



International Criminal Tribunal for Rwanda  
Tribunal pénal International pour le Rwanda

26603  
10

ICTR-99-50-T

16-05-2008

(26603-26599)

OR: ENG

TRIAL CHAMBER II

**Before Judges:** Khalida Rachid Khan, Presiding  
Lee Gacuga Muthoga  
Emile Francis Short

**Registrar:** Mr. Adama Dieng

**Date:** 16 May 2008

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

Case No. ICTR-99-50-T

2008 MAY 16 A.JI: 29  
JUDICIAL RECEIVED  
OFFICE OF THE PROSECUTOR

**DECISION ON PROSECUTOR'S MOTION OBJECTING TO THE ADMISSION  
OF PROFESSOR GEOFFREY CORN'S REPORT**

*Rules 89 and 94bis 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. Shyam Lal Rajapaksa  
Mr. Olivier De Schutter  
Mr. Kartick Murukutla  
Ms. Marie Ka

**Counsel for the Defence:**

Ms. Michelyne C. St. Laurent 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. Cynthia Cline for **Prosper Mugiraneza**

## INTRODUCTION

1. On 1 May 2008, the Defence for Prosper Mugiraneza ("Defence") filed the *curriculum vitae* and expert report of Geoffrey Corn, a Professor of Law who specialises in the Law of Armed Conflict.<sup>1</sup> The Report concludes, amongst other things, that certain acts or conduct during an internal armed conflict do not violate international law.
2. The Prosecutor objects to the Report and to its admission, as well as any proposed oral testimony of Professor Corn.<sup>2</sup> Furthermore, the Prosecution objects to the qualification of Professor Corn as an expert.<sup>3</sup> The Prosecutor submits that the Chamber is deemed to have knowledge of applicable international law and the Report is not relevant to this case.<sup>4</sup>
3. The Defence responded to the Motion, submitting that the Report is relevant.<sup>5</sup> In particular the Defence refers to Prosecution Expert Witness Dr. Alison Des Forges' testimony, and submits that she made statements regarding unacceptable conduct during an armed conflict.<sup>6</sup> The Defence submits that Professor Corn's Report is relevant because it concludes that the same conduct does not violate international law.<sup>7</sup>

## DISCUSSION

### *Law regarding expert evidence*

4. Rule 94bis governs the disclosure of expert witness statements and provides a mechanism by which an opposing party can accept or reject the qualification of the witness as an expert and/or that expert's statement.<sup>8</sup> It also provides a mechanism for admission of expert evidence without calling the expert witness to provide oral

<sup>1</sup> *Curriculum Vitae*, Geoffrey Steven Corn and "Detailed Proffer of Lt. Col. Corn's Opinion" with attachments, filed 1 May 2008 ("Report"). According to Professor Corn's *curriculum vitae* he is a Professor of Law in Criminal Law, Criminal Procedure, National Security Law and the Law of Armed Conflict.

<sup>2</sup> "Prosecutor's Rule 94bis Notice and Motion for the Exclusion of the Proposed Expert Report and Evidence of Geoffrey Corn" filed 6 May 2008 ("Motion").

<sup>3</sup> *Ibid.*, paras. 3 – 10.

<sup>4</sup> *Ibid.*, para. 3. c.

<sup>5</sup> "Prosper Mugiraneza's Response to Prosecutor's Rule 94bis Notice and Motion for the Exclusion of the Proposed Expert Report and Evidence of Geoffrey Corn" filed 12 May 2008 ("Defence Response").

<sup>6</sup> These statements are set out in the Defence Response, para. XIX: "A. It is not acceptable to make slurs against opponents in an armed conflict, especially if those slurs are based on the basis of ethnic background or political ideas. B. That it was improper to call certain opponents of a government 'the enemy' in many circumstances, including: 1. People who bear arms against the government in an internal armed conflict because they would not be enemies of the nation but enemies of a particular regime. 2. Persons who purchase weapons for the government opponents in a guerrilla war unless they had been judicially convicted. 3. Persons providing material support for fighting the government in an internal armed conflict. Instead, they should be called 'opponents.' 4. The Designation of 'enemy' in an internal armed conflict is something that has to be proved in court, including for those bearing arms against the government. C. Additionally, she asserted that the Prosecution Exhibit 69 (the so-called definition of the enemy) was somehow improper or a call for genocide."

<sup>7</sup> Defence Response, para. XX.

<sup>8</sup> Rule 94bis (A) and (B).



testimony.<sup>9</sup> In all other respects, the admission of expert testimony is governed by Rule 89 of the Rules which is the general provision governing the admission of evidence before this Tribunal.<sup>10</sup> Rule 94bis is therefore the *lex specialis* with regard to the admission of expert evidence and Rule 89, the *lex generalis*.

5. Rule 89 (B) entrusts the Chamber with a broad discretion to employ "rules of evidence which will best favour a fair determination of a matter before it and are consonant with the spirit of the Statute and the general principles of law." Further, Sub-Rule (C) provides that a Chamber may admit evidence which it deems to be both relevant and probative.

6. According to the Tribunal's jurisprudence, whether expert witness testimony is relevant may be determined by considering whether it: (i) enlightens the Chamber on specific issues of a technical nature, requiring specialised knowledge in a special field; and (ii) whether the specialised knowledge possessed by the expert may assist the Chamber in understanding the evidence before it.<sup>11</sup>

*Does the Report satisfy the requirements of Rule 89 (C)?*

7. The Chamber will now consider the contents of Professor Corn's Report, in light of the aforementioned Rules and jurisprudence, in order to determine whether it is admissible. First, the Chamber will consider whether the Report is relevant and of probative value, such that it satisfies the minimum requirements of admissibility pursuant to Rule 89 (C).

8. Professor Corn's Report deals, broadly, with three areas: first, whether certain conduct during internal armed conflict constitutes a violation of international law; second, whether certain information may have been in the possession of the United States Government; third, the Report aims to refute certain matters addressed by the testimony of Prosecution Expert Witness Dr. Alison Des Forges.

9. With respect to the first general area, the Report concludes that the following conduct during internal armed conflict does not violate international law:

- (i) use of the word "enemy" against opposition groups;<sup>12</sup>
- (ii) mass burials of the dead;<sup>13</sup>

<sup>9</sup> Rule 94bis (C)

<sup>10</sup> *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T ("*Karemera*"). "Decision on Prosecution Prospective Experts Witnesses Alison Des Forges, Andre Guichaoua and Binaifer Nowrojee", 25 October 2007, para. 13.

<sup>11</sup> "Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Deo Sebahir Mbonyinkebe (Rule 89 (C))", 2 September 2005, para. 11; *Karemera*, "Decision on Joseph Nzirorera's Motion to Preclude Testimony by Charles Ntampaka", 26 September 2007, para. 8; and "Decision on Prosecution Prospective Experts Witnesses Alison Des Forges, Andre Guichaoua and Binaifer Nowrojee", 25 October 2007, para. 14.

<sup>12</sup> Report, pp. 2 to 7, 13 and 14. The issue of whether Prosecution Exhibit 69 violates international law is also centred on the use of the word "enemy." The document is a communiqué from the Rwandan Ministry of National Defence and defines who is the "enemy."

<sup>13</sup> Report, pp. 7 to 9.



26600

- (iii) targeting of infiltrators or spies;<sup>14</sup> and
- (iv) use of dehumanising designations for opposition forces.<sup>15</sup>

10. With respect to the second general area, Professor Corn concludes that where the United States National Security Agency invokes a "national security" exception when requested to provide access to a document, this strongly suggests that such a document exists and is in the Agency's possession.<sup>16</sup>

11. The Chamber considers that the Defence has failed to demonstrate how any of the aforementioned areas addressed by the substance of Professor Corn's Report are relevant to this trial, particularly with respect to the crimes with which Prosper Mugiraneza has been charged.

12. First, pursuant to the Indictment in this case, Prosper Mugiraneza is charged with crimes contained in Articles 2, 3 and 4 of the Tribunal's Statute, namely: conspiracy to commit genocide; genocide or alternatively complicity in genocide; direct public incitement to commit genocide; crimes against humanity and violations of Article 3 Common to the Geneva Conventions and Additional Protocol II.<sup>17</sup> The Indictment does not charge Prosper Mugiraneza with any of the acts addressed in Professor Corn's Report, nor is the Chamber required to determine whether such acts are violations of international law for the purposes of this trial.

13. Second, the Defence has not demonstrated how the Chamber would be assisted by hearing evidence that certain information may be, or have been, within the possession of the United States Government.

14. Third, and with regard to the Defence submission relating to Prosecution Expert Witness Dr. Des Forges, the Chamber recalls the Witness' testimony and considers that the answers she gave during cross-examination have been taken out of context. Dr. Des Forges was accepted as "an expert in the history of Rwanda, human rights observations and research, and human rights abuses in Rwanda in the 1990s", not as an expert in international law.<sup>18</sup> The purpose of her evidence was therefore not to provide an opinion on what is lawful under international law and indeed, her testimony cannot be taken as constituting expert evidence on issues of international law.<sup>19</sup> The Chamber thus rejects

<sup>14</sup> Report, pp. 9 to 11.

<sup>15</sup> Report, pp. 11 to 12.

<sup>16</sup> The requested information is "National Security Agency reports concerning activities of the Government of Rwanda or Interim Government of Rwanda ... during the genocide in Rwanda" from 6 April to 22 July 1994. See Annex to the Report: Letter dated 23 December 2003 from National Security Agency to Mr. William Ferroggioaro.

<sup>17</sup> Indictment, filed 16 August 1999, p. 1 and "Decision on Defence Motions Pursuant to Rule 98bis", 22 November 2005.

<sup>18</sup> T. 31 May 2005, p. 5.

<sup>19</sup> With regard to the Defence Response, para. XIX. A., during cross-examination, when asked whether it is acceptable for the leader of a country to make slurs about "guys" on the other side, Dr. Des Forges replies "I would say it's frequent conduct rather than acceptable conduct, particularly if the slurs are directed at people on the basis of their ethnic group or their political ideas." (T. 16 June 2005, p. 50.) With regard to the Defence Response, para. XIX. B. 1., Dr. Des Forges says in response to a question from Mr. Moran,

 4

26599

the Defence argument that Professor Corn's Report is relevant to issues arising from Dr. Des Forges' evidence.

15. Considering the three main areas covered by Professor Corn's Report, in light of the allegations which Prosper Mugiraneza has been called upon to answer before this Chamber, the Chamber finds that the Report, as well as any proposed oral testimony of Professor Corn based on his Report, is irrelevant and therefore inadmissible pursuant to Rule 81(C) of the Rules.

**FOR THESE REASONS, THE CHAMBER**

**GRANTS** the Prosecutor's Motion; and

**DIRECTS** the Defence for Prosper Mugiraneza to remove Professor Corn from its Third Amended Witness List, as filed before this Chamber on 13 May 2008.

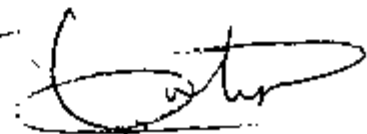
Arusha, 16 May 2008



Khalida Rashid Khan  
Presiding Judge



Leo Gaquiga Muteboga  
Judge



Emile Francis Short  
Judge

[Seal of the Tribunal]



"... certainly there are many cases of internal uprisings where citizens take up their arms against their government and would not be held to be enemies of the nation, although they might be held to be enemies of that particular regime." (T. 16 June 2005, p. 59.) With regard to Defence Response, para. XIX, B. 2., Dr. Des Forges stated it would "... depend on the circumstances. If it is in connection with a guerilla war and it is adequately demonstrated by judicial process that those people are, in fact, engaged in that activity, then I would suppose that they could be found to be guilty of being enemies, yes." (T. 16 June 2005, p. 59.) With regard to Defence Response, para. XIX, B. 3., Dr. Des Forges states that "opponents might be a more appropriate term depending on the circumstance of the situation." (T. 16 June 2005, p. 59.) With regard to Defence Response, para. XIX, B. 4., Dr. Des Forges says that she "thinks the use of the word 'enemy' is something that needs to be defined more and proved in courts. It is not an accusation to be tossed around in political speeches. Is there a defined term 'enemy' under the law? If there is, then, it should be applied according to due process..." (T. 16 June 2005, p. 60.) With regard to Defence Response, para. XIX, C., Dr. Des Forges does not state that PX 69 is "improper" or a "call for genocide" but describes the document. (T. 16 June 2005, p. 68.)



## TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

**COURT MANAGEMENT SECTION**  
(Art. 27 of the Directive for the Registry)

### I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

<b>To:</b>	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input checked="" type="checkbox"/> Trial Chamber II R. N. Kouambo	<input type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Appeals Chamber / Arusha F. A. Taton
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Deputy Chief, CMS M. Diop	<input type="checkbox"/> Chief, JPU, CMS K. K. A. Afande	<input type="checkbox"/> Appeals Chamber / The Hague R. Buriss
<b>From:</b>	<input checked="" type="checkbox"/> Chamber (names)	<input type="checkbox"/> Defence (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
<b>Case Name:</b>	The Prosecutor vs. Casimir Bizimungu et al.			<b>Case Number:</b> ICTR-99-50-T
<b>Dates:</b>	Transmitted: 16 May 2008		Document's date: 16 May 2008	
<b>No. of Pages:</b>	5	<b>Original Language:</b>	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
<b>Title of Document:</b>	DECISION ON PROSECUTOR'S MOTION OBJECTING TO THE ADMISSION OF PROFESSOR GEOFFREY CORN'S REPORT			
<b>Classification Level:</b>	<b>TRIM Document Type:</b>			
<input type="checkbox"/> Strictly Confidential / Under Seal	<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence	<input type="checkbox"/> Submission from non-parties
<input type="checkbox"/> Confidential	<input checked="" type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal	<input type="checkbox"/> Submission from parties
<input checked="" type="checkbox"/> Public	<input type="checkbox"/> Disclosure	<input type="checkbox"/> Order	<input type="checkbox"/> Appeal Book	<input type="checkbox"/> Accused particulars
	<input type="checkbox"/> Judgement	<input type="checkbox"/> Motion	<input type="checkbox"/> Book of Authorities	

### II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

**CMS SHALL take necessary action regarding translation.**

Filing Party hereby submits only the original, and will **not submit** any translated version.

Reference material is provided in annex to facilitate translation.

Target Language(s):

English  French  Kinyarwanda

---

**CMS SHALL NOT take any action regarding translation.**

Filing Party hereby submits **BOTH the original and the translated version** for filing as follows:

Original	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda
Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

---

**CMS SHALL NOT take any action regarding translation.**

Filing Party will be submitting the translated version(s) in due course in the following language(s):

English  French  Kinyarwanda

**KINDLY FILL IN THE BOXES BELOW**

<p><input type="checkbox"/> The OTP is over-seeing translation. The document is submitted for translation to:</p> <p><input type="checkbox"/> The Language Services Section of the ICTR / Arusha.</p> <p><input type="checkbox"/> The Language Services Section of the ICTR / The Hague.</p> <p><input type="checkbox"/> An accredited service for translation; see details below:</p> <p>Name of contact person: Name of service: Address: E-mail / Tel. / Fax:</p>	<p><input type="checkbox"/> DEFENCE is over-seeing translation. The document is submitted to an accredited service for translation (fees will be submitted to DCDMS):</p> <p>Name of contact person: Name of service: Address: E-mail / Tel. / Fax:</p>
--	---

### III - TRANSLATION PRIORITISATION (For Official use ONLY)

<input type="checkbox"/> Top priority	<b>COMMENTS</b>	<input type="checkbox"/> Required date:
<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input checked="" type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: