



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  
(111410 - 111406)

**The PROSECUTOR**

v.

**Augustin NGIRABATWARE**

Case No. ICTR-99-54-T

JUDICIAL REGISTRAR/ACCUSATIONS  
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**DECISION ON THE FOURTH DEFENCE MOTION FOR ADMISSION OF  
DOCUMENTARY EVIDENCE**

**Office of the Prosecutor**

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

**Defence Counsel**

Ms. Mylène Dimitri  
Mr. Claver Sindayigaya  
Mr. Deogratias Sebureze  
Ms. Anne-Gaëlle Denier  
Mr. Gregg Shankman

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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 Fourth Motion for Admission of Documentary Evidence”, filed confidentially on 4 April 2012 (the “Defence Motion”);

**CONSIDERING:**

- (a) The “Prosecution Response to Defence Fourth Motion for Admission of Documentary Evidence”, filed on 10 April 2012 (the “Prosecution Response”); and
- (b) The “Defence Reply to the Prosecution Response to the Defence Fourth Motion for Admission of Documentary Evidence”, filed confidentially on 16 April 2012 (the “Defence Reply”);

**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 54 and 89 (C) of the Rules.

### **INTRODUCTION**

1. On 22 February 2012 the Defence closed its case-in-chief.<sup>1</sup>
2. On 26 March 2012, the Prosecution disclosed the document titled “Letter from Director General of Immigration of the Republic of Zambia” under its obligations stated in Rule 68 (A) of the Rules.<sup>2</sup>
3. On 4 April 2012, the Defence filed the present motion.

### **SUBMISSIONS OF THE PARTIES**

#### ***Defence Motion***

4. The Defence seeks to admit into evidence a document titled “Letter from Director General of Immigration of the Republic of Zambia”.<sup>3</sup>

<sup>1</sup> T. 22 February 2012, p. 28.

<sup>2</sup> Prosecution Correspondence to the Defence 26 March 2012 “Disclosure of Rule 68 of Rules of Procedure and Evidence: Letter from the Director General of Immigration of Republic of Zambia”.

<sup>3</sup> Defence Motion, para. 31.



5. The Defence submits this document is relevant and probative as it supports the Accused's alibi by confirming that the Accused was in Zambia between 20 and 22 April 1994. The document contradicts the rebuttal evidence presented by Prosecution Witness Massamba Ndiaye regarding the Zambian stamps in the Accused's passport. It also responds to the Prosecution's attempts to undermine the alibi credibility by attacking the different stamps in his passport.<sup>4</sup>

6. The Defence also alleges that this document challenges Prosecution Exhibit 40,<sup>5</sup> which is a letter from the Nigerian embassy in Dakar that comments on the authenticity of the Accused's visa. Moreover, the Defence never had the opportunity to cross-examine the author of this exhibit and underlines that the rebuttal evidence is now closed.<sup>6</sup>

7. Moreover, the Defence states that the letter is an official document issued by a Zambian state authority in the context of the Prosecution's investigation, making it reliable. The Defence also adds the fact that the letter was disclosed by the Prosecution on 26 March 2012 and therefore it could not demand its admission into evidence before this date and the delay cannot be attributed to any negligence or lack of diligence from the Defence. The Defence submits that the document is in conformity with jurisprudential requirements on admission of fresh evidence".<sup>7</sup>

### *Prosecution Response*

8. The Prosecution alleges that the letter clearly stipulates that records for the period in question cannot be traced at the Kenneth Kaunda International Airport in Zambia. Also there is nothing in the document to show that the author of the letter was working at the Kenneth Kaunda International Airport in April 1994, and therefore there is no basis for the conclusions he draws in the letter.<sup>8</sup>

9. The Prosecution further considers that the Defence has failed to show that the author refers to the passport of the Accused.<sup>9</sup>

10. According to the Prosecution, the letter does not purport to prove or disprove the presence of the Accused in Zambia as alleged by the Defence, nor does it even contradict Prosecution Exhibit 40. In the Prosecution's view, the wording of the letter is so vague and general that it does not provide sufficient indicia of reliability to allow the conclusion that the author is indeed referring to a stamp on the passport of the Accused when expressing a simple "opinion".<sup>10</sup>

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<sup>4</sup> *Id.*, paras. 34-36, 40, 42.

<sup>5</sup> Prosecution Exhibit 40; T. 10 February 2011, p. 62.

<sup>6</sup> Defence Motion, paras. 38-39, 49-50.

<sup>7</sup> *Id.*, paras. 42-45, 51-53.

<sup>8</sup> Prosecution Response, para. 10.

<sup>9</sup> *Id.*, para. 14.

<sup>10</sup> *Id.*, paras. 11, 17.

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**Defence Reply**

11. The Defence submits that the weight of the evidence has to be decided at a later stage.<sup>11</sup> According to the Defence, it is undeniable that the Zambian letter refers clearly to the Accused following the mention of Ngirabatware's name in the "Subject" and last paragraph of the letter.<sup>12</sup>

12. Regarding the connection between the Zambian letter and the date stamp impression in the passport of the Accused, the Defence submits that it is the Prosecution itself that initiated the request to Zambia, via Interpol, and it is the one that must know what it was asking for.<sup>13</sup>

13. The Defence submits that whether the author of the letter was working at the Lusaka airport in 1994 is irrelevant. What matters is that he provides the official position of its government in this specific issue.<sup>14</sup>

14. The Defence states that the Prosecution is blatantly acting with bad faith since it is in possession of all the elements it alleges are lacking and prays the Prosecution be sanctioned under Rule 46 (A).<sup>15</sup>

**DELIBERATIONS**

15. Pursuant to Rule 89 (C), the Chamber "may admit any relevant evidence which it deems to have probative value". Thus, the Chamber has wide discretion in determining the admissibility of evidence. A distinction must be drawn between admissibility of evidence and the exact probative weight to be attached to it, which is to be assessed by the Trial Chamber at a later stage.<sup>16</sup> At the admissibility stage, the moving party needs to show *prima facie* that the document is relevant and has probative value.<sup>17</sup> A factor in the assessment of the relevance and probative value of evidence is the requirement that it must have sufficient indicia of reliability.<sup>18</sup> Indicia of reliability include: the authorship of the document; whether it is an original or a copy; the place from which the document was obtained in conjunction with its chain of custody; whether its contents are supported by other evidence; and the nature of the document itself, such as signatures, stamps, or the form of the handwriting.<sup>19</sup>

<sup>11</sup> Defence Reply, paras. 5-6.

<sup>12</sup> *Id.*, paras. 8-9.

<sup>13</sup> *Id.*, paras. 16, 20, 22-23.

<sup>14</sup> *Id.*, para. 26.

<sup>15</sup> *Id.*, paras. 33-36, 38.

<sup>16</sup> *Pauline Nyiramasuhuko et al. v. The Prosecutor*, Case No. ICTR-98-42-A, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC) 4 October 2004, paras. 6-7.

<sup>17</sup> *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T ("*Bagosora et al.*"), Decision on Ntabakuze Motion to Deposit Certain United Nations Documents (TC), 19 March 2007, paras. 2-3.

<sup>18</sup> *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-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. 20; *Bagosora et al.*, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole (TC), 13 September 2004 ("*Bagosora et al.* Decision of 13 September 2004"), para. 8.

<sup>19</sup> *Bagosora et al.* Decision of 13 September 2004, para. 9; *Bagosora et al.*, Decision on Request to Admit United Nations Documents into Evidence Under Rule 89(C) (TC), 25 May 2006, para. 4 (and sources cited therein).

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16. The Chamber finds that this document lacks probative value and relevance. The Chamber first notes that this document is in response to a "request to retrieve passenger manifest." Although the Zambian authorities seem to have recognized the date stamp impression shown to them, it is not clear as to which stamp impressions the letter refers. The Chamber further notes that the letter does not indicate whether the stamp impression was from one of the Accused's passports, and if so, which passport. The Chamber thus finds that this document lacks probative value and relevance. In view of the marginal significance, if any, of the correspondence, the Chamber decides not to admit the document.

**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** the Defence Motion.

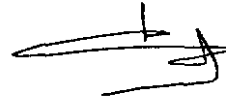
Arusha, 4 July 2012



William H. Sekule  
Presiding Judge



Solomy Balungi Bossa  
Judge



Mparany Rajohnson  
Judge

