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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
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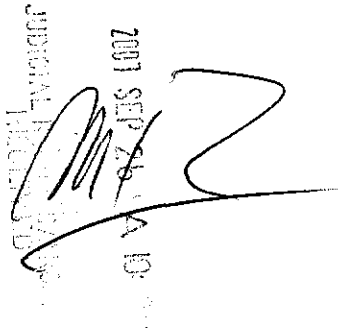
OR: ENG

**TRIAL CHAMBER III**

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

**Registrar:** Adama Dieng

**Date:** 26 September 2007



**THE PROSECUTOR**

**v.**

**Édouard KAREMERA**
**Mathieu NGIRUMPATSE**
**Joseph NZIRORERA**

***Case No. ICTR-98-44-T***

# DECISION ON JOSEPH NZIRORERA'S MOTION TO PRECLUDE TESTIMONY BY CHARLES NTAMPAKA

***Rule 94bis of the Rules of Procedure and Evidence***

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## INTRODUCTION

1. The proceedings in the instant case commenced on 19 September 2005 with the presentation of the Prosecution's case.

2. On 7 September 2007, Joseph Nzirorera applied to preclude the testimony of prospective expert witness Charles Ntampaka on the grounds (i) that he is not qualified to provide an expert opinion on issues relevant to the trial; and (ii) that his proposed testimony relates principally to interpretation of legal texts, and to the criminal responsibility of the accused, which would invade the province of the Trial Chamber.

3. In its Pre-Trial brief, filed on 27 June 2005, the Prosecution gave notice of its intention that Professor Charles Ntampaka should "offer expert opinion evidence on the laws of Rwanda, with specific reference to the Rwandan constitutions of 1962, 1978, 1991 and the Loi Fondamentale introduced by the Arusha Accords of 4 August 1993."

4. On 16 May 2005, the Trial Chamber ordered the Prosecution to file all of its expert reports by 5 August 2005. Ntampaka's report entitled "Evolution constitutionnelle et pouvoir politique au Rwanda du 1er octobre 1990 au 1er juillet 1994" was eventually filed in March 2006 after several orders for extensions of time had been granted.

5. On 24 March 2006, Mr. Nzirorera gave notice that he objected to the qualifications of Professor Ntampaka as well as his report, and indicated he wished to cross-examine him. The Prosecution has now listed Professor Ntampaka as a prospective witness for the trial session commencing 1 October 2007.

### Preliminary Issue

6. The Prosecution objects that the motion is premature[1] and suggests that a *voir-dire* proceeding should be held in order to address the issues raised in the motion. The Chamber recalls that Rule 73 of the Rules of Procedure and Evidence (the "Rules") allows any party to move the Chamber for appropriate relief at any time after the initial appearance of the accused and rejects the Prosecution's submission of prematurity. The qualifications of the proposed witness are not in dispute as they are contained in his *curriculum vitae* which has been filed with the Chamber and served on the Accused. Neither is the subject matter on which the opinion is sought in dispute, as his report has been filed with the Chamber and

[1] Prosecutor's Response to Nzirorera's Motion to Preclude Testimony by Charles Ntampaka, 12 September 2007, par. 4.

served on the Accused. Those materials are sufficient for the Chamber to assess the qualifications of the proposed witness and the subject matter of his opinion. The Chamber recalls that there is no compulsory *voir-dire* hearing,[2] and considers that it would not be necessary in this case.

## DISCUSSIONS

7. Rule 94*bis* of the Rules relates to the testimony of expert witnesses. It does not provide any details on how one could qualify as an expert, and how expert evidence has to be assessed by the Chamber. However, Rule 89 gives discretion to the Judges to "apply rules of evidence which will best favour a fair determination of the matter [...] and are consonant with the spirit of the Statute and the general principles of law", while they "shall not be bound by [any] national rules of evidence". The Chambers have therefore discretion in determining who is qualified to testify as an expert and in assessing the expert evidence.[3]

8. There have been a number of cases in which the Chambers have had to determine whether to allow expert testimony and this has given rise to important jurisprudential developments.[4] It is now settled that the requirements for the admission of an expert include:

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[2] See: *Georges Anderson Nderubumwe Rutaganda c. Le Procureur*, Affaire No. ICTR-96-3-A, Arrêt, par. 164 ("La Chambre d'appel relève que si le Règlement contient une procédure spécifique permettant de recevoir le rapport d'un expert sans procéder à son audition, sous réserve de l'acceptation par la partie adverse, il n'exige pas la tenue d'un « voir-dire » préalable à l'audition du témoignage de la personne proposée comme expert. La Chambre d'appel rappelle qu'aux termes mêmes de l'article 89 A) du Règlement, les Chambres ne sont pas liées par les règles de droit interne régissant l'administration de la preuve. En l'espèce, la Chambre de première instance a manifestement choisi une approche qui consiste à voir préciser les qualifications des personnes proposées comme expert par le Procureur au cours de leur interrogatoire principal par ce dernier et de leur contre-interrogatoire par le Conseil de l'Appelant, ce qui revient à recevoir le témoignage de l'intéressé avant d'avoir statué sur son admission comme expert. La Chambre d'appel considère que dans le silence du Règlement s'agissant des modalités pratiques de l'administration de la preuve par expert à l'audience, et conformément aux dispositions de l'article 89 B) du Règlement, cette approche n'apparaît pas contraire à l'esprit du Statut et des principes généraux du droit et était de nature à permettre un règlement équitable de la cause." Footnotes have been omitted).

[3] It is also settled jurisprudence in *common law* that the judge has to determine whether a witness is qualified to give evidence as an expert. See: *R. v. Silverlock* (1894) 2 QB 766; *R v Robb* (1991) 93 Cr App R 161; *R v Ian Hersey* (1997) EWCA Crim 3106, 1 December 1997; and *The Queen v O'Doherty* Re Application for Judicial Review (2002) NICA 20, 19 April 2002. The last two judgements are available online at the British and Irish Legal Information Institute (http://www.bailii.org/). In *civil law* system, the investigative judge or the court in some rare instances will call the expert, each party having equal right to challenge the expert evidence. In such procedure, the assessment of the qualification is a step ahead of the appointment as an expert.

[4] *Prosecutor v. Dragomir Milosevic*, Case No. IT-98-29/1-T, Decision on Defence Expert Witnesses (TC3), 21 August 2007; *Prosecutor v. Dragomir Milosevic*, Case No. IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia (TC3), 15 February 2007; *Prosecutor v. Momcilo Perisic*, Case No. IT-04-81-PT, Order on Defence Submissions Regarding Various Experts' Reports Disclosed by the Prosecution Pursuant to Rule 94*bis* (TC), 2 February 2007; *Prosecutor v. Milan Martic*, Case No. IT-95-11-T, Decision on Defence's Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94*bis*, and on Prosecution's

(i) the witness has to be an expert; (ii) the statement / report has to be reliable; (iii) the statement has to be relevant and of probative value; and (iv) the contents of the statement / report has to fall within the expertise of the witness. In general, the Chamber must decide whether the subject matter of the opinion falls within the class of subjects upon which expert evidence is permissible. In making this determination it will consider whether the subject matter is such that the Chamber may not be able to form a sound judgement on it without the assistance of witnesses possessing special knowledge or experience in the area.[5]

9. In the present case, Nzirorera has raised objections to the qualification of Ntampaka as an expert, and to the subject matter of the report.

**Qualification of Ntampaka**

10. The Prosecutor has submitted that Ntampaka "has extensive qualifications in the field of Rwandan law", and that his PhD (*Philosophiae Doctor*) research "demonstrates [his] expertise on the implications of the laws in Rwandan society, generally including expertise in the field of Rwandan administration". The Prosecutor further adds that Ntampaka has

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Motion to Exclude Certain Sections of the Military Report of Milisav Sekulic, and on Prosecution Motion to Reconsider Order of 7 November 2006 (TC1), 13 November 2006; *Prosecutor v. Milan Martic*, Case No. IT-95-11-T, Decision on Defence's Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94*bis* (TC1), 9 November 2006; *The Prosecutor v. Casimir Bizimungu et al*, Case No. ICTR-1999-50-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; Decision on the Admissibility of the Expert Testimony of Dr Binaifer Nowrojee, 8 July 2005; *Prosecutor v Enver Hadzihasanovic &Amir Kubura*, Case No. IT-01-47-T, Decision on Report of Prosecution Expert Klaus Reinhardt (TC2), 11 February 2004 ("[A]n expert witness may not be authorised to offer his opinion on the criminal liability of the accused, a matter which falls within the sole jurisdiction of the Chamber at the close of the trial"); *Prosecutor v. Radoslav Brdjanin*, Case No. IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown (TC2), 3 June 2003; *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-T, Decision on the Expert Witness Statements Submitted by the Defence (TC1B), 27 January 2003; *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps (TC1B), 3 July 2002 (An expert witness is "a person whom by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute" and who "to that end testifies"; "an expert witness is expected to give his or her expert opinion in full transparency of the established or assumed facts he or she relies upon and of the methods used when applying his or her knowledge, experience or skills to form his or her expert opinion"); *The Prosecutor versus Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-T, Oral Decision on Expert Witness Cigar (TC), Transcripts of 28 January 2000, pp. 13305-13307.

[5] See: *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Decision on Defence Motion for Appearance of an Accused as an Expert Witness (TC), 9 March 1998 ("[T]he Tribunal is of the view that there is a fundamental difference between, on the one hand, a witness called to testify about the crimes with which the accused is directly charged and, on the other hand, an expert witness, whose testimony is intended to enlighten the Judges on specific issues of a technical nature, requiring special knowledge in a specific field"). In another more recent case, the Appeals Chamber has confirmed that there was no error in a Trial Chamber's denial to hear an expert witness on international criminal law. See: *Prosecutor v. Milomir Stakic*, Case No.: IT-97-24-A, Judgement (AC), 22 March 2006, par. 164.

lectured "on several topics on Rwandan law including constitution law" and "has several relevant publications [...] listed in his *curriculum vitae*".

11. The Chamber recalls that the ambit of an expert is to provide the Judges with a specialized / technical opinion. The person providing the opinion must therefore be an expert. His/her expertise can be the consequence of academic qualifications or experience, research publications being relevant to the latter.

12. The Chamber considers that legal studies are complex, and it is no longer a discipline where one could be expected to be knowledgeable in all aspects. Therefore, it is not conceivable that one could be expert in all aspects of the law.

13. It is not disputed that Ntampaka has a law degree, a PhD in Law, with a thesis on Rwandan family and customary law. The Defence concedes that Ntampaka may be qualified as an expert in Rwandan family and customary law. This is supported by the *curriculum vitae* produced by the Prosecution, the party willing to call Charles Ntampaka as an expert. Such qualification is also supported by Ntampaka's experience as lecturer. Such qualification is further supported by the list of publications. However, not all publications will evidence an expertise. For instance, one has to distinguish between papers published in a magazine and those in a legal journal. Furthermore, in the assessment of expertise, a paper published in a peer-reviewed journal should be given greater value than a paper in a person's own magazine, as in the present case. The Chamber has not seen any evidence in the Prosecution's submissions which could support its assertion that "Ntampaka has given lectures on several topics on Rwandan [...] constitutional law". Because Charles Ntampaka lacks academic distinctions, professional experience, and because there is no evidence of any specialization in constitutional law, this publication alone cannot support the alleged expertise. The Chamber therefore concludes that Charles Ntampaka cannot be considered as an expert in relation with constitutional issues which are the main field of his report.

14. The Prosecution also submits that "Ntampaka's expertise encompasses the constitution of Rwanda and the socio-political implications of the constitution and the Arusha Accords in Rwandan society and the political arena". The Prosecution qualifies this mixture as an "interdisciplinary field of socio-legal-political science".

15. The *curriculum vitae* does not reveal that Ntampaka has had any training or experience in political or social sciences. In addition, the Chamber is not persuaded that the interdisciplinary field of socio-legal-political science is sufficiently organized or recognized

as a reliable body of knowledge or experience with which the Witness could potentially provide assistance to the Chamber.

16. In any event the Chamber reaffirms that the scope of the report is not within the expertise of Charles Ntampaka, who could only be regarded as being specialized in Rwandan family and customary law.

17. Under the circumstances, the Chamber considers that Ntampaka does not qualify as an expert. Therefore, he cannot be called as an expert witness and his report cannot be admitted into evidence.

**FOR THESE REASONS, THE CHAMBER**

**I. GRANTS** the motion;

**II. EXCLUDES** the evidence of Charles Ntampaka.

Arusha, 26 September 2007, done in English.

Dennis C. M. Byron
Presiding Judge

Gberdao Gustave Kam
Judge

Vagn Joensen
Judge

[Seal of the Tribunal]

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| **Dates:** | Transmitted: **26 September 2007** | Document's date: **26 September 2007** | |
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