



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
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ICTR-98-44D-T
15-06-2011
(7903-7896)

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OR: ENG

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyar Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

Date: 15 June 2011

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

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DECISION ON DEFENCE MOTION FOR THE ADMISSION OF DOCUMENTARY EVIDENCE

Rules 54 and 89(C) of the Rules of Procedure and Evidence

Office of the Prosecutor
Paul Ng'arua
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Defence Counsel
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88

INTRODUCTION

1. On 7 April 2011, the Defence filed a Motion, pursuant to Rules 54 and 89 (C) of the Rules of Procedure and Evidence (“Rules”), requesting that the Trial Chamber admit into evidence a book entitled *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (“*Fact-Finding*”) by Nancy Armoury Combs, Ph.D. (“Dr. Combs”).¹
2. On 12 April 2011, the Prosecution filed a Response opposing the Motion.²
3. On 15 April 2011, the Defence filed a Reply.³

SUBMISSIONS OF THE PARTIES

Defence Motion

Relevance

4. The Defence submits that *Fact-Finding* is relevant to the instant proceedings as it contains analyses of other cases before this Tribunal, and identifies factors that may hinder an accurate factual determination by this Chamber of the evidence adduced to support the allegations in the Indictment.⁴ For example, in Chapter 1 of the book, Dr. Combs asserts that factual findings at this Tribunal are almost exclusively based on eyewitness testimony,⁵ while noting that nearly 80% of wrongful convictions in the United States of America (“USA”) are the result of eyewitness errors and that “witnesses or victims of such violent crimes are even more likely to misperceive events.”⁶ She elaborates on how a witness’ memory can be substantially distorted by the passage of time or upon receiving information after the events.⁷ To support its position, the Defence submits that the evidence against the Accused is supported almost entirely by eyewitness testimony. It further recalls that the events occurred 17 years ago and that witnesses have been “bombarded with information” on

¹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Motion for the Admission of Documentary Evidence, 7 April 2011 (“Motion”).

² *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor’s Response to Motion for the Admission of Documentary Evidence, 12 April 2011 (“Response”).

³ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Callixte Nzabonimana’s Reply to Prosecutor’s Response to Motion for the Admission of Documentary Evidence, 15 April 2011 (“Reply”).

⁴ Motion, para. 9.

⁵ Motion, para. 11.

⁶ Motion, para. 11; citing *Fact-Finding* at pp. 11-20.

⁷ Motion, para. 11; citing *Fact-Finding* at pp. 14-15.

7901

the events in the intervening years; thus the case is prone to the dangers of reliance on eyewitness testimony as set out by Dr. Combs.⁸

5. In addition, the Defence notes that in Chapter 2 of *Fact-Finding*, Dr. Combs observes that more often than not there is information missing from eyewitness testimony. Witnesses often answer the questions put to them vaguely or not at all, and this inevitably complicates the process of factual determination.⁹ Information is further improperly transmitted for other reasons including life experiences, cultural or educational factors, or problems related to translation or interpretation. The Defence avers that these shortcomings are present in the instant case, and draws attention to the problem of simultaneous translation into three languages which may result in inadvertent translation errors that may distort the process of accurate fact-finding.¹⁰ The Defence states that its investigator Fernand Batard testified about many of the impediments described by Dr. Combs when interviewing witnesses.¹¹

6. In Chapter 4 of *Fact-Finding*, Dr. Combs identifies recurring problems faced in the fact-finding process such as discrepancies between witness' testimonies and their prior statements, investigative errors and perjury.¹² The Defence contends that these recurring problems are evident in the instant case and that discrepancies are often blamed on investigators. In some cases, additional statements are provided by witnesses to correct the earlier inconsistencies. For instance the Defence submits that Defence witnesses T24 and Jean-Marie Vianney Mporanzi ("Mr. Mporanzi") recanted their prior statements to the Prosecution, and that Witness T65 also intended to recant a prior statement in which he falsely incriminated the Accused.¹³ In Chapter 5, Dr. Combs asserts that there is a high rate of perjury before the Tribunal and collusion between Prosecution witnesses, particularly co-detainees.¹⁴ It is the Defence position that similar circumstances surround the instant case.¹⁵

7. The Defence therefore concludes that *Fact-Finding* is relevant because the factors enumerated therein may impact on the reliability and credibility of the evidence adduced in

⁸ Motion, para. 12.

⁹ Motion, para. 13; citing *Fact-Finding* at pp. 21-62.

¹⁰ Motion, para. 15.

¹¹ Motion, para. 14.

¹² Motion, para. 16; citing *Fact-Finding* at pp. 106-129.

¹³ Motion, para. 17.

¹⁴ Motion, para. 18; citing *Fact-Finding* at pp. 119-124, 149, 157.

¹⁵ Motion, para. 20.

88

the instant case and may therefore assist the Chamber in its factual determinations of issues in this case.¹⁶

Reliability

8. The Defence is of the view that *Fact-Finding* has probative value¹⁷ as it is authored by a Professor of Law and incumbent Vice-Dean¹⁸ at William and Mary Law School, in Williamsburg, Virginia, USA.¹⁹ To support its position, the Defence attaches to its Motion a “sworn affidavit” and resume from Dr. Combs.²⁰ It argues that Dr. Combs’ “rigorous scientific” research is highly reliable and should be admitted into evidence.²¹

Prosecution Response

9. At the outset, the Prosecution remarks that the instant Motion is untimely as the Defence closed its case on 7 April 2011. It alleges that the Defence is now attempting “to introduce expert ‘evidence’ irregularly through the back door.”²² It further states that the Defence is attempting to elicit ‘expert evidence’ on matters within the knowledge of the Chamber.²³ The Prosecution cites jurisprudence from the *ad hoc* Tribunals dealing with matters that may arise when relying on eyewitness testimony, inconsistencies and perjury.²⁴ By way of illustration, it asserts that the *Ndindabahizi*, *Kvočka* and *Kupreškić* Appeal Judgements extensively dealt with questions of materiality of dates, specificity in pleading dates in the Indictment and the Chamber’s right to “infer” dates where there are discrepancies in the evidence.²⁵

10. The Prosecution therefore asserts that there is authoritative jurisprudence to provide guidance to the Chamber on matters concerning evaluation and treatment of witness testimonies where there are apparent inconsistencies.²⁶ Thus, it submits that the role of the

¹⁶ Motion, para. 21.

¹⁷ Motion, para. 22.

¹⁸ According to the “Sworn Affidavit” appended to the Motion as Annex “B”, at para. 1, Dr. Combs states that she “will occupy the position of Vice-Dean at [William and Mary Law School] beginning in August 2011”.

¹⁹ Motion, paras. 23-24.

²⁰ Annexes B and C to the Motion.

²¹ Motion, paras. 25-26.

²² Response, paras. 11-15.

²³ Response, para. 17.

²⁴ Response, para. 20.

²⁵ Response, para. 21; citing *Ndindabahizi v. Prosecutor*, ICTR-01-71-A, Judgement, 16 January 2007, paras. 16-29; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005, para. 31; *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeals Judgement, 23 October 2001, paras. 89-90.

²⁶ Response, para. 26.

Trial Chamber as the trier of fact and primary assessor of evidence is not transferable to persons outside the trial process.²⁷

Relevance

11. The Prosecution contends that *Fact-Finding* lacks relevance.²⁸ According to the Prosecution, it makes no specific reference to evidence in the instant case or any alleged perjury or recantations of witnesses T24, T65 and Mporanzi.²⁹ In addition, the Prosecution contends that not only did the Defence have the opportunity to ventilate issues concerning recantation of witnesses T24 and Mporanzi, the Chamber also had the opportunity to hear and question these witnesses in court regarding the matter.³⁰ Moreover, the Prosecution avers that in the course of these proceedings the Defence has opted to seek admission of documents to challenge inconsistencies in witness testimony and invoke Rule 77 proceedings, for instance in relation to Prosecution Witness CNAI.³¹

Probative Value

12. The Prosecution contends that *Fact-Finding* lacks probative value as it does not go to prove or disprove any issue in the instant case but merely to a general assessment of the evidence.³²

Reliability

13. With respect to the indicia of reliability, the Prosecution does not dispute that *Fact-Finding* is based on substantial research but considers that the Chamber would not be in position to assess whether the deductions reached by Dr. Combs are *prima facie* reliable.³³

Defence Reply

14. In its Reply, the Defence objects to the Prosecution contention that it is attempting to introduce "evidence" after the Chamber declared its case closed on 7 April 2011.³⁴ It asserts that the instant Motion was filed the morning of 7 April 2011, prior to the closure of the

²⁷ Response, para. 27.

²⁸ Response, para. 37.

²⁹ Response, para. 30.

³⁰ Response, paras. 32-36.

³¹ Response, paras. 38-42.

³² Response, paras. 43-46.

³³ Response, para. 47.

³⁴ Reply, para. 3.

Defence case that afternoon.³⁵ It adds that a scheduling order issued on 12 April 2011 declared the instant proceedings closed subject to certain conditions, namely the hearing of the Prosecution rebuttal evidence and the Defence alibi evidence. Consequently, the instant proceedings were in fact scheduled to continue from 3-6 May 2011.³⁶ In addition, the instant proceedings are not complete as pending motions remain outstanding. Thus, *Fact-Finding* does not violate the Chamber's orders.³⁷

15. In its Reply, the Defence introduces a new argument that the fair trial rights of the Accused as prescribed in Article 20(2) of the Statute permit the admission of *Fact-Finding*.³⁸ It submits that should the Chamber take issue with the timing of the filing of the instant Motion, the Appeals Chamber reasoned that "time and resource constraints exist in judicial institutions and it is legitimate for a Trial Chamber to ensure that proceedings do not suffer undue delays [...]. However, [...] these considerations should never impinge on the rights of the parties to a fair trial."³⁹

16. The Defence submits that the Prosecution's characterisation of Dr. Combs as an expert is unfounded, as it is not seeking to elicit the expert opinion of Dr. Combs but merely seeking the admission of a book written by her.⁴⁰ The Defence adds that its request for the admission of *Fact-Finding* is dictated by the limited number of witnesses it was permitted to call, consequently rendering it impossible for the Defence to adduce every relevant piece of evidence in this case.⁴¹

17. It notes that the Chamber has previously admitted forms of evidence other than from witnesses or experts such as the admission of a paragraph from the Official Government of Rwanda Comments on the Draft UN Mapping Report on the DRC.⁴²

³⁵ Reply, para. 4.

³⁶ Reply, para. 5.

³⁷ Reply, paras. 6-7.

³⁸ Reply, paras. 12-14.

³⁹ Reply, para. 15; citing *Ngirabatware v. Prosecutor*, ICTR-99-54-A, Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009, para. 31.

⁴⁰ Reply, para. 9.

⁴¹ Reply, para. 17.

⁴² Reply, para. 18; recalling *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Defence Motion for the Admission of Documentary Evidence: "Official Government of Rwanda Comments on the Draft UN Mapping Report on the DRC", 31 March 2011.

DELIBERATIONS

Applicable Law

18. Rule 89 (C) provides that a Chamber “may admit any relevant evidence which it deems to have probative value.” Rule 89 (D) adds that a Chamber “may request verification of the authenticity of evidence obtained out of court.” In determining the relevance of evidence, the moving party must show that a connection exists between the evidence sought to be admitted and the proof of an allegation sufficiently pleaded in the indictment.⁴³ In order to establish the probative value of the evidence, the moving party must show that the evidence tends to prove or disprove an issue.⁴⁴ A factor in the assessment of the relevance and probative value of evidence is the requirement that it be *prima facie* credible; that is, it must have sufficient indicia of reliability.⁴⁵ Indicia of reliability include: the authorship of the document; whether it is an original or a copy; the place from which the document was obtained in conjunction with its chain of custody; whether its contents are supported by other evidence; and the nature of the document itself, such as signatures, stamps, or the form of the handwriting.⁴⁶

19. The admissibility of evidence should not be confused with the assessment of weight to be accorded to that evidence, or even whether its contents are truthful or accurate,⁴⁷ which are issues to be decided by the Chamber after hearing the totality of the evidence.⁴⁸

Relevance and Probative Value of “Fact-Finding”

⁴³*Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on the Prosecution’s Motion for Admission of Certain Exhibits into Evidence, 25 January 2008, para. 6; *Karemera*, Decision on Joseph Nzirorera’s Motion to Admit Documents Authored by Enoch Ruhigira, 26 March 2008, para. 3.

⁴⁴*Karemera*, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ndirumpatse, 2 November 2007, para. 2; *Karemera*, Interim Order on the Prosecutor’s Motion for Admission of Documents, 8 August 2007, para. 7.

⁴⁵*Prosecutor v. Delalić et al.*, IT-96-21, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, para. 20; *Prosecutor v. Bagosora et al.*, ICTR-98-41, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole, 13 September 2004 (“Maxwell Nkole Decision”), para. 8.

⁴⁶*Bagosora*, Maxwell Nkole Decision, para. 9; *Bagosora*, Decision on Request to Admit United Nations Documents into Evidence Under Rule 89(C), 25 May 2006 (“UN Documents Decision”), para. 4 (and sources cited therein).

⁴⁷*Bagosora*, UN Documents Decision, para. 4.

⁴⁸*Karemera*, Decision on Admission of UNAMIR Documents, 21 November 2006, para. 7; *Karemera et al.*, Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence, 25 January 2008, para. 6; *Prosecutor v. Simba*, ICTR-01-76-T, Decision on the Admission of Prosecution Exhibits 27 and 28, 31 January 2005, para. 12.

20. The Chamber observes that *Fact-Finding* is a research publication by Dr. Combs containing analyses of transcripts of other cases before this Tribunal. In this book, the author identifies factors that may hinder accurate factual determination of evidence such as reliance on eyewitness testimony, inconsistencies between witness testimony and prior statements, exposure of witnesses to information about the events and the long passage of time prior to the giving of testimony by witnesses, perjury, cultural and educational considerations.

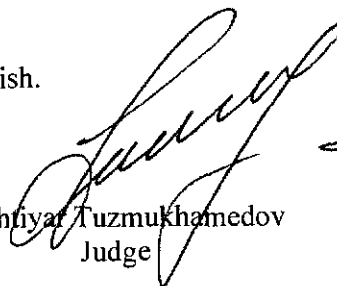
21. The Trial Chamber considers that it is in a position to effectively evaluate the credibility and reliability of eyewitness evidence on the basis of the jurisprudence of the Tribunal. The Chamber is further of the view that because *Fact-Finding* does not address the particular issues or witnesses in the instant case it lacks relevance. The Chamber therefore concludes that *Fact-Finding* will not assist the Chamber in the analysis of the evidence before it and accordingly denies the admission of this work into evidence pursuant to Rule 89(C).

**FOR THESE REASONS, THE TRIAL CHAMBER
DENIES the Motion.**

Arusha, 15 June 2011, done in English.



Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Tuzmukhamedov
Judge



Mparany Rajohnson
Judge

