



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 4 July 2012

ICTR-99-54-T
4th July 2012
(111405-111397)

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS SECTION
UNICTR

2012 JUL -4 P 4: 33

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

Office of the Prosecutor

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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 "Prosecution Motion for Admission of Documentary Evidence" filed on 19 March 2012 (the "Prosecution Motion");

CONSIDERING:

- (a) The "Defence Response to the Prosecution's Motion for Admission of Documentary Evidence", filed confidentially on 30 March 2012 (the "Defence Response");
- (b) The "Prosecution Reply to the Defence Response to the Prosecution Motion for Admission of Documentary Evidence", filed confidentially on 10 April (the "Prosecution Reply"); and
- (c) The "Corrigendum to the Prosecution Reply to the Defence Response to the Prosecution Motion for Admission of Documentary Evidence", filed on 2 May 2012 (the "Prosecution Corrigendum");

CONSIDERING also the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion pursuant to Rules 89 (C).

INTRODUCTION

1. On 31 August 2010 the Prosecution closed its case-in-chief. Over the course of 53 trial days, the Prosecution called 20 witnesses and tendered 28 exhibits.
2. The Defence case commenced on 16 November 2010 and closed on 22 February 2012. Over the course of 82 trial days, the Defence called 35 witnesses. The Accused testified for 23 trial days.
3. The Prosecution Rebuttal case commenced on 6 March 2012, and closed on 2 April 2012. Over the course of 12 trial days, the Prosecution called 6 rebuttal witnesses. On 18 May 2012, the Chamber granted the reopening of the rebuttal case to hear Witness PRVIII, whose testimony was completed on 3 July 2012.
4. The Prosecution filed the present Motion on 19 March 2012.



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5. On 21 March 2012, the Chamber granted the Defence request for an extension of time to file its Response by 30 March 2012. The Chamber also provided an extension of similar length to the Prosecution for the filing of any Reply.¹

SUBMISSIONS OF THE PARTIES

Prosecution Motion

6. The Prosecution seeks to admit into evidence three sets of documents (Annexes B, D, and E).

Newspapers Issued by the Times of Swaziland between 13 and 21 May 1994 (Annex B)²

7. The Prosecution seeks to admit a series of newspaper copies from Swaziland between 13 and 21 May 1994 as it contradicts the evidence presented by the Accused regarding his presence and diplomatic efforts in Swaziland. The Prosecution submits that the Times of Swaziland extensively covered the ACP/EEC meeting and the arrival times of ministers. It does not mention the Accused's arrival, his condemnation of the atrocities occurring in Rwanda, or any public statements regarding the efforts of the interim government. For these reasons the Prosecution contends that this document is relevant and probative and should therefore be admitted.³

Various Criminal Records of Faustin Bagango (Annex D)⁴

8. The Prosecution seeks to admit 16 Gacaca criminal records convicting Faustin Bagango of various crimes, including the planning of genocide, killings, manning roadblocks, incitement to commit genocide, distribution of weapon, and looting. The Prosecution submits that these records contradict evidence presented by the Accused, as well as Defence Witnesses DWAN-41, DWAN-133, DWAN-47, DWAN-21, DWAN-12, DWAN-25, DWAN-71, DWAN-89 and DWAN-13 regarding the character and involvement of Bagango in the genocide. As Bagango is mentioned in the Indictment as a co-conspirer and co-perpetrator as well as in the evidence led by both the Prosecution and Defence, the Prosecution contends that this set of documents bears some relevance and probative value in this trial.⁵

9. The Prosecution also contends that, as these documents are written on Republic of Rwanda letterhead, bear original stamps, contain signatures from the assigned judicial officers, have ERN numbers and were obtained through the Rwandan authorities, these documents bear significant indicia of reliability and should therefore be granted admission through Rule 89 (C).⁶

¹ T. 21 March 2012, p. 21.

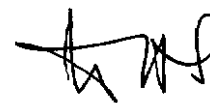
² Labelled as Annex B in the Prosecution Motion. Annex A in the motion organizes and summarizes Annex B.

³ Prosecution Motion, paras. 13-22.

⁴ Labelled as Annex D in the Motion. Annex C in the motion organizes and summarizes Annex B.

⁵ Prosecution Motion, paras, 23-37.

⁶ *Id.*, paras. 40-41.



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Email Tracts between Interpol and Mr. Frederick Nyiti dated between 12 and 16 January 2012 (Annex E)

10. The Prosecution further seeks to admit a series of email exchanges between Mr. Frederick Nyiti, from the Office of the Prosecutor, and the International Police regarding a request to Interpol to confirm the Accused's location in Swaziland in May 1994. The Prosecution contends that, according to the "final" response received, the Swaziland Home Affairs Unit, the Swaziland Government Immigration and Border Security, and the Royal Swazi National Airways did not find any results relating to the Accused's movements in May 1994. As this contradicts the Accused's testimony and alibi that he was in Swaziland between 13 and 19 May 1994, the Prosecution submits that these documents bear some relevance to this trial and some probative value.⁷

11. The Prosecution submits that this document was printed directly from the ICTR Lotus email account of a Prosecution staff member tasked with communicating with Interpol, that it bears significant indicia of reliability under Rule 89 (C) and should therefore be admitted into evidence.⁸

Defence Response

12. The Defence opposes the admission into evidence of Annexes B, D, and E.

Newspapers Issued by the Times of Swaziland between 13 and 21 May 1994

13. The Defence notes that page 3 of the 15 May 1994 Times of Swaziland newspaper is missing and submits that it cannot assume with certainty that the Accused is not mentioned.⁹

14. The Defence also finds that the motion is a misleading interpretation of the Accused's testimony (as the Accused never stated that he made statements regarding the position of the interim Government on the situation in Rwanda "at all meetings"). The Defence also submits that the motion mischaracterizes the content of the newspaper articles. In contrast to the Prosecution's assertion, the newspaper does not state that the delegates arrived on 14 May 1994 at the earliest. In support of this the Defence highlights that the Accused's date of arrival, 13 May 1994, corresponded with the Chinese president's arrival, which was heavily reported that day.¹⁰

15. The Defence also disputes the relevance of this document as it fails to prove that journalists were present as the ACP/EEC meetings or that every speech was reported by the Times of Swaziland. The Defence submits there is thus no proof the document contradicts the testimony of the Accused.

⁷ *Id.*, paras. 42-44.

⁸ *Id.*, paras. 45-46.

⁹ Defence Response, para. 9.

¹⁰ *Id.*, paras. 10-15.

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16. The Defence finally contends that this motion is a motion for reconsideration in disguise. The Defence refers to the Chamber's oral ruling on 7 March 2012 rejecting the admission of this document during the testimony of Massamba Ndiaye because it was not timely.¹¹

Various Criminal Records of Faustin Bagango

17. The Defence objects to the relevance of the Gacaca judgements as it does not relate to the scope accepted for rebuttal evidence, that being evidence relating to the alibi period from 23 April to 23 May 1994. Admitting fresh evidence now would amount to prejudice against the Accused and would outweigh any probative value. The Defence also rejects the documents' relevance as none of the Gacaca judgements relate to the Accused.¹²

18. The Defence also asserts that the Prosecution Motion misleads the Chamber. The Defence asserts that the Prosecution's claim that witnesses "portrayed" Bagango as hardworking and was "not involved in the genocide directly or indirectly" is completely false. Specifically, the Prosecution mischaracterizes the testimonies of Witnesses DWAN-89, DWAN-25, DWAN-12, DWAN-47 and DWAN-41. The Defence emphasizes that these witnesses testified on specific issues related to Bagango and specific sectors. The Defence submits that the Prosecution Motion is also misleading in that it presents all the documents as "16 criminal records", meanwhile these documents are not judgments, but, rather, files used to prepare the trials before the Gacaca courts.¹³

19. The Defence objects to the reliability and probative value of these documents as Bagango was tried in his absence in two of the judgments submitted by the Prosecution. Furthermore, the documents do not have dates or bear any official stamps indicating reliability and authenticity.¹⁴

20. The Defence contends that some of the documents are only submitted in Kinyarwanda, which is not a working language of the Tribunal. The Defence also notes that many pages in Annex D are completely illegible, therefore the Chamber is unable to ascertain the relevance of these documents.¹⁵

Email Tracts between Interpol and Mr. Frederick Nyiti dated between 12 and 16 January 2012

21. The Defence submits that the email correspondence does not mention the name of the Accused, his nationality, or his passport number and the Chamber is therefore unable to sufficiently identify the target of Interpol's investigations. The email correspondence also does not specify any dates or timeframes for the investigations.¹⁶

¹¹ *Id.*, paras. 16-18.

¹² *Id.*, paras. 20-44, 71.

¹³ *Id.*, paras. 45-55.

¹⁴ *Id.*, paras. 63-71.

¹⁵ *Id.*, paras. 58-59.

¹⁶ *Id.*, paras. 74-75, 77-79.

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22. The Defence highlights that the email response from Interpol is identified as an “initial partial reply”, related to the “initial request”, which “summarises” what was obtained thus far in the investigations. The Defence therefore submits that this document cannot be relied on as an official position of Interpol nor provide any probative value.¹⁷

23. The Defence also objects to the scope, relevance, and probative value of the investigation itself. The Accused never testified to having taken Royal Swazi National Airways nor did the Accused ever apply for political asylum, temporal residence, or a working permit, as would be relevant to an investigation with the Swazi Home Affairs Refugee Unit.¹⁸

Prosecution Reply

Newspapers Issued by the Times of Swaziland between 13 and 21 May 1994

24. The Prosecution states that the process of obtaining the missing newspaper page is still underway.¹⁹

25. The Prosecution submits that the Defence’s various rationales for why the Accused’s presence and utterances would not be reported in the Times of Swaziland is not an issue at the stage of admission under Rule 89 (C).²⁰

26. The Prosecution referred to the relevant transcript of the Accused supporting his participation and involvement in the Swaziland meetings. The Prosecution also referred to specific newspaper articles to re-assert its original claim regarding ministers’ arrival times and the arrival time of the Chinese President.²¹

27. The Prosecution also highlights that the atrocities occurring in Rwanda in 1994 received significant coverage by the Times of Swaziland during the relevant 13-21 May 1994 time period as well as the ACP events between 16-21 May 1994. The Prosecution therefore reasserts its submission that the documents are relevant and probative as they may contradict the Accused’s evidence regarding his presence and utterances in Swaziland.²²

28. The Prosecution states that the newspapers were delivered to the Prosecution on 15 February 2012, processed by 28 February 2012, and disclosed on 6 and 7 March 2012 and were therefore disclosed in a timely manner.²³

¹⁷ *Id.*, paras. 76, 85.

¹⁸ *Id.*, para. 80.

¹⁹ Prosecution Reply, para. 4. See also Prosecution Corrigendum (containing page 3 of the 15 May 1994 Times of Swaziland newspaper).

²⁰ Prosecution Reply, para. 5.

²¹ *Id.*, paras. 6-7.

²² *Id.*, para. 8.

²³ *Id.*, para. 9.

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Various Criminal Records of Faustin Bagango

29. The Prosecution reasserts its claims that these records contradict evidence presented by the Accused, and Defence witnesses.²⁴ The Prosecution objects to the Defence's claim that this document does not amount to "fresh evidence" and notes there is no jurisprudence barring a party from admitting evidence under Rule 89 (C) after their case in chief is closed. The Prosecution asserts that the Chamber is to admit documents based on relevance and probative value when admission on these ground does not amount to prejudice against the Accused.²⁵

Email Tracts between Interpol and Mr. Frederick Nyiti dated between 12 and 16 January 2012

30. The Prosecution contends that the Defence's observations and objections relate to the weight of the evidence rather than relevance or probative value.²⁶ In response to the Defence's request for additional specificity, including time frames, names, and passport numbers, the Prosecution attached supplemental and previous emails to support its assertions.²⁷

DELIBERATIONS

31. 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)²⁸ and to the applicability of Rule 92bis, 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.²⁹ The Chamber recalls that it has previously admitted some documents which were not tendered through witnesses.³⁰

²⁴ *Id.*, paras. 10-15.

²⁵ *Id.*, paras. 16-20.

²⁶ *Id.*, para. 23.

²⁷ *Id.*, para. 24, Appendix B pp. 15-24 (supplemental emails).

²⁸ *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.

²⁹ 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* 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*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for Admission of Documents into Evidence (TC), 30 September 2008; *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Admission of UNAMIR Related Documents (TC), 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*

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32. 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.³¹

33. 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.³²

34. While Rule 89 (D) provides that a Chamber may request verification of the authenticity of evidence obtained out of court, the Appeals Chamber has held that this is not a prerequisite to admission under Rule 89 (C).³³

Newspapers Issued by the Times of Swaziland between 13 and 21 May 1994

35. The Chamber finds that the newspapers issued by the Times of Swaziland between 13 and 21 May 1994 lack the necessary probative value to be admitted under Rule 89 (C). These newspapers provide only limited reporting, and are of a general nature, of the ACP/ECC meetings including the arrival of ministers and the Rwandan situation. In view of the marginal significance, if any, of the newspapers, the Chamber decides not to admit these documents. The Chamber finds that the Prosecution has failed to make a *prima facie* showing of the probative value of the material sought to be admitted.

D) Various Criminal Records of Faustin Bagango

36. The Chamber notes that the admission of evidence under Rule 89 (C) at this stage of the proceedings is limited to the scope of rebuttal evidence,³⁴ and that the Prosecution

Dorđević, 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.

³⁰ Decision on Defence Motion for Admission of Documentary Evidence (TC), 9 February 2012; 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.

³¹ *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 ("Nyiramasuhuko et al. Appeals Decision of 4 October 2004"), para. 7.

³² *Nzabonimana* 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, para. 3.

³³ *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.

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seeks to admit documents that do not appear to be related to the scope of rebuttal evidence in this case.

37. The Prosecution stated that it obtained all but one document after the close of its case-in-chief but it does not explain why it failed to use them during cross-examination of the Accused or any of the Defence witnesses.³⁵ The Chamber notes that these documents could have been introduced if necessary during the cross-examination of the Defence witnesses, if the Prosecution had exercised reasonable diligence.

38. For these reasons, the Chamber denies admission into evidence of these documents.

E) Email Tracts between Interpol and Mr. Frederick Nyiti dated between 12 and 16 January 2012

39. The Chamber notes that the emails tracts are not complete and do not expressly refer to Ngirabatware or to the time frame of the search. The Prosecution in its reply attached supplemental emails that explained the starting date of the request made to the Interpol.³⁶ The Chamber notes that the Prosecution does not seek to admit these supplemental emails. Thus the Chamber finds that due to this vagueness the emails tracts between Interpol and Mr. Frederick Nyiti dated between 12 and 16 January 2012 are not of sufficient relevance and of probative value as required by Rule 89 (C).

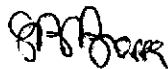
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Prosecution Motion.

Arusha, 4 July 2012



William H. Sekule
Presiding Judge



Solomy Balungi Bossa



Mparany Rajohnson
Judge

³⁴ *Karemera et al.*, Decision on Prosecution's Motion for Admission of I-P-32 into Evidence Pursuant to Rule 89 (C) (TC), dated 2 September 2009, para. 3 (stating this general rule). The Chamber notes that although the *Karemera et al.* Trial Chamber ultimately admitted the document at issue into evidence, it did so only after recalling that the document had "been used in the Prosecution case during the cross-examination of Defence witnesses". *Id.*, para. 3, p. 6.

³⁵ Prosecution Reply, para. 21. The Chamber notes that these records were obtained by the Prosecution on 29 June, 26 August, 23 September and 19 October 2011 and that one document was obtained on 23 October 2009.

³⁶ Prosecution Reply, para. 24, Appendix B.