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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Or: ENG

TRIAL CHAMBER II

Before: Judge Khalida Rachid Khan, Presiding
Judge Lee Gacuiga Muthoga
Judge Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 2 September 2005

ICTR-99-50
02-09-2005
(22241-22236)

The PROSECUTOR

v.

Casimir BIZIMUNGU
Justin MUGENZI
Jérôme-Clément BICAMUMPAKA
Prosper MUGIRANEZA

Case No. ICTR-99-50-T

**DECISION ON CASIMIR BIZIMUNGU'S URGENT MOTION FOR THE
EXCLUSION OF THE REPORT AND TESTIMONY OF DÉO SEBAHIRE
MBONYINKEBE (RULE 89 (C))**

Office of the Prosecutor:

Mr. Paul Ng'arua
Mr. Ibukunolu Babajide
Mr. Elvis Bazawule
Mr. Justus Bwonwonga
Mr. Shyamlal Rajapaksa

Counsel for the Defence:

Ms. Michelyne St. Laurent and Ms. Alexandra Marcil for *Casimir Bizimungu*
Mr. Ben Gumpert for *Justin Mugenzi*
Mr. Pierre Gaudreau and Mr. Michel Croteau for *Jérôme Bicamumpaka*
Mr. Tom Moran and Ms. Marie-Pierre Pouline for *Prosper Mugiraneza*

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal")

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Chamber");

BEING SEISED of "Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Déo Sebahire Mbonyinkebe", filed on 9 April 2005 (the "Motion");

CONSIDERING the "Prosecutor's Response to Casimir Bizimungu's Urgent Motion Seeking Exclusion of the Report and the Testimony of Mr. Déo Mbonyinkebe", filed on 18 April 2005 (the "Response");

CONSIDERING "Casimir Bizimungu's Reply to the Prosecutor's Response to Urgent Motion Seeking Exclusion of Déo Sebahire Mbonyinkebe", filed on 21 April 2005 (the "Reply");

CONSIDERING the Statute of the Tribunal ("the Statute") and the Rules of Procedure and Evidence ("the Rules"), in particular Rule 89 (C) of the Rules;

HEREBY DECIDES the Motion, pursuant to Rule 73 (A) of the Rules, upon the basis of the oral and written submissions of the Parties.

INTRODUCTION

1. In an oral ruling delivered by the Chamber on 2 May 2005, following a *voir dire* hearing in relation to the qualification of Professor Mbonyinkebe as an expert witness, the Chamber determined that, by virtue of Professor Mbonyinkebe's education and experience, the witness was qualified as "an expert witness on issues of social and cultural anthropology in relation to the events of 1994 in Rwanda"¹. Following the Chamber's Decision, Professor Mbonyinkebe then testified before the Tribunal, in his capacity as an expert witness, between 2 May 2005 and 12 May 2005.
2. During the course of Professor Mbonyinkebe's testimony, the Chamber admitted into evidence his report entitled "On the Genocide of the Rwandan Tutsi: *Essay Answers to Some Questions*", dated 7 October 2004².
3. After hearing oral submissions by the Parties in relation to that part of the Defence Motion which challenges the admissibility of the evidence on the basis that they are irrelevant to the Prosecution's case, the Chamber dismissed

¹ T. 2 May 2005, p. 54.

² Exhibit number P. 95 (F); T. 2 May 2005, p. 66.



the Defence Motion,³ indicating that written reasons would follow. The Chamber now sets out those reasons.

SUBMISSIONS

Defence Motion

4. As a preliminary issue, the Chamber notes that, since it has already ruled on the expertise of Professor Mbonyinkebe as stated in paragraph 1, this issue is settled, and any submissions in this regard are moot.
5. The Defence for Casimir Bizimungu moves the Chamber to exclude the expert report and testimony of Prosecution Witness Professor Déo Sebahire Mbonyinkebe on the ground that the witness' evidence is inadmissible pursuant to Rule 89 (C) of the Rules. The Defence submits that the witness' evidence is "irrelevant, unreliable and lacks probative value"⁴ and furthermore is entirely lacking in scientific value.
6. In relation to the "*relevancy*" requirement of Rule 89 (C), the Defence submits that: (i) the evidence does not relate to the charges against the Accused, specifically, the charges in Part 7 of the Indictment; and (ii) the evidence, including the witness' methodology in compiling his report, contains words or statements of legal characterisation (such as "genocide"), which an anthropologist is not qualified to give, rendering his opinion irrelevant. Furthermore, such statements relating to the role or *mens rea* of Ministers are inadmissible, as determinative of ultimate issues, and cause prejudice to the Accused, which outweighs any probative value the evidence may have.
7. In relation to the "*probative value*" requirement of Rule 89 (C), the Defence submits that the Prosecution has failed to show that the witness' report meets the requisite standard. Furthermore, the Defence submits that the report is based upon scientifically unreliable methodology and an inadequate pool of data.

Prosecution Response

8. The Prosecution submits that the report is both relevant and probative, in accordance with the standards articulated in Rule 89 (C). It submits that the report is relevant because it covers issues such as genocide, the multiparty

³ Transcript, 2 May 2005, p. 16.

⁴ *Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Déo Sebahire Mbonyinkebe*, filed on 9 April 2005, paragraph 4.



system, the use of youths by the political parties,⁵ the power struggle in the multiparty system, the Arusha Peace Accords and the general Rwandan culture as a factor influencing the events of 1994. The Prosecution further submits that the report is probative, pointing to the methods outlined by the author in the written report itself, in which he also recognizes the limitations and constraints on his methodology.

Defence Reply

9. In its reply, the Defence reiterates its submission that Professor Mbonyinkebe's evidence be excluded on the ground that it is not admissible under Rule 89 (C).

DELIBERATIONS

The Standard of Admissibility

10. Rule 89 (C) of the Rules gives the Chamber broad discretion to admit evidence which it deems to be both relevant and probative. The Chamber now considers each of these thresholds.

Relevancy

11. Whether expert witness testimony is relevant may be determined by considering whether the testimony enlightens the Chamber on "specific issues of a technical nature, requiring specialised knowledge in a special field"⁶ and whether "the specialised knowledge possessed by the expert, applied to the evidence which is the foundation of the opinion, may assist the Chamber in understanding the evidence".⁷
12. The Chamber finds that the report and the testimony of Professor Mbonyinkebe are relevant, since his evidence relates to material issues in this case and may assist the Chamber in understanding the evidence. The Chamber is satisfied that there is a nexus between parts of Professor Mbonyinkebe's report and certain paragraphs in the Indictment, notably the links drawn between Part 5 of the Indictment and the Professor's report. Specifically, the report and the testimony bear upon issues such as anti-Tutsi sentiment in Rwanda, the power struggle within the Rwandan multiparty system, the effect of the Arusha Peace Accords on the "social atmosphere in Rwanda", and

⁵ Exhibit P. 95 (E), Report of Professor Mbonyinkebe entitled "On the Genocide of the Rwandan Tutsi: Essay Answers to Some Questions", dated 7 October 2004, pp. 15, 28 and 29.

⁶ *Prosecutor v. Akayesu*, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness (TC), 9 March 1998, para. 2.

⁷ *Prosecutor v. Bagosora et al.*, Decision of Motion for Exclusion of Expert Witness Statement of Filip Reyntjens (TC), 28 September 2004, para. 8.

various other matters of Rwandan cultural significance. All of these matters are relevant to the Prosecution case. This testimony may be of assistance to the Chamber in better understanding the factual evidence of the case.

13. The Defence expresses concern that Professor Mbonyinkebe's evidence includes legal characterisation and expressions of opinion on ultimate issues of fact.⁸ In this respect, the Chamber recalls its previous ruling made in relation to the testimony of Expert Witness Dr. Binaifer Nowrojee.⁹ Thus, the Chamber deems inadmissible the opinions of Professor Mbonyinkebe on ultimate issues of fact. Only the Chamber is competent to make such determinations.

Probative Value

14. The issue is whether the alleged scientific defects in Professor Mbonyinkebe's report render it "so lacking in terms of the indicia of reliability, such that it is not probative"¹⁰ and therefore inadmissible. This is a low threshold to satisfy, and the Appeals Chamber has determined that "only the beginning of proof that evidence is reliable" is required.¹¹
15. The Chamber finds that the Prosecution has met this preliminary threshold, demonstrating that Professor Mbonyinkebe's report and testimony do possess "sufficient indicia of reliability" to be admissible. By virtue of his expertise in social and cultural anthropology concerning the events in Rwanda in 1994, Professor Mbonyinkebe is qualified to comment on the matters raised in his report. The report's limitations, some of which are acknowledged by the witness in both his testimony and his report,¹² will be factored into the Chamber's consideration and weighing of the Professor's evidence.
16. Subject to the Chamber's finding in paragraph 13 above, the Chamber overrules the Defence objections on admissibility. The Chamber reminds the Parties of the holding of the Appeals Chamber in *Nyiramasuhuko*, where it stated that:

[A] distinction must be drawn between, on the one hand, admissibility of evidence, and, on the other, the exact probative weight to be attached to it. The former requires some relevance and

⁸ Motion, paras. 80-82.

⁹ *Prosecutor v. Bizimungu et al.*, Decision on the Admissibility of the Expert Testimony of Dr. Binaifer Nowrojee (TC), 8 July 2005, para. 12.

¹⁰ *Nyiramasuhuko v. The Prosecutor*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7.

¹¹ *Ibid.*

¹² Exhibit P. 95, Report of Professor Mbonyinkebe entitled "On the Genocide of the Rwandan Tutsi: *Essay Answers to Some Questions*", dated 7 October 2004, pp. 2-3.



probative value, whereas the latter is an assessment to be made by the Trial Chamber at the end of the case.¹³

17. Consequently, although the Chamber has admitted the report, it is yet to determine what weight to attach to it.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

GRANTS the Motion IN THE FOLLOWING TERMS:

The Chamber rules inadmissible those portions of Professor Mbonyinkebe's evidence which express opinions on ultimate issues of fact in this trial.

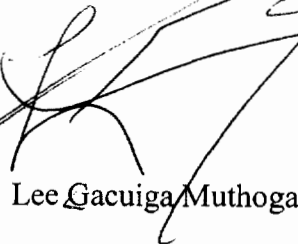
DENIES the Motion in all other respects.

Arusha, 2 September 2005.



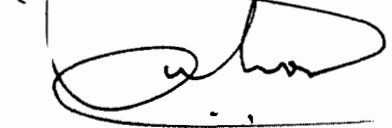
Khalida Rachid Khan

Presiding Judge



Lee Gacuga Muthoga

Judge



Emile Francis Short

Judge

[Seal of the Tribunal]



¹³ *Nyiramasuhuko et al.*, para. 6.