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ICTR-98-44-T

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 21 August 2007

THE PROSECUTOR

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-T

2007 AUG 22 A 9:15
[Signature]

**DECISION ON JOSEPH NZIRORERA'S MOTION TO LIMIT THE SCOPE OF
TESTIMONY OF EXPERT WITNESSES ALISON DES FORGES AND ANDRE
GUICHAOUA.**

Office of the Prosecutor:

Don Webster
Alayne Frankson-Wallace
Iain Morley
Saidou N'Dow
Gerda Visser
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Mathieu Ngirumpatse
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Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Nimy Mayidika
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[Signature]

INTRODUCTION

1. On 12 July 2007, the Defence for Nzirorera moved the Trial Chamber to limit the testimony of expert witnesses Alison Des Forges and Andre Guichaoua to preclude each from offering opinions adverting to the acts, conduct, mental state or criminal responsibility of the accused. Mr Nzirorera submits, in the alternative, that the Chamber should exclude Alison Des Forges and Andre Guichaoua opinions concerning the acts, conduct, mental state and criminal responsibility of the accused as a matter of fairness to the accused.¹

DISCUSSION

2. Mr Nzirorera contends that the evidence of the two expert witnesses is inadmissible because it exceeds its purview by adverting to the ultimate issues in the trial. The Prosecutor rejoins that Mr Nzirorera's application is flawed as there is nothing in law preventing the Trial Chamber from receiving the expert testimony in question. Rule 89(C) of the Rules of Evidence and Procedure (the "Rules") confers a wide power upon a Trial Chamber to admit relevant evidence. The Prosecutor avers that the testimony of its proposed expert witnesses is relevant and has probative value.

3. The Chamber notes that there is a preponderance of jurisprudential material in both ICTR and ICTY that proscribe expert evidence from usurping the function of the Trial Chamber delineated in Article 1 and 22 of the Statute of the Tribunal by offering opinions that are determinative of the guilt or innocence of the accused or by adverting to the acts, conduct and mental state of the accused.² The ambit of expert witness testimony is limited to enlightening the Judges on specific issues of a technical nature, requiring special knowledge in a specific

¹ See Joseph Nzirorera's Motion to Limit the Scope of Testimony of Expert Witnesses Alison Des Forges and Andre Guichaoua, filed on 12 July 2007. On 17 July 2007, the Prosecutor filed a response opposing Nzirorera's Motion. On 19 July 2007, the Accused Joseph Nzirorera filed a reply brief to Prosecution's response to his Motion.

² *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Urgent Motion For the Exclusion of the Report and Testimony of Deo Sabahire Mbonyinkebe* (Rule 89(C)) (2 September 2005), *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Admissibility of the Expert Testimony of Dr Binaifer Nawrojee* (8 July 2005), *Prosecutor v Dragomir Milosevic* No. IT-98-29/1-T *Decision on Admission of Expert Report of Robert Donia* (15 February 2007), *Prosecutor v Enver Hadzihasanovic & Amir Kubura* No. IT-01-47-T *Decision on Report of Prosecution Expert Klaus Reinhardt* (11 February 2004), *Prosecutor v Dario Kordic and Mario Cerkez*, No. IT-95-14/2-T, T.13306-307 (28 January 2000), T20828 (9 June 2000); *Prosecutor v Blagojevic*, No. IT-02-60-T T.12109-12111 (22 July 2004); *Prosecutor v Milan Martić*, No. IT-95/11-T, *Decision on Defence Submission for the Expert Report of Prof. Smilja Avramov Pursuant to Rule 94bis*, (9 November 2006), and *Decision on Defence's Submission of the Expert Report of Milisav Sedouard Karemeraulic Pursuant to Rule 94bis and on Prosecution Motion to Reconsider Order of 7 November 2006*, (13 November 2006); *Prosecutor v Stanislav Galic* No. IT-98-29-T, *Decision Concerning the Expert Witness Ewa Tableau and Richard Phipps* (3 July 2002); *Prosecutor v Brima et al* No. SCSL-2004-16-T, *Oral Decision* (24 October 2005) Transcript 24 October 2005, pp.110,112. *Prosecutor v Slobodan Milosevic* No. IT-02-54- AR73.4, *Decision on Interlocutory Appeal on the Admissibility of Evidence -in-Chief in the Form of Written Statements* (30 September 2003).

field.³ The Chamber recalls the decision in *Prosecutor v Casimir Bizimungu et al* which stated that "to the extent that Dr Nowrojee expresses opinions on ultimate issues of fact, the Chamber considers such opinions to be inadmissible", the Chamber went on to underscore the delimited ambit of expert witness testimony by adding that "Dr Nowrojee's expert evidence serves the limited purpose of illuminating the broader context of the events alleged in the indictment. Only the Chamber, as the finder of fact, is competent to make a judicial determination on the ultimate issues on the case".⁴ The Chamber holds that there is an inextricable nexus between the acts, conduct and the mental state of the accused and the ultimate issue of criminal responsibility and therefore expert witnesses are precluded from offering determinative opinions that advert to the act, conduct and mental state of the accused.

4. In addition, Mr Nzirorera argues that the admission of the testimony of the Prosecution expert witnesses will adversely impinge on the fairness of the trial given the disinclination of the expert witnesses to reveal the sources buttressing their opinions. The Defence for Nzirorera further contends that availability of sources for cross examination is an important *indicium* of reliability and furthermore, the nondisclosure by the expert witnesses of their sources compounds the lack of the reliability of their testimony and deprives the accused of an opportunity to cross examine the sources upon whose statements the expert's opinion is based. The Prosecutor replies that the arguments of Mr Nzirorera are misplaced and there is no unfairness to the Accused in the subject matter of the expert witnesses.

5. The Chamber notes that procedural fairness is a paramount consideration in international criminal trials, encompassing such fundamental guarantees as the right of the parties to be equal before the Tribunal⁵ and the right of an Accused to examine to or have examined witnesses against him or her⁶. However, the Chamber finds that admitting into evidence the testimony of the two proposed prosecution expert witnesses, including those parts of their testimony in relation to which they have declined to name their sources will not violate the right of any of the accused to examine, or have examined, the witnesses against him or her,

³ See *The Prosecutor v Akayesu, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness*, 9 March 1998, para.2.

⁴ See *The Prosecutor v Casimir Bizimungu, Case No ICTR-99-50-T, Decision on the Admissibility of the Expert Testimony of Dr Binaifer Nowrojee*, 8 July 2005, para 12.

⁵ Article 20(1) of the ICTR Statute provides that "all persons shall be equal before the International Tribunal For Rwanda"

⁶ Article 20(4) provides that "In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."

pursuant to Article 20(4) (e) of the statute. The Chamber adopts the reasoning in *Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Deo Sabahire Mbonyinkebe(Rule 89(C))* which characterized the reliability required for expert witnesses as being a low threshold to satisfy. The Chamber finds that the Prosecutor has satisfied this threshold requirement and that the reports of the proposed expert witnesses possess sufficient indicia of reliability to be admissible and any limitations in the testimony will be factored into the Chambers consideration and weighing of the expert witnesses' evidence.⁷ The Tribunal in *Bagosora et al* held that "in light of the complexity and scale of the events in Rwanda in 1994, it is unsurprising that Chambers of this Tribunal have adopted a liberal approach to the admission of expert testimony.... The standard for admission of expert testimony is whether the specialized knowledge possessed by the expert, applied to the evidence which is the foundation of the opinion, may assist the Chamber in understanding the evidence."⁸

6. The fact that the expert witnesses have not divulged the sources of their findings is not in the Chamber's opinion a cogent reason to exclude their testimony nor does it detract from the fairness of the proceedings. The accused will have adequate opportunity to put to test the reliability of the sources undergirding the expert witnesses opinions during cross examination. In the Chamber's opinion, this renders the need to cross examine the sources of the expert's extrapolations unnecessary and moreover, puts a *quietus* to Nzirorera's argument that admitting the evidence of expert witnesses in light of their disinclination to reveal the sources of their findings is unfair to the accused.

7. The Chamber notes that Mr Nzirorera's alternative application would have been pertinent in the context of evidence tendered under Rule 92bis of the Rules where the witness is not expected to attest orally to the accuracy of her written testimony, hence, the stringent provisos of Rule 92bis. The Chamber recalls the decision of the appeals Chamber in *Galic* to the effect that "Rule 92bis is the *lex specialis* which takes the admissibility of written statements of prospective witnesses and transcripts of evidence out of the scope of the *lex generalis* of Rule 89(C)."⁹ That the two proposed expert witnesses are going to testify and will orally attest to the veracity of their written reports is sufficient to place this application

⁷ See *Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Deo Sabahire Mbonyinkebe(Rule 89(C))*.para 14,15,16. Dated 09/08/2007.

⁸ See *Bagosora et al., Decision of Motion for Exclusion of Expert Witness statement of Filip Reyntjens*, 28September 2004, para.8.

⁹ See *Prosecutor v. Galic, Decision on Interlocutory Appeal concerning Rule 92bis(C)*, Case No IT-98-29-AR73.2, 7 June 2002,para 31


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beyond the purview of 92bis. The safeguards of Rule 92bis are superfluous where a witness attends or is expected to attend court and testify to the veracity of his or her written testimony since the prohibitive provisos of Rule 92bis do not extend to evidence material not governed by Rule 92bis. Additionally, a determination that the evidence in question constitutes written evidence within the meaning of Rule 92bis notwithstanding the fact that the proposed witnesses are expected to testify, would be an excessively formalistic construal of the Rule.¹⁰ In fine, Mr Nzirorera's alternative application is vitiated by his failure to take into consideration the specific nature of Rule 92bis, which governs the admissibility of a specific genre of evidence, that is written evidence which is admitted in lieu of oral testimony.


FOR THE ABOVE REASONS, THE CHAMBER


- I. **GRANTS IN PART** the Defence motion, thereby ruling inadmissible those portions of Dr Alison Des Forges and Dr Andre Guichaoua's reports that express opinions on Ultimate issues before the Chamber,
- II. **DIRECTS** the Prosecutor to tender the entirety of Alison Des Forges and Andre Guichaoua's written evidence without redacting the inadmissible portions in order to facilitate the Chamber's reading of the written testimonies of the two expert witnesses.
- III. **DISMISSES THE REMAINDER** of the Defence Motion

Arusha 21 August 2007, done in English.


Dennis C. M. Byron

Presiding Judge


With the consent and on behalf of
Gberdao Gustave Kam
Judge
(Absent during signature)


With the consent and on behalf of
Vagn Joensen
Judge
(Absent during signature)



¹⁰ See Prosecutor v Slobodan Milosevic No.IT-02-54-AR73.4, *Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements* (30 September 2003), paras 16,17



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| Dates: | Transmitted: 22-August-2007 | | Document's date: 21-August-2007 | |
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