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ICTR-2001-64-T  
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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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**TRIAL CHAMBER III**

Case No. ICTR-2001-64-T

ENGLISH

Original: FRENCH

Before: Judge Andréia Vaz, presiding  
Judge Ram Reddy  
Judge A. Egorov

Registrar: Adama Dieng

Date filed: 11 November 2003

**THE PROSECUTOR**

v.

**SYLVESTRE GACUMBITSI**

2004 FEB 24 P 5:36  
JUDICIAL RECORDS  
1013  
Sylvester Gacumbitsi

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**DECISION ON EXPERT WITNESSES FOR THE DEFENCE**  
**Rules 54, 73, 89 and 94bis of the Rules of Procedure and Evidence**

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Office of the Prosecutor:

Richard Karegyesa  
Andra Mobberly  
Khaled Ramadan

Counsel for the Defence:

Kouengoua  
Ngantio Mbattang

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”)

SITTING as Trial Chamber III composed of Judge Andréia Vaz, presiding, Judge Ram Reddy and Judge Sergei A. Egorov (“the Chamber”),

SEIZED of the “*Prosecutor’s Motion for the Exclusion of the Proposed Expert Report and Evidence of Pascal Ndengejeho*”, filed on 3 November 2003 (“the Motion”),

SEIZED ALSO of the “*Prosecutor’s Notice of No Objection to the Expert Report of Dominique Leconte & Walter Vorhauer*”, filed on 3 November 2003 (“the Notice”),

CONSIDERING the Statute of the Tribunal (“the Statute”) and the Rules,

RELYING solely on the Prosecutor’s briefs, pursuant to Rule 73(A) of the Rules,

**CONSIDERS THE MOTION.**

**Submissions by the Parties**

*Regarding the Motion*

1. The Prosecution requests the Chamber to deny Pascal Ndengejeho the status of an expert witness, pointing out that the Trial Chamber conducting the Semanza Case had adopted that position at Ndengejeho’s appearance.<sup>1</sup> The Prosecution submits that Mr. Ndengejeho’s curriculum vitae contains no qualifications of an academic or any other nature regarding the matters on which his expertise is proposed. The Prosecution also submits that neither the curriculum vitae nor Mr. Ndengejeho’s report indicate in what way he was able to acquire in-depth knowledge of the matters relating to the trial;<sup>2</sup> that, furthermore, Ndengejeho has no publications in specialized journals recognized in academic or specialized circles on Rwandan issues; and, lastly, that the report falls short of the criteria one is entitled to expect of an expert, especially with regard to Rwanda. The Prosecution sees nothing in the report but a series of hypotheses, gratuitous assertions, innuendos and hearsay, a partisan study not based on a scientific approach characterized by concern for critical analysis, and not backed by systematic references to the sources drawn on in the expert report and capable of supporting its conclusions.

2. The Prosecution further requests the Chamber to disallow Mr. Ndengejeho’s appearance as his testimony lacks relevance and probative value. The Prosecution, in this regard, misinterprets Rule 89(C) of the Rules, which states:

*“A Chamber may admit any relevant evidence which it deems to have probative value.”*

<sup>1</sup> The Prosecution cites the transcripts of 28 January 2002 in *The Prosecutor v. Semanza*, Case No. ICTR-97-20-T, pp. 46-48 of the English version.

<sup>2</sup> Pascal Ndengejeho’s report, filed in the instant case on 23 October 2003.

3. The Prosecution notes that to judge from his report, Mr. Ndengejeho would come to testify (i) that foreign powers played a part in the massacres committed in Rwanda in 1994; (ii) that the Rwandan Patriotic Front (RPF) assassinated the President of Rwanda, Juvénal Habyarimana, on 6 April 1994; (iii) that Hutus killed Tutsis and Tutsis killed Hutus; and (iv) that Mr. Sylvestre Gacumbitsi is one of the innocent people.

4. The Prosecution alleges that points (i) and (ii) above are irrelevant to the charges brought against the Accused, and moreover, that these assertions are based on dubious, indeed inadmissible, facts and are therefore in themselves of no probative value. In addition, the Prosecution maintains that point (iii) is not admissible ground of defence and is irrelevant. The Prosecution in this regard notes that the only issue at bar is the proof beyond every reasonable doubt, of the Accused's personal responsibility in respect of the charges against him, or the absence of such proof.<sup>3</sup> With regard to point (iv), the Prosecution submits that an expert cannot testify to his opinion as to whether an accused is guilty or not.<sup>4</sup>

*With regard to the Notice*

5. In its second submission of 3 November 2003, pursuant to Rule 94*bis* of the Rules, the Prosecution accepts the report of the two Expert Witnesses Prof. Dominique Lecomte and Dr. Walter Vorhauer, and informs the Chamber that it does not intend to cross-examine them. The Prosecution then requests the Chamber to admit the report into evidence without calling the expert witnesses to appear.

**Deliberation**

6. The Chamber, having not received any response to date from the Defence, considers the matter to be urgent in that a decision must absolutely be rendered before hearings commence on 17 November 2003. The Chamber also takes judicial economy into account in rendering its decision expeditiously so as to allow the Registry to make the necessary practical arrangements.

7. Rule 94*bis* of the Rules does not oblige the Chamber to hear expert witnesses once their report has been filed. It follows from this rule that they are required to appear only if the opposing party wishes to exercise its right to cross-examine them. Having considered the information regarding Prof. Dominique Lecomte and Dr. Walter Vorhaeur, the Chamber accords them the status of expert witnesses and therefore grants the Prosecution's request that they should not appear, since their

<sup>3</sup> The Prosecution refers in particular to the case-law of the International Criminal Tribunal for the Former Yugoslavia (ICTY), which rules out defence evidence symbolized by the adage *tu quoque*: *Prosecutor v. Zoran Kupreskic and Others*, Case No. IT-95-16-T, "Decision on evidence of the good character of the Accused and the defence of *tu quoque*", (Trial Chamber I [sic]), 17 February 1999.

<sup>4</sup> The Prosecution refers to the following ICTY case-law: *Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-T, *Oral Decision excluding a Prosecution Expert*, Court transcript of 28 January 2000, pp. 13305-13307, where the Trial Chamber, in justifying the exclusion of the testimony of an expert witness called by the Prosecution, stated that: "What this witness effectively is doing is to provide evidence or provide opinion, more accurately, upon the very matters upon which this Trial Chamber is going to have to rule, and that, as they correctly point out, invades the right, power, and duty of the Trial Chamber to rule upon the issue."

report has been admitted into evidence. The Chamber will, at the appropriate time, assess the probative value of the said report.

8. With regard to expert witnesses in general, the Chamber recalls it alone has the power to accord that status on the basis of the submissions made by the parties, and that it also has the power to accept or reject, in whole or in part, the contribution of an expert witness. Moreover, in contributing special knowledge to assist the Chamber, the expert must do so with the utmost neutrality and with scientific objectivity.

9. In the instant case, the Prosecution prays the Chamber not only to dismiss Mr. Ndengejeho's expert status, but also not to admit his report or hear his testimony. The Chamber is of the opinion that certain elements in the report submitted by Ndengejeho are not relevant to the instant case and cannot constitute an expert's contribution to justice. Furthermore, on the basis of the information about Mr. Ndengejeho brought to the Chamber's attention, his curriculum vitae and his report, the Chamber is of the opinion that Ndengejeho is not an expert within the meaning of Rule 94*bis* of the Rules. However, the Chamber decides that there is no cause, in the circumstance, to dismiss the testimony. The Prosecutor's Motion must accordingly be partially dismissed in part. The Chamber decides to hear Mr. Ndengejeho as a Defence witness according to the calendar scheduled to that effect, and to restrict such testimony to the events at Rusumo in April-May 1994, with the examination-in-chief not to exceed two hours.

**FOR THESE REASONS,**

**THE CHAMBER**

- I. RULES that it is not necessary to hear the testimony of Expert Witnesses Prof. Dominique Lecomte and Dr. Walter Vorhauer;
- II. ACCEDES IN PART to the Prosecutor's Motion, by denying Mr. Ndengejeho expert status; he will testify under the conditions set forth in paragraph 9 above;
- III. DISMISSES the remainder of the Motion.

Arusha, 11 November 2003

[Signed]  
Andrésia Vaz

[Seal of the Tribunal]