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25-11-2009
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 25 November 2009

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H. J. O. S. M. O. U.

THE PROSECUTOR
v.
DOMINIQUE NTAWUKULILYAYO

Case No. ICTR-05-82-T

**DECISION ON PROSECUTION MOTION TO REJECT JOSEPH UFITEYEZU AS
AN EXPERT WITNESS**

Rules 89 and 94bis of the Rules of Procedure and Evidence

Office of the Prosecutor:
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Counsel for the Defence:
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INTRODUCTION

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1. On 22 October 2009, the Defence filed the report of its proposed expert linguist, Mr. Joseph Ufiteyezu ("Report").¹ The Report did not include a curriculum vitae ("CV") detailing Mr. Ufiteyezu's qualifications, which was filed on 11 November 2009.
2. The Prosecution objects to Mr. Ufiteyezu's Report and moves the Chamber to find that (i) the evidence adduced does not require any specialised knowledge to assist the Chamber in understanding it, and (ii) Mr. Ufiteyezu does not qualify to testify as an expert witness.²
3. The Defence did not respond to the Prosecution Motion.

DISCUSSION

Applicable Law

4. Rule 94bis of the Rules of Procedure and Evidence ("Rules") requires that the full statement of an expert witness must be disclosed to the opposing party as early as possible and be filed with the Trial Chamber not less than 21 days prior to the date on which the expert is expected to testify. Sub-Rule (B) provides that within 14 days of the filing of the report, 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.

Sub-Rule (C) states that if the opposing party accepts the expert's statement, it may be admitted into evidence by the Trial Chamber without calling the witness to testify.

5. 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.³ Rule 94bis is therefore the *lex specialis* with regard to the admission of expert evidence and Rule 89, the *lex generalis*.

6. 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. The Chamber therefore has a broad discretion when assessing the admissibility of evidence.⁴

¹ Rapport de Mission d'Expertise Linguistique, dated 27 September 2009 and filed on 22 October 2009.

² Prosecution's Motion to Reject Joseph Ufiteyezu's Qualifications as an Expert Pursuant to Rule 94bis of the Rules of Procedure and Evidence, 19 November 2009 ("Prosecution Motion").

³ *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, 25 October 2007 ("*Karemera* Decision of 25 October 2007"), para. 13; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosecutor's Motion Objecting to the Admission of Professor Geoffrey Corn's Report, 16 May 2008 ("*Bizimungu* Decision of 16 May 2008"), para. 4.

⁴ *Bizimungu et al.*, Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Deo Sebahire Mbonyinkebe (Rule 89 (C)), 2 September 2005 ("*Bizimungu* Decision of 2 September 2005"), para 10; *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, Decision on Appeal Regarding Statement of a Deceased Witness (AC), 21 July 2000, para. 20; *Pauline Nyiramasuhuko v. The*



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7. 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.⁵

Preliminary Matter

8. The Chamber notes that Mr. Ufiteyezu's CV was not filed 21 days prior to the expected date for his testimony.⁶ The Chamber recalls that the CV of an expert witness should be submitted as verification or in support of their expert status⁷ and reminds the Defence that the filing obligations under Rule 94bis are intended to ensure that the opposing party has sufficient notice to effectively prepare for cross-examination and make objections thereto.⁸

Does the Report Satisfy the Requirements of Rule 89 (C)?

9. The Report deals with four documents, three of which were admitted as exhibits in these proceedings. The fourth document is not evidence in this case. The Report states that the translation provided for these documents is not accurate. The Chamber will turn to consider the Report in respect of each of these documents.

(i) *Exhibit No. 19 - Letter of 29 April 1994*

10. The Letter of 29 April 1994 is from the Accused and addressed to certain authorities.⁹ It states that due to the death of the Head of State and the resumption of hostilities of the *Inkotanyi*, the population has been left feeling "extremely bitter."¹⁰ The Report, relying on common French and Rwandan dictionaries, states that the correct translation should be "sadness" and that through using the words "extremely bitter", the translator adds a tone which is not truly representative.

Prosecutor, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC) 4 October 2004, paras 6-7; *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Admit Documents Authored by Enoch Ruhigira, 26 March, 2008, para. 3.

⁵ *Bizimungu* Decision of 16 May 2008, para. 11; *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Preclude Testimony by Charles Ntampaka, 26 September 2007 ("Karemera Decision of 26 September 2007"), para. 8; *Karemera* Decision of 25 October 2007, para. 14; *Nahimana v The Prosecutor*, Case No. ICTR-99-52-T, Judgement (AC), 28 November 2007, para. 198.

⁶ The second session of the Defence case commenced on 17 November 2009 and the Defence intended to call Mr. Ufiteyezu on that date. The Chamber informed the Defence that it could not proceed to do so due to the late filing of Mr. Ufiteyezu's CV, just six days prior to his proposed testimony. On 23 November 2009, the Defence informed the Chamber by email that it intended to call Mr. Ufiteyezu on 26 November 2009. On the same date, the Chamber informed the Defence that it could not decide to hear Mr. Ufiteyezu until 21 days after the filing of his full report and CV, as required by Rule 94bis (A).

⁷ *Bizimungu et al.*, Decision on Mugenzi's Confidential Motion for the Filing, Service or Disclosure of Expert Reports and/or Statements, 10 November 2004, para. 22 (citing *Prosecutor v. Nahimana et al.*, Case ICTR-99-52-T, Decision on the Expert Witnesses for the Defence, 24 January 2003).

⁸ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, 28 September 2004, para. 6.

⁹ The type of authorities is stated in the letter but is not revealed in this Decision in order to protect Witness AXV's identity.

¹⁰ The letter is written in Kinyarwanda and the word referred to is "agahinda." The Report is in French and deals with the French translation.



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11. The Prosecution submits that the evidence adduced in respect of the content of the Letter of 29 April 1994 is not such that it requires any specialised knowledge in order for the Chamber to understand it.

12. The Chamber recalls that the Letter of 29 April 1994 was admitted as an exhibit during the testimony of Prosecution Witness AXV who testified that he had received a copy of that letter. It refers to “instructions issued by the *Prefet* of Butare regarding security” and states that: “We shall also decide about the location and supervision of the ‘roadblocks.’” Witness AXV testified that the “instructions” related to “strengthening the roadblocks to prevent the enemy from moving around”¹¹

13. The Letter of 29 April 1994 further refers to the “Prime Minister’s message to the Banyarwanda on 28 April 1994.” Witness AXV testified that this message was broadcast on the radio and “[o]n that occasion the prime minister was requesting various authorities to reinforce the situation and to be more careful about checking those going through the road – the roadblocks.”¹²

14. The Chamber considers that Mr. Ufiteyezu’s opinion on whether the word “sadness” should have been used instead of the words “extremely bitter” does not assist it in understanding the evidence of Witness AXV or the contents of the said letter in relation to which he testified. Indeed, Mr. Ufiteyezu’s opinion on the words “extremely bitter” is irrelevant to Witness AXV’s evidence which concerned instructions issued by the *Prefet* of Butare, and the Prime Minister’s message, regarding roadblocks.

15. Accordingly, the Chamber finds that this part of the Report, as well as any proposed oral testimony based on it, does not meet the requirements of Rule 89 (C) as it does not enlighten or assist the Chamber in understanding the evidence before it.

(ii) *Exhibit No. 20 - Letter of 10 May 1994*

16. The Letter of 10 May 2009 informs certain authorities,¹³ following the meeting of the Security Council of Butare *prefecture* held on 6 May 1994, of urgent measures which must be implemented to ensure security and which are listed as Items 1 to 6 therein. The Report states that this letter has not been correctly translated, in particular:

- In Item 1 of the letter, instead of “continue to safeguard security, by organizing meetings and encouraging the conseillers and members of the cellule committees to do the same *everywhere*”, it should be “*to do it at their area.*”
- In Item 4 of the letter, the reference to “*the newly recruited youth*” to assist the Rwandan Armed Forces, should be “*those young people that the commune have recently sent.*”

17. The Prosecution submits that the Chamber does not require any specialised knowledge to understand Witness AXV’s testimony that the Letter of 10 May 1994 reflects decisions that were taken at a previous meeting.

¹¹ T. 25 May 2009, p. 45.

¹² T. 25 May 2009, p. 45.

¹³ The type of authorities is stated in the letter but is not revealed in this Decision in order to protect Witness AXV’s identity.

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18. The Chamber recalls that the Letter of 10 May 1994 was admitted during the evidence of Witness AXV who confirmed that he received the letter and testified on its contents. He stated that the Letter of 10 May 1994:

“[R]eflects the decisions that were taken at the meeting of 5 May¹⁴ at which it was decided that the enforcement of security in the area needed to be reinforced, that there was need to see to the proper application of the curfew from 6 p.m. [...] It also demanded of the population that contributions be made in order to acquire materials that would be given to the youth who would be linking up with the national army. The meeting also decided that it was necessary to check acts of banditry and to stop people from exploiting Tutsi girls whom they had taken for wives [...] Newly recruited youth were young persons who had been selected from among the members of the population to support the army.”¹⁵

19. The Chamber considers that it does not require expert opinion to understand Witness AXV’s testimony on what he understood to be stated in the Letter of 10 May 1994, which he received. Furthermore, the content of the said letter, namely, measures which were agreed upon during a meeting of 6 May 1994, is not relevant to any of the charges in the Indictment.

20. Accordingly, the Chamber finds that this part of the Report, as well as any proposed oral testimony based on it, does not meet the requirements of Rule 89 (C) as it fails to enlighten or assist the Chamber in understanding the evidence or in determining any issues which are relevant to the crimes with which the Accused is charged.

(iii) *Exhibit No. 21 - Letter of 14 May 1994*

21. The Letter of 14 May 1994 informs certain authorities¹⁶ that the Accused will come to the commune offices to hold meetings which are to take place on various dates and in various communes. It further states the participants and items for the agenda.¹⁷

22. Although the Report states that it will address this document, it in fact omits to do so. In any event, the Letter of 14 May 1994 contains nothing of a technical nature which would require expert opinion to assist the Chamber in understanding it, nor in understanding Witness AXV’s testimony which confirmed that the Accused visited him on the date and time specified in the said letter.

(iv) *Letter dated 28 May 1994*

23. The Letter of 28 May 1994 was not admitted into evidence and Witness AXV did not testify on its contents. The Chamber therefore does not require expert evidence to assist it in understanding this document.

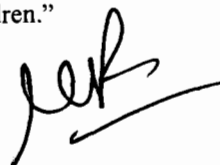
24. In view of the above, and considering the requirements of Rule 89 (C), the Chamber finds that the Report does not enlighten it on any specific issues of a technical nature. Nor does the Report assist the Chamber in understanding the evidence before it. Accordingly, the

¹⁴ The Chamber notes that the Letter of 10 May 1994 refers to the meeting being held on 6 May 1994.

¹⁵ T. 25 May 2009, pp. 59-60.

¹⁶ The type of authorities is stated in the letter but is not revealed in this Decision in order to protect Witness AXV’s identity.

¹⁷ The agenda items listed are “security and assistance to the Armed Forces in this war that they are waging” and to “make the population aware of its well-being and that of its children.”



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Chamber finds that the Report, as well as any proposed oral testimony of Mr. Ufiteyezu based on his Report, is inadmissible pursuant to Rule 89 (C).

25. Since the Chamber finds the Report, as well as any proposed testimony based on the Report, irrelevant for the purposes of Rule 89 (C), the Chamber need not consider whether Mr. Ufiteyezu has the requisite specialised knowledge for the purposes of qualifying him as an expert and thus a *voir dire* is also unnecessary.¹⁸

FOR THESE REASONS

THE CHAMBER

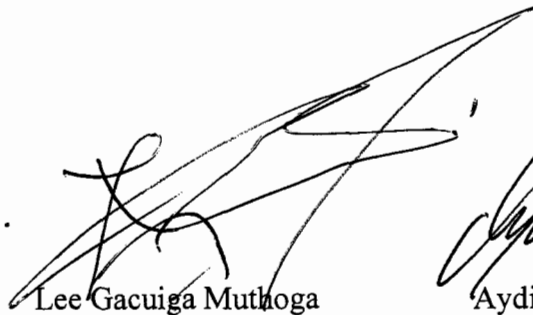
GRANTS the Prosecution Motion, and

DIRECTS the Defence to remove Mr. Joseph Ufiteyezu from its Witness List.

25 November 2009



Khalida Rachid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge



Aydin Sefa Akay
Judge



¹⁸ The Chamber recalls that a *voir dire* hearing is not mandatory. See for example, *Bizimungu* Decision of 16 May 2008; *Karemura* Decision of 26 September 2007, para. 6; and *Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgment (AC), 26 May 2003, para. 164.