



ICTR-00-56-T
23-10-08
(68002-67996)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

68002
PM

OR: ENG

TRIAL CHAMBER II

Before Judges: Asoka de Silva, Presiding
Taghrid Hikmet
Seon Ki Park

Registrar: Adama Dieng

Date: 23 October 2008

The PROSECUTOR
v.
Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU
Case No. ICTR-00-56-T

2008 OCT 23 1 P 3 23
JUDICIAL RECEIVED

**DECISION ON THE PROSECUTION'S OBJECTIONS TO EXPERT WITNESSES
LUGAN AND STRIZEK**

Rule 94 bis of the Rules of Procedure and Evidence

Office of the Prosecution:

Mr Alphonse Van
Mr Moussa Sefon
Mr Segun Jegede
Mr Lloyd Strickland
Mr Abubacarr Tambadou
Ms Felistas Mushi
Ms Faria Rekkas
Ms Marlize Keefer

Counsel for the Defence:

Mr Gilles St-Laurent and Mr Benoit Henry for Augustin Bizimungu
Mr Christopher Black and Mr Vincent Lurquin for Augustin Ndindiliyimana
Mr Charles Taku and Ms Beth Lyons for François-Xavier Nzuwonemeye
Mr Fabien Segatwa and Mr Seydou Doumbia for Innocent Sagahutu

INTRODUCTION

1. The Defence case for the Accused Sagahutu is scheduled to begin on 20 October 2008. On 24 July 2008, the Defence for Sagahutu filed Mr. Bernard Lugan's expert report. On 6 August 2008, the Prosecution filed a notice under Rule 94bis (B) of the Rules of Procedure and Evidence ("Rules") in which it opposed Mr. Lugan's qualifications as an expert, urged the Trial Chamber to reject the proposed expert report, and indicated its intention to cross-examine Mr. Lugan, should he testify.¹ On 11 August 2008, the Defence replied to the Prosecution motion, affirming the relevance and substance of Mr. Lugan's testimony.²

2. On 14 August 2008, the Defence for Sagahutu filed Mr. Helmut Strizek's expert report. On 22 August 2008, the Prosecution filed a similar notice objecting to Mr. Strizek's expertise, requesting the Chamber to reject Mr. Strizek's expert report, and indicating its intention to cross-examine the witness should he testify.³ On 26 August 2008, the Defence replied to the Prosecution Motion, affirming the relevance and substance of Mr. Strizek's testimony.⁴

SUBMISSIONS

Witness Lugan

3. The Prosecution contends that Mr. Lugan's proposed testimony is irrelevant to the allegations against Sagahutu and is therefore unhelpful in assisting the Chamber to discover the truth. The Prosecution also submits that Mr. Lugan is not properly qualified to testify in military matters. The Prosecution claims that Mr. Lugan does not have a sufficient background in military matters, as evidenced by his treatment of such matters in his report. According to the Prosecution, Mr. Lugan ignores known facts and fails to address key questions. In addition, the Prosecution contends that Mr. Lugan is not qualified to testify on legal issues, which he incorrectly comments on throughout the report.

4. The Sagahutu Defence responds that Mr. Lugan's testimony covers matters which are crucial for his case. It submits that Mr. Lugan has military expertise and references all of the conferences he has attended as well as his relevant research. The Defence also contends that Mr. Lugan is qualified, using "notions of law", to make scientific assessments of available facts and to draw historical conclusions.

Witness Strizek

5. The Prosecution requests the Chamber to reject Mr. Strizek as an expert witness on two grounds. First, that the expert report fails to identify a specific, useful task to be accomplished by Mr. Strizek's testimony. Secondly, the Prosecution submits that Mr. Strizek

¹ "Observations du Procureur aux Fins de Rejet du Rapport de Monsieur Bernard Lugan, Historien," filed on 6 August 2008.

² Replique aux "Observations du Procureur aux Fins de Rejet du Rapport de Monsieur Bernard Lugan, Historien," filed on 11 August 2008.

³ "Observations du Procureur aux Fins de Rejet du Rapport du Monsieur Helmut Strizek, Historien et Homme de Lettres," filed on 22 August 2008.

⁴ Replique aux "Observations du Procureur aux Fins de Rejet du Rapport du Monsieur Helmut Strizek, Historien et Homme de Lettres," filed on 26 August 2008.



does not have any expertise on military and judicial matters. The Prosecution argues that the witness himself has admitted his lack of knowledge in these areas and merely tries to rely on the report of another expert witness. The Prosecution further submits that the testimony of Mr. Strizek is merely duplicative of that provided by Mr. Bernard Lugan and should be denied for that reason.

6. The Defence replies that Mr. Strizek's testimony is relevant to issues of geopolitics, military cooperation, and social and diplomatic conditions in Rwanda and is essential for ascertaining the truth regarding the charges against Sagahutu. He also argues that expert witnesses Mr. Strizek and Mr. Lugan have clearly defined, individual mandates. The Defence submits that Mr. Strizek has acted as an expert on military issues for the Tribunal for five years and that the Chamber has already recognized his importance as a witness, as evidenced by a 26 May 2008 decision permitting his testimony by video link.

DELIBERATIONS

Expert Witness Testimony

7. While Rule 94*bis* of the Rules provides the basic procedural framework for the admission of expert reports, it does not provide the substantive legal standards applicable to the admission of expert testimony. The Chamber has discretion in deciding whether and under what circumstances to allow the admission of expert testimony and how to assess the reliability and probative value of expert evidence.⁵ In making a determination on the admissibility of expert evidence, other Trial Chambers have evaluated the qualification of experts, the relevance and probative value of expert testimony and the appropriate scope of that testimony pursuant to Rule 89(C) of the Rules.⁶

8. Recently, in the *Karemera* case, the Chamber drew on the jurisprudence to enumerate a five-part test for the admission of expert testimony: (i) the Chamber must decide, in its discretion, that it is necessary to hear an expert on a particular issue; (ii) the witness must be an expert; (iii) the witness statement/report must be reliable; (iv) the witness statement/report must be relevant and have probative value; and (v) the contents of the witness statement/report must fall within the expertise of the witness.⁷

Qualification of a Witness as an Expert

⁵ *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Decision on Expert Witness for the Defence (Rules 54, 73, 89 and 94*bis* of the Rules of Procedure and Evidence) (TC), 11 November 2003, para. 8 ("11 November 2003 *Gacumbitsi* Decision"); *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007, para. 199.

⁶ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Deo Sebahire Mbonyinkebe (Rule 89(C)) (TC), 2 September 2005, para. 10 ("2 September 2005 *Bizimungu* 89(C) Decision"); *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the Admissibility of the Expert Testimony of Dr. Binaifer Nowrojee (TC), 8 July 2005, paras. 13 - 16 ("8 July 2005 *Bizimungu* Decision").

⁷ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecution Prospective Experts Witnesses Alison Des Forges, Andre Guichaoua and Binaifer Nowrojee (TC), 25 October 2007, para. 18 ("25 October 2007 *Karemera* Decision"); *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzitorera's Motion to Preclude Testimony by Charles Ntampaka (TC), 26 September 2007, para. 8. Though the substance is virtually the same, the 25 October 2007 decision lays out a five-part test, and the 26 September 2007 decision lays out a four-part test, most likely without any intended change in substance.

67999

9. The Chamber has the discretion to determine who is qualified to testify as an expert.⁸ The Chamber must be satisfied that the witness possesses "a relevant, specialized knowledge acquired through education, expertise, or training in his proposed field of expertise."⁹ This determination is based solely on the credentials of a specific individual. Moreover, experts must be impartial and provide their testimony "with the utmost neutrality and with scientific objectivity."¹⁰

10. The Chamber notes that Mr. Lugan has extensive qualifications in the areas of history, politics and military affairs. Between 1972 and 1983, Mr. Lugan was a professor of African and Rwandan history at the National University of Rwanda. In 1976, he received a doctoral degree from the University of Aix-en-Provence where he wrote a thesis on the pre-colonial Rwandan exchange economy. He returned to Rwanda in 1977, where he became the head of the history department at the National University of Rwanda. He wrote another doctoral thesis in 1983 at the University of Aix-en-Provence concerning rural life in ancient Rwanda. Since 1983, he has been an Associate Professor of African history at the University of Lyon III. Mr. Lugan has also been a lecturer at the Center of High Military Studies of Paris, the Institute of High Studies of the National Defence of Paris, the *College Interarmées de Defense* and the Military Academy of Zaragoza. In addition, Mr. Lugan has published five books and a multitude of articles in academic reviews regarding various topics on Rwanda. The Chamber finds that Mr. Lugan's education and experience qualify him as an expert in history, politics and military affairs in relation to the events of 1994 in Rwanda.

11. The Chamber notes that Mr. Strizek has extensive qualifications in geopolitical issues, including those of a developmental, diplomatic and social nature. Beginning in 1980, he worked in Rwanda first as the Economic Counselor with the Delegation of the Commission of the European Communities in Rwanda, then as part of the Evaluation Unit of the German Ministry of Economic Cooperation and Development. From 1987 to 1989, he worked on German cooperation projects in Rwanda and Burundi. Since 1992, Mr. Strizek has conducted research studies on the Great Lakes of Central Africa, publishing three books and a dozen articles on the political situation in Sub-Saharan Africa, including Rwanda. In 1996, he obtained a doctoral degree from the University of Hamburg for his thesis which studied the failed democracies of Rwanda and Burundi following their independence. The Chamber finds that Mr. Strizek's education and experience qualify him as an expert on issues of geopolitics in the Great Lakes region, developmental issues in Rwanda, as well as diplomatic and social relations relevant to the Chamber's understanding of the events that unfolded in Rwanda in 1994.

Reliability, Relevance, Probative Value and Scope of Expert Testimony

12. Subject to the Chamber's observations below on to the scope of the expert reports, the Chamber has no difficulty in finding that the reports prepared by Mr. Lugan and Mr. Strizek are *prima facie* reliable. There is no question that the reports emanate from proper custody and are of proper authorial pedigree and that they only contain the *bona fide* opinions of the two experts. For the limited purpose of their admissibility therefore, the Chamber finds that

⁸ *Gacumbitsi v. Prosecutor*, Case No. ICTR-2001-64-A, Judgement (AC), 7 July 2006, para. 31.

⁹ 25 October 2007 *Karemura* Decision; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Oral Decision on Defence Motions Challenging the Qualification of Expert Witness Dr. Alison Des Forges (IC), 4 September 2002 ("4 September 2002 *Bagosora* Decision").

¹⁰ 11 November 2003 *Gacumbitsi* Decision, para. 8.

67998

the reports are reliable.¹¹

13. The admission of expert testimony must meet the standards of relevance and probative value contained in Rule 89(C) of the Rules. Specifically, expert testimony is relevant if it enlightens the Chamber "on specific issues of a technical nature, requiring specialized knowledge in a special field" and assists the Chamber in "understanding the evidence presented or in determining a fact in issue."¹² In addition, an expert witness cannot express opinions on ultimate issues of fact, as "[o]nly the Chamber, as the finder of fact, is competent to make a judicial determination on the ultimate issues in the case."¹³

14. In assessing the utility of an expert, the Appeals Chamber has stated that the Chamber must focus on the ability of the expert witness to contribute to the particular case at hand.¹⁴ Therefore, it is not relevant whether an individual has been recognized as an expert in other trials, and "the same person might be qualified as an expert in one case and not in another."¹⁵

15. The testimony of an expert witness is only admissible "to the extent that the testimony comes within the scope of the witness's expertise."¹⁶ The Chamber can specify the appropriate scope of expert testimony and prohibit the expert from testifying outside of that scope.¹⁷ In addition, the Chamber can intervene and limit the testimony of a witness during the course of the trial if the testimony is too general, unsubstantiated or otherwise outside the scope of permissible testimony.¹⁸

16. The Chamber finds that some of Mr. Lugan's proposed testimony could provide useful context and enlighten the Chamber. The Chamber, however, considers that the following parts of his expert report lie outside the scope of Mr. Lugan's expertise and are inadmissible: the section dealing with the Indictment against Captain Sagahutu which relates to legal issues, including the sufficiency of the evidence offered by the Prosecutor; the choices made by the Prosecutor in bringing cases or presenting evidence; the accuracy of charges in the Indictment; and the value of evidence presented in other cases before the Tribunal. Mr. Lugan's opinions on ultimate issues of fact are equally inadmissible. The Chamber therefore orders that Mr. Lugan's testimony will be limited to the historical and military context in which the events alleged in the Indictment occurred. The Chamber retains the sole competence to determine the ultimate issues of fact and law in the case.

¹¹ *Prosecutor v. Nyiramasuhuko et al*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7 on where the Appeals Chamber opined that reliability of evidence requires a showing that it possesses "sufficient indicia of reliability". In other words this is only the "beginning of proof that evidence is reliable." See also 2 September 2005 *Bizimungu* Rule 89 (C) Decision, para. 14.

¹² 2 September 2005 *Bizimungu* 89(C) Decision, para. 11; 25 October 2007 *Karemera* Decision, para. 14; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens (TC), 28 September 2004, para. 8.

¹³ 8 July 2005 *Bizimungu* Decision, para. 12.

¹⁴ 25 October 2007 *Karemera* Decision, para. 16.

¹⁵ 25 October 2007 *Karemera* Decision, para. 16; *Gacumbitsi v. Prosecutor*, Case No. ICTR-2001-64-A, Judgement (AC), 7 July 2006, para. 32.

¹⁶ 8 July 2005 *Bizimungu* Decision, para. 11.

¹⁷ *Prosecutor v. Semanza*, Case No. ICTR-97-20, Oral Decision on Defense Expert Ndengejeho's Qualifications (TC), 28 January 2002.

¹⁸ 4 September 2002 *Bagosora* Decision; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Defense Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison Des Forges (TC), para. 19, 2 September 2005 (internal citation omitted).

67997

17. The Chamber also finds that parts of Mr. Strizek's report and proposed testimony could assist the Chamber's understanding of some of the evidence and issues in this trial. The Chamber, however, considers that elements of Mr. Strizek's expert report, in particular the section of the report entitled "Acts of Which Captain Sagahutu is Accused," relate to legal issues concerning the charges against the Accused, and therefore fall outside the scope of Mr. Strizek's expertise. For that reason, they are inadmissible. In addition, the Chamber finds that it will not benefit from having Mr. Strizek merely repeat the findings of expert witness Lukan on military matters. In the interests of judicial economy, the Chamber will limit Mr. Strizek's evidence to areas which fall within the ambit of his expertise. These areas are geopolitical issues in the Great Lakes region, developmental subjects as well as diplomatic and social relations that obtained in Rwanda. Therefore his expert report will be considered by the Chamber only to the extent it covers these issues. Again, the Chamber finds that Mr. Strizek's proposed expert testimony does not permit him to express opinions on ultimate issues of fact, which remain within the sole competence of the Chamber.



67996

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Prosecution motions in part;

ADMITS Witnesses Lugan and Strizek as expert witnesses for Sagahutu's Defence;

GRANTS the Prosecution request to cross-examine both witnesses on the content of their expert reports;

ORDERS that the testimonies of Witnesses Lugan and Strizek shall be limited to the areas for which the Chamber has recognised their expertise;

ORDERS that the expert report of Mr. Lugan will be considered only to the extent that it addresses military, political and historical matters. The Chamber will not consider the parts of the report dealing with legal issues such as the Indictment and the evidence offered by the Prosecution in support of the allegations in the Indictment, or to the extent that it expresses opinions on the ultimate issues of fact in this case;

ORDERS that it will only consider the expert report of Mr. Strizek to the extent that it covers geopolitical issues in the Great Lakes region, developmental issues in Rwanda, as well as diplomatic and social relations relevant to the Chamber's understanding of the events that unfolded in Rwanda in 1994. The Chamber will not consider the parts of the report dealing with matters of law or fact which are for the Chamber's determination and the sections that only repeat the views of other experts.

Arusha, 23 October 2008, done in English.


Asoka de Silva

Presiding Judge


Taghrid Hikmet

Judge


Seon Ki Park

Judge

[Seal of the Tribunal]