



UNITED NATIONS  
NATIONS UNIES

**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

OR: ENG

**TRIAL CHAMBER II**

**Before Judges:** Khalida Rachid Khan, presiding  
Lee Gacuiga Muthoga  
Emile Francis Short

**Registrar:** Mr. Adama Dieng

**Date:** 21 February 2008

**THE PROSECUTOR**  
**v.**  
**CASIMIR BIZIMUNGU**  
**JUSTIN MUGENZI**  
**JÉRÔME-CLÉMENT BICAMUMPAKA**  
**PROSPER MUGIRANEZA**

**Case No. ICTR-99-50-T**

**DECISION ON MOTION OF JÉRÔME-CLÉMENT BICAMUMPAKA TO ADMIT  
THE REPORT OF EXPERT DR. BERNARD LUGAN INTO EVIDENCE**

*Rules 73 and 94 bis of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

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

**Counsel for the Defence:**

Ms. Michelyne C. St. Laurent and Ms. Alexandra Marcil for **Casimir Bizimungu**  
Mr. Ben Gumpert and Mr. Jonathan Kirk for **Justin Mugenzi**  
Mr. Michel Croteau and Mr. Philippe Larochelle for **Jérôme-Clément Bicamumpaka**  
Mr. Tom Moran and Ms. Marie-Pierre Poulain for **Prosper Mugiraneza**

## INTRODUCTION

1. On 16 July 2007, the Defence for Jérôme-Clément Bicomumpaka (“Defence”) filed the curriculum vitae<sup>1</sup> and expert report of Dr. Bernard Lugan (“Report”)<sup>2</sup>.
2. The Prosecutor did not file a notice in accordance with Rule 94 *bis* (B)<sup>3</sup> of the Rules of Procedure and Evidence (“Rules”).
3. On 31 January 2008, the Defence filed a motion to admit the Report pursuant to Rule 94 *bis* (C).<sup>4</sup> The Defence submits that the Prosecution’s,  
  
“lack of notice, not just the untimely one, must be construed as *de facto* acceptance of the expert’s qualification and report, allowing for the Chamber to exercise its discretion appropriately – qualify the expert on the basis of his curriculum vitae and admit into evidence the expert report, without calling the witness to testify in person.”<sup>5</sup>
4. On 5 February 2008, the Prosecutor confidentially responded to the Defence Motion, objecting to Dr. Lugan’s qualifications and submitting that the terms of reference for the Report are beyond his competence.<sup>6</sup>
5. The Defence replied to the Prosecutor’s Response on 11 February 2008.<sup>7</sup>

## DISCUSSION

### *Preliminary Matters*

#### (a) Confidential Status of Prosecution Response

6. The Chamber wishes to express its concern regarding the filing of documents confidentially, in absence of a legitimate basis for doing so. The transparency of proceedings, among other things, is served by the public filing of documents. The Chamber recalls that ascribing confidential status to filings before the Chamber should be reserved for exceptional circumstances – for instance, where the protection of a witness is

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<sup>1</sup> Curriculum Vitae, Bernard Lugan, Annex 2, filed 16 July 2007.

<sup>2</sup> *Rapport de Bernard Lugan*, Annex 1, dated 10 June 2007, filed 16 July 2007. The terms of reference for the Report, as specified by the Defence, are: “(i) Did the MDR and PL split into two factions of which one, the faction called “Power” joined together with MRND to plan and execute the genocide of Tutsi? (ii) Did the MDR split at the Kabusunzi Congress of 23 July 1993? (iii) What is the constitutional legitimacy of the IGR (Interim Government of Rwanda)? (iv) Of what relevance is the intervention of Minister Bicomumpaka before the United Nations Security Council on 17 May 1994?”

<sup>3</sup> See para. 8 below.

<sup>4</sup> “Bicomumpaka’s Motion to Admit the Report of Expert Dr. Bernard Lugan into Evidence”, filed 31 January 2008 (“Motion”).

<sup>5</sup> *Ibid*, para. 5

<sup>6</sup> “Prosecutor’s Response to Bicomumpaka’s Motion to Admit the Report of Expert Dr. Bernard Lugan into Evidence under Rule 94 *bis* and Rule 73 ‘Confidential’”, filed 5 February 2008, (“Prosecutor’s Response”) paras. 6 and 8.

<sup>7</sup> “Bicomumpaka’s Reply to Prosecutor’s Response to Bicomumpaka’s Motion to Admit the Report of Expert Dr. Bernard Lugan into Evidence”, filed 11 February 2008.

at stake.<sup>8</sup> In the present case, the Chamber considers that the Prosecutor's Response contains no confidential information and, therefore, that the document's confidential status should be lifted.

(b) Whether the Chamber should consider the substance of the Prosecution Response

7. The Prosecution failed to file any notice in accordance with Rule 94 *bis* (B), which provides a procedure for opposing or accepting an expert's qualifications and/or witness statement within a specified time-frame. The Prosecution now attempts to raise such objections, almost seven months outside that time-frame, by filing a Response to the Defence Motion, pursuant to Rule 73 of the Rules.<sup>9</sup> The Prosecution requests the Chamber's acquiescence in filing its rejection notice.<sup>10</sup> As justification for its failure to comply with Rule 94 *bis* (B), the Prosecution submits that it had not been put on notice that the Defence intended to rely upon the opinion of Dr. Lugan until the Defence filed its list of remaining witnesses.<sup>11</sup>

8. The Chamber rejects the Prosecution's submissions. An opposing party cannot overcome its total failure to comply with the express procedure set out in Rule 94 *bis* (B), by raising those objections – almost 200 days out of time – by way of a Rule 73 Response. The Chamber considers that the Prosecutor's Response is not a Rule 73 response and refuses to treat it as anything other than an extremely untimely attempt to file a Rule 94 *bis* (B) notice. The Chamber further rejects the Prosecution's excuse for failing to comply with Rule 94 *bis*. The Defence filed and disclosed Dr. Lugan's Report in accordance with Rule 94 *bis* (A), and had no obligation to provide any further reassurance that he would testify.

9. The Chamber is concerned that notwithstanding the number of Prosecution counsel working on this case, it failed to comply with a mandatory requirement under the Rules. The Prosecution's total failure to comply with the notice requirement is further compounded by the number of days that it allowed to pass before attempting to raise objections to Dr. Lugan's qualifications and report. The Chamber finds that the circumstances in this case show no possible justification for such conduct.

10. The Chamber will therefore give no further consideration to the Prosecution's submissions of 5 February 2008.

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<sup>8</sup> *The Prosecutor v. Protais Zigiranyirazo*, "Order for Transfer of Detained Witnesses", 1 March 2007, para. 5; *Prosecutor v. Karemera et al.*, Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment (TC), 3 May 2005, para. 13.

<sup>9</sup> Rule 73 (A) provides that "either party may move before a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused...." The Defence Motion is filed pursuant to Rules 73 as well as 94 *bis*. Rule 73 (E) provides: "A responding party shall, thereafter, file any reply within five days from the date on which Counsel received the motion." The Prosecutor filed his response to the Defence Motion within five days.

<sup>10</sup> Prosecutor's Response, para. 4.

<sup>11</sup> *Ibid*, para. 2 and 3.

*Merits of the Defence Motion*

11. Rule 94 *bis* of the Rules sets out a specific procedure for dealing with the testimony of an expert witness. Sub-paragraph (B) provides:

“Within fourteen days of filing of the statement of the expert witness, the opposing party shall file a notice to the Trial Chamber indicating whether:

- (i) It accepts or does not accept the witness’ qualification as an expert;
- (ii) It accepts the expert witness statement; or
- (iii) It wishes to cross-examine the expert witness.”

12. Rule 94 *bis* (C) states: “If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.”

13. Rule 94 *bis* (C) requires a Trial Chamber to be satisfied that an opposing party “accepts” the statement of the expert witness as a pre-condition to its discretion to admit being invoked. Rule 94 *bis* (B) bestows a duty upon an opposing party to file – within fourteen days – a notice indicating its attitude towards the matters outlined in (i)-(iii) of that sub-Rule. The question which falls for the Chamber’s determination is whether a party’s total failure to comply with its obligations under sub-Rule (B) of the Rule should be construed as a tacit acceptance for the purposes of sub-Rule (C) of that Rule. If the answer is in the affirmative, the Chamber’s discretion is enlivened.

14. The Defence submits that the Prosecutor’s lack of notice must be construed as *de facto* acceptance of the expert’s qualifications and report, allowing the Chamber to exercise its discretion to admit Dr. Lugan’s report without hearing him in person, pursuant to Rule 94 *bis* (C). The Defence further argues that any alternative interpretation would render Rule 94 *bis* (B) meaningless and violate the principles of statutory construction.

15. The Chamber recalls that the right of cross-examination is fundamental to the fairness of proceedings and applies to both the Defence and the Prosecution. The Tribunal’s jurisprudence demonstrates a reluctance to construe a failure to file a timely notice as a waiver of the right to cross-examine an expert witness on their qualifications and report.<sup>12</sup> While the Tribunal’s jurisprudence on this issue has concerned the rights of the accused, the Chamber considers that the Prosecution should not be deprived of its right to cross-examine a purported expert in absence of an express waiver of that right. To construe the provision otherwise would be contrary to the interests of justice.

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<sup>12</sup> *The Prosecutor v. Karamera et al*, Case No. ICTR-98-44-T, “Decision on Prosecution Experts Witnesses Alison Des Forges, Andre Guichaoua and Binaifer Nowrojee”, 25 October 2007, para. 6; *The Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, “Decision on Prosecutor’s Motion for Dismissal of the Defence Notice due to failure to meet the time limit, Rule 94 *bis* (B) of the Rules of Evidence and Procedure”, 24 February 2006, para. 5.

16. The Chamber therefore considers that, under Rule 94 *bis* (C), actual acceptance is required before a Chamber may exercise its discretion to admit a purported expert's statement without calling him to testify. Having declined to construe the Prosecutor's failure to file a notice in accordance with Rule 94 *bis* (B) as acceptance for the purposes of Rule 94 *bis* (C), the Chamber's discretion to admit the Report, without Dr. Lugan being called to testify in person, has not been enlivened.

**FOR THESE REASONS, the CHAMBER**

**DENIES** the Defence Motion; and

**ORDERS** that the confidential status of the "Prosecutor's Response to Bicomumpaka's Motion to Admit the Report of Expert Dr. Bernard Lugan into Evidence under Rule 94 *bis* and Rule 73" filed on 5 February 2008, be lifted by the Registrar forthwith.

Arusha, 21 February 2008

Khalida Rachid Khan  
Presiding Judge

Lee Gacuiga Muthoga  
Judge

Emile Francis Short  
Judge

[Seal of the Tribunal]