents into evidence in the course of this trial, including sitreps and facsimiles which appear to be similar to the documents now at issue.⁶²

58. Despite the Defence omission to provide a copy of the Assistant Secretary-General's letter, the Chamber considers that the 21 UNAMIR documents bear sufficient indicia of reliability for purposes of admission under Rule 89(C). UNAMIR stamps and facsimile transmission date and time stamps are visible on these documents. These appear to be contemporaneous records of the events in Rwanda during the period and in areas of Rwanda referred to in the Indictment.

59. As regards the Prosecution submission that there may be an upcoming Defence witness who can testify on some of these UNAMIR documents,⁶³ the Chamber recalls its

⁵⁹ *Nzabonimana* Trial Decision of 15 June 2011, para. 18; *Karemera et al.*, Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence (TC), 25 January 2008, para. 8; *Bagosora et al.*, Decision on Ntabakuze Motion to Deposit Certain United Nations Documents (TC), 19 March 2007 ("*Bagosora et al.* Trial Decision of 19 March 2007"), para. 3.

⁶⁰ *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-9 6-21-A, Decision on Application of Defendant Zejnil Delalić 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. 25.

⁶¹ *Karemera et al.* Trial Decision of 28 November 2007, para. 7; *Bagosora et al.* Trial Decision of 19 March 2007, para. 4; *Bagosora et al.*, Decision on Request to Admit United Nations Documents into Evidence under Rule 89(C) (TC), 25 May 2006, para. 6.

⁶² See, for example, Defence Exhibits 95 to 103, 107 to 110.

⁶³ Prosecution Response, paras. 21-23, 26, 32.

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earlier discussion of how documents may be admitted directly from the bar table under Rule 89(C). As regards these UNAMIR documents, the Chamber can evaluate their relevance and probative value independent of a witness.

60. The Chamber is therefore of the view that the 21 UNAMIR documents could have probative value and relevance with regard to the alleged crimes committed by the Accused, and with regard to the testimonies of Prosecution Witnesses ANAL, ANAJ, ANAN, ANAT, ANAS, ANAO, DAK, and ANAW.⁶⁴ The Chamber directs that these be admitted into evidence for such purposes.

Radio Rwanda Broadcasts

61. The Defence seeks to tender into evidence 10 Radio Rwanda broadcasts in order to contradict Prosecution testimony, corroborate Defence evidence, and support the Accused's alibis for April and May 1994. These Radio Rwanda broadcasts are identified as those of 21 and 25 February 1994; 18 and 23 March 1994; 9, 10, 11, 16 and 17 April 1994; and 24 May 1994.⁶⁵

62. As noted earlier, the 9 and 10 April 1994 Radio Rwanda broadcasts (Documents 22 and 23 in the Defence Motion) and the transcripts thereof have previously been admitted into evidence.⁶⁶

63. As regards the 11, 16 and 17 April 1994, and the 24 May 1994 Radio Rwanda broadcasts sought to be admitted into evidence, the Chamber observes that the transcripts thereof annexed to the Defence Motion are mostly in Kinyarwanda, with some portions in French. As most of the contents of these documents are not in one of the working languages of the Tribunal, the Chamber is not in a position to ascertain their consistency with the Accused's testimony, and therefore cannot evaluate their relevance and probative value under Rule 89(C). The Chamber considers that these documents must be read in their totality, and the Chamber cannot limit itself to evaluating the French portions.

64. Accordingly, the Chamber rejects these four audio recordings and their transcripts, and denies the Defence Motion to have them admitted in their current format.

65. With respect to the Radio Rwanda broadcasts of 21 and 25 February 1994, as well as those of 18 and 23 March 1994, the Chamber notes that there is no submission that any witness has testified to having listened to them. The Chamber observes that the transcripts do not appear to contain any form of certification from Radio Rwanda as to their accuracy and authenticity. Consequently, even if the transcripts were translated into either English or French, the Chamber would have no basis to assess whether the recordings bear sufficient indicia of reliability. The Chamber considers that the appearance alone of K-numbers on the pages of the transcripts does not render the

⁶⁴ Defence Motion, paras. 15-166.

⁶⁵ *Id.*, paras. 167-239.

⁶⁶ Defence Exhibits 141-142 are extracts of audio recordings of Radio Rwanda broadcasts, and Defence Exhibits 90-91 are portions of transcripts of such broadcasts.

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documents sufficiently reliable and authentic so as to convince the Chamber that these are relevant and have probative value under Rule 89(C). The Chamber therefore denies admission into evidence to the Radio Rwanda broadcasts of 21 and 25 February 1994, and 18 and 23 March 1994.

Rwandan Judicial Records

66. The Chamber recalls that the *gacaca* judgements of 21 July 2006 and 10 August 2010 on the death of Safari Nyambwega (Document 33), and the *gacaca* judgement dated 7 December 2006 of the trial of Mukarugambwa's assassination (Document 36) have been previously admitted into evidence.⁶⁷

67. The Defence seeks to tender into evidence a judgement of the Special Chamber of the Tribunal of First Instance of Gisenyi rendered on 27 October 2000, which the Defence submits is related to the alleged killing of Safari Nyambwega. The Defence further seeks to tender into evidence a judgement of the Special Chamber of the Tribunal of First Instance of Gisenyi dated 25 May 2001 wherein, according to the Defence, Banzi Wellars was one the accused. The Defence submits that Banzi Wellars is referred to in various counts of the Indictment as a co-conspirator of the Accused and as having been a member of a joint *criminal enterprise* with the Accused. The Defence stresses that the Accused is not referred to in either of these judgements.⁶⁸

68. The Chamber notes the following with respect to what the Defence submits are two judgements of the Special Chamber of the Tribunal of First Instance of Gisenyi:

- a) The word "DRAFT" appears on top of all the pages of these judgements;
- b) There is an indication that the judgements are signed, without the actual signatures appearing thereon; and
- c) The judgements are in English, without any indication that these are official translations from what would presumably be the original Kinyarwanda text.

69. While these two apparent judgements reflect K-numbers, the Chamber again considers that this alone is insufficient to establish reliability for purposes of Rule 89(C), particularly in light of the above observations. The Chamber therefore denies admission to these two judgements of the Special Chamber of the Tribunal of First Instance of Gisenyi.

⁶⁷ The *gacaca* judgement of 21 July 2006 on the death of Safari Nyambwega was admitted as Defence Exhibit 149, and the *gacaca* judgement dated 7 December 2006 of the trial of Mukarugambwa's assassination was admitted as Defence Exhibit 151. Both documents were admitted into evidence on 26 September 2011. While the Defence Motion refers to a 10 August 2010 *gacaca* judgement on the death of Safari Nyambwega, the face of the document itself indicates the date "10/08/06 and is identical to the 10 August 2006 *gacaca* judgement admitted as Defence Exhibit 150.

⁶⁸ Defence Motion, paras. 236-246, 257-266.

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70. The Defence likewise seeks to tender into evidence a judgement of the Rubona *gacaca* court. The Chamber observes that this judgement is written in Kinyarwanda. As mentioned above, the Chamber is in no position to assess the document under Rule 89(C) unless it is in one of the working languages of the Tribunal. The Chamber therefore rejects this document, and denies the Defence Motion for its admission into evidence.

Documents in Support of the Accused's Alibi

71. The Chamber notes that except for one document which the Defence submits is a page from a Gabonese newspaper, the documents the Defence seeks to tender into evidence in support of the Accused's alibis appear to be correspondence from States. Documents from periods in 1994 that may be relevant to the Accused's alibi are attached to some of these letters.

72. The Chamber considers that the letters from States, having been signed and bearing official stamps, exhibit sufficient indicia of reliability for purposes of Rule 89(C). The Chamber also accepts that these documents are relevant and may have probative value as these may support some of the Accused's alibis. The Chamber therefore directs that the four letters and the attachments thereto be admitted into evidence.⁶⁹

73. The Chamber likewise considers that the page of what the Defence submits is the 29 April 1994 issue of the Gabonese newspaper *L'Union* bears sufficient indicia of reliability, and is relevant and may have probative value. This article refers to the Accused and his position as Minister of Planning in 1994, and may support the Accused's alibi that he visited Gabon at some point during the period covered by the Indictment. The Chamber thus directs that this document be admitted into evidence.

Other Documents

Cable dated 14 October 1993 from US Secretary of State to the American Embassy in Kigali

74. The Defence seeks to tender into evidence what appears to be a cable dated 14 October 1993 from the US Secretary of State to the American Embassy in Kigali. The Defence submits that this cable corroborates the testimony of the Accused that he accompanied President Habyarimana on official mission to Washington, D.C. in October 1993 and that it counters the Prosecution suggestion that the Accused never participated in any subcommittees on refugees and displaced persons.⁷⁰

75. The Chamber considers that this document lacks sufficient relevance to be admissible under Rule 89(C). The Chamber therefore denies admission into evidence to this document.

⁶⁹ Defence Motion, paras. 289-314.

⁷⁰ *Id.*, paras. 316-319.

Extracts from Ambassador Swinnen's testimony in the *Bizimungu et al.* trial, and from General Dallaire's testimony in the *Bagosora et al.* and *Ndindiliyimana et al.* cases

76. The transcript of Ambassador Swinnen's testimony is sought to be admitted by the Defence in order to rebut the Prosecution contention that the Accused played a role in the RTLM's broadcast of incendiary speech and/or did nothing to halt these broadcasts.⁷¹

77. The Chamber observes that the Defence seeks to admit page 18 of the transcript of Ambassador Swinnen's testimony in the *Bizimungu et al.* trial on 7 May 2008. This page appears to refer to a meeting on 9 April 1994 between Ambassador Swinnen and Ministers Bicamumpaka and Bizimungu, wherein the RTLM radio broadcasts were raised. No mention is made, however, of the Accused. As the Defence has not substantiated its submission concerning the relevance and probative value in the present case, the Chamber denies the Defence request to admit this document into evidence.

78. As regards the testimony of General Dallaire in the *Bagosora et al.* case, the Defence seeks to tender into evidence two pages of his testimony on 20 January 2004. The Defence submits that these are the pages following the extract of the *Bagosora et al.* transcript which was previously admitted into evidence as Prosecution Exhibit 29. The Defence seeks to clarify the content of Prosecution Exhibit 29, and in particular, to confirm the possibility that persons other than the addressees of a UN code cable may have had access thereto.⁷²

79. The Chamber recalls, however, that Prosecution Exhibit 29 consists of pages one and two of General Dallaire's 20 January 2004 testimony in the *Bagosora et al.* case, while the portion tendered by the Defence consists of pages four and five thereof. Contrary to the Defence submission,⁷³ these two pages do not appear to demonstrate that UN code cables addressed solely to UNAMIR staff or UN headquarters could be subsequently accessed by members of the Rwandan government. These two pages likewise do not indicate that General Dallaire was to provide copies of certain UN code cables to President Habyarimana.

80. The Chamber is therefore of the view that these two pages lack relevance and probative value under Rule 89(C), and therefore denies admission into evidence thereto.

81. As regards the two-page excerpt of General Dallaire's 6 December 2006 testimony in the *Ndindiliyimana et al.* case, the Defence submits that this will establish that following 6 April 1994, UNAMIR lost its "eyes and ears" outside Kigali as its observers were forced to withdraw from other areas of Rwanda and regroup in the capital. The Defence submits that this corroborates the testimony of the Accused that there was a significant difference in the detail with which UNAMIR reported on events

⁷¹ *Id.*, paras. 328-334.

⁷² Defence Motion, paras. 368-369, 371.

⁷³ *Id.*, para. 366.

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throughout Rwanda before 6 April 1994 and afterwards. The Defence highlights that prior to 6 April 1994, even minor incidents were reported by UNAMIR observers.⁷⁴

82. This extract of General Dallaire's testimony in the *Ndindiliyimana et al.* case does not appear to go to the acts or conduct of the Accused as charged in the Indictment, and thus Rule 92 *bis* (D) does not pose a bar to this document's admission into evidence. The Chamber considers that this excerpt is relevant and may have probative value under Rule 89(C). The Chamber therefore directs that these two pages be admitted into evidence with regard to the issue of the monitoring capabilities of UNAMIR at the time.

Situation of Rwandan Army Officers on 1 March 1994

83. The Defence seeks to have this list of Rwandan Army officers admitted into evidence in order to impeach the credibility of Prosecution Witnesses ANAN and DAK. While the Defence describes this as an official document from the Rwandan Ministry of Defence dated 5 March 1994,⁷⁵ there is no indication on the face of the document as to its provenance and authenticity. The appearance alone of K-numbers on its pages does not render the documents sufficiently reliable and authentic so as to convince the Chamber that these are relevant and have probative value under Rule 89(C). The Chamber therefore considers that this document lacks sufficient indicia of reliability and denies admission into evidence thereto.

Documents with signatures of the Accused and his Director of Cabinet Anne-Marie Mukakayange

84. The Defence seeks to tender into evidence these three documents in order to contradict the Prosecution's assertion that the Accused's signature appears in a document dated 28 June 1994. The Chamber recalls that while the Prosecution showed this document to the Accused during cross-examination and much debate arose between Parties thereon, the Prosecution did not seek to have this document admitted into evidence.⁷⁶ The Chamber considers that documents alone cannot establish the signature of an individual, whether it be that of the Accused or another person. The Chamber therefore holds that these documents lack sufficient relevance and probative value *vis-à-vis* the purposes put forth by the Defence, and denies their admission into evidence.

10 April 1994 Speech of Sindikubwabo

85. The Defence seeks to tender into evidence the text of the 10 April 1994 speech of President Sindikubwabo to counter the Prosecution assertion that the Interim Government, of which the Accused was a member, did nothing to stop the massacres in Rwanda in 1994.⁷⁷ The text of his speech, however, is entirely in Kinyarwanda, which is not a working language of the Tribunal. As the Chamber is not in a position to assess the

⁷⁴ *Id.*, paras. 373-375.

⁷⁵ *Id.*, para. 335.

⁷⁶ T. 6 December 2010, pp. 42-52.

⁷⁷ Defence Motion, paras. 354-359.

relevance and probative value of the document, under Rule 89(C), the Chamber denies the Defence Motion for this document's admission.

List of Members of Broad-Based Transitional Government as of 19 March 1994

86. The Defence seeks to tender into evidence a list of the Broad-Based Transitional Government members as of 19 March 1994 to contradict Prosecution Witness ANAN's testimony that Ferdinand Nahimana was a member of the CDR party.⁷⁸ The Chamber notes, however, that there is no indication on the face of the document as to its provenance and authenticity and therefore denies admission into evidence thereto.

Wikipedia article on Pascaline Ondimba

87. The Defence seeks to tender into evidence a Wikipedia article on Pascaline Ondimba, daughter of former Gabonese President Omar Bongo, to rebut the Prosecution assertion that she was the Gabonese Foreign Minister when the Accused visited Gabon in 1994.⁷⁹ While the Chamber does not discount that Internet sources may be sufficiently reliable as evidence under Rule 89(C), the Chamber notes that the introductory page on the Wikipedia web site provides that anyone is allowed to edit Wikipedia pages.⁸⁰ Accordingly, a Wikipedia article does not bear sufficient indicia of reliability so as to be admitted into evidence as proof of its contents.

88. The Chamber further considers that this document lacks sufficient relevance and probative value to be admissible under Rule 89(C).

89. The Chamber therefore denies admission into evidence of this document.

Telexes to/from Belgian embassies in Nairobi and Kigali

90. The Defence seeks to tender into evidence Telex No. 843 of 14 August 1993 to the Belgian embassy in Nairobi and Telex No. 892 of 2 September 1993 from the Belgian embassy in Kigali to refute the Prosecution submission that the Accused never participated in any subcommittees on refugees and displaced persons following the Kinyihira meeting which took place around 13 December 1993.⁸¹

91. The Chamber considers that this document lacks sufficient relevance to be admissible under Rule 89(C). The Chamber therefore denies admission into evidence to this document.

Marriage certificate

92. The Defence seeks to tender into evidence a marriage certificate to establish that Faustin Bagango was *bourgmestre* of Nyamyumba commune in July 1993. According to the Defence, this contradicts the testimonies of several Prosecution witnesses that

⁷⁸ *Id.*, paras. 360-362.

⁷⁹ *Id.*, paras. 363-365.

⁸⁰ See <http://en.wikipedia.org/wiki/Wikipedia:Introduction> (last visited 9 February 2012).

⁸¹ Defence Motion, paras. 376-381; T. 18 November 2010, pp. 65-66.

Bagango was appointed *bourgmestre* only in late December 1993 or 1994. The Defence further submits that the *bourgmestre* is the authority at the commune level who can sign marriage certificates.⁸²

93. The Defence, however, does not provide any evidence to establish that the *bourgmestre* is the Civil Registry Officer at the commune level. The Defence merely cites the Accused's testimony to this effect, which the Chamber considers to be insufficient for the present purposes.

94. In addition, the Chamber cannot accept based solely on the contentions of the Defence that the signature appearing on the certificate is that of Faustin Bagango. As the Defence submissions on the relevance and probative value of the marriage certificate rely on the acceptance of the signature as Faustin Bagango's, the Chamber considers that the document lacks sufficient relevance and probative value to be admissible under Rule 89(C).

95. The Chamber therefore denies admission into evidence of this document.

Letter dated 17 March 1993 of the RPF

96. The Defence seeks to tender into evidence a letter dated 17 March 1993 from Patrick Mazimaka, member of the RPF Executive Committee, to the Rwandan Foreign Minister requesting the Rwandan government to remove, *inter alia*, Égide Karemera as *bourgmestre* of Nyamyumba commune. The Defence submits this corroborates some exhibits already in evidence,⁸³ establishes that some *bourgmestres* were replaced after an evaluation conducted by the Kabanda Commission, and confirms that Faustin Bagango was elected *bourgmestre* of Nyamyumba commune in March 1993, contrary to the testimonies of several Prosecution witnesses who alleged that he attained this position in late 1993 or 1994. Moreover, according to the Defence, this letter corroborates the Accused's testimony about this letter.⁸⁴

97. The Chamber notes that the portion of this document with Égide Karemera's name is in Kinyarwanda. It is not clear from the French cover letter that the names listed in the annexed table are those of officials from the prefecture and commune level who are to be replaced. The Chamber is therefore not in a position to assess the relevance and probative value under Rule 89(C). Accordingly, the Chamber denies the Defence Motion insofar as it seeks the admission of this document.

Death certificate of Jean Safari

98. The Defence seeks to tender into evidence a death certificate indicating that Jean Safari died on 23 December 1997. The Defence submits that this directly contradicts the

⁸² Defence Motion, paras. 382-383.

⁸³ Defence Exhibits 115 and 117.

⁸⁴ Defence Motion, paras. 384-387.

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allegation in paragraph 60 of the Indictment that Safari was among those Tutsis killed in April 1994 by *Interahamwe* members instigated by the Accused.⁸⁵

99. The Death Certificate appears to bear a signature and an official stamp. There is no explanation for why the Death Certificate is dated 18 September 2009, and yet attests to the death of an individual almost 12 years earlier. Given the potentially crucial impact of this document, the Chamber considers that it does not bear sufficient indicia of reliability. The Chamber therefore denies admission into evidence of this document.

Death certificate of Venantie Karwera

100. The Defence seeks to tender into evidence the death certificate of Venantie Karwera, which could indicate that she died several years before the death of Paul Buzazi. According to the Defence, this contradicts the testimony of Prosecution Witness ANAE, who testified that Karwera was still alive at the time of Buzazi's funeral.⁸⁶

101. The Chamber has the same observations on this document as it does on the alleged death certificate of Jean Safari. The death certificate is dated 27 November 2009, and allegedly certifies a death which took place more than 20 years earlier, on 13 December 1987. For the same reasons, the Chamber denies admission into evidence of this document.

Conclusion

102. As regards the documents that have been admitted into evidence, the Chamber reiterates that such admission is not a conclusive determination of the probative weight thereof, which will be conducted at a later stage of the proceedings.

103. The finalization of this process will take place during the current trial session, whereby the documents will be given exhibit numbers and other modalities will be addressed, such as whether any of the documents should be filed confidentially. The Chamber directs the Parties to consult with a view towards expediting this process.

⁸⁵ *Id.*, paras. 388-393.

⁸⁶ *Id.*, paras. 394-397.

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FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Defence Motion in part;

DIRECTS that Documents 1 to 21, 37 to 41, and 51, as numbered by the Defence in its Motion, be admitted into evidence;

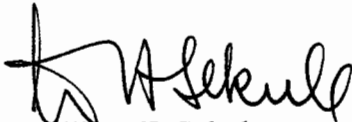
DIRECTS the Parties to consult with a view towards expediting this process;

DISMISSES the Defence Motion in part as moot, insofar as it concerns Documents 22, 23, 33, 36, and 43, which are already in evidence;


DENIES the admission into evidence of Documents 24 to 32, 34, 35, 42, 44 to 50, 52 to 56; and

DIRECTS the Registry to reclassify the Prosecution Response as confidential.

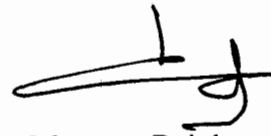
Arusha, 9 February 2012



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

