



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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TRIAL CHAMBER II

Before: Judge Lee Gacuiga Muthoga

Registrar: Mr. Adama Dieng

Date: 8 July 2005

The PROSECUTOR
v.
Casimir BIZIMUNGU
Justin MUGENZI
Jérôme-Clément BICAMUMPAKA
Prosper MUGIRANEZA

Case No. ICTR-99-50-T

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**DECISION ON THE ADMISSIBILITY OF THE EXPERT TESTIMONY OF
DR. BINAIFER NOWROJEE**

Office of the Prosecutor:

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

Counsel for the Defence:

Mr. Tom Moran and Ms. Marie-Pierre Pouline, for *Prosper Mugiraneza*
Ms. Michelyne St. Laurent and Ms. AlexanDra Marcil, for *Casimir Bizimungu*
Mr. Ben Gumpert, for *Justin Mugenzi*
Mr. Pierre GauDreau and Mr. Michel Croteau, for *Jérôme Bicamumpaka*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING in the person of Judge Lee Gacuiga Muthoga, designated by Trial Chamber II, in accordance with Rule 73 (A) of the Rules of Procedure and Evidence (the “Chamber”);

SEISED of “Justin Mugenzi’s Motion for the Exclusion of Portions of Prosecution Exhibits P97 and P98”, filed on 20 May 2005; “Requête de Casimir Bizimungu en Exclusion Partielle du Rapport, du Livre et de la Déposition du Témoin Binaifer Nowrojee”, filed on 23 May 2005; “Bicamumpaka’s Submissions for Limiting the Admittance of Binaifer Nowrojee’s Testimony, her Expert Report (Prosecution Exhibit 98), and her Book (Prosecution Exhibit 97)”, filed on 26 May 2005; and “Prosper Mugiraneza’s Motion on the Admissibility of Expert Testimony of Binaifer Nawrojee”, filed on 3 June 2005 (the “Motions”);

CONSIDERING “Arguments Additionnels à la Requête de Casimir Bizimungu en Exclusion Partielle du Rapport, du Livre et de la Déposition du Témoin Binaifer Nowrojee”, filed on 2 June 2005 (“Additional Arguments”); and the “Prosecutor’s Response to Defence Objections to the Qualifications and Testimony of Expert Binaifer Nowrojee”, filed on 8 June 2005 (the “Response”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

HEREBY DECIDES the Motions, pursuant to Rule 73 (A) of the Rules, on the basis of the written submissions of the Parties.

INTRODUCTION

1. Each of the four Accused has submitted a separate motion regarding the admissibility of Dr. Binaifer Nowrojee’s expert testimony. Since the four motions are similar in substance, it is expedient to address them as one.
2. Before the commencement of Dr. Nowrojee’s testimony, on 16 May 2005, the Chamber determined that Dr. Nowrojee’s evidence would be accepted, but expressly reserved the right of the Defence to make submissions, after the completion of her testimony, as to whether Dr. Nowrojee qualified as an expert and whether any parts of her book, *Shattered Lives*, (Exhibit P 97) or report (Exhibit P 98) should be excluded. The issues now before the Chamber are: (i) whether Dr. Nowrojee qualifies as an expert; (ii) whether her evidence comes within the scope of her expertise; (iii) whether she expresses opinions on ultimate issues in the case; and (iv) whether her evidence has probative value.
3. It should be noted that in an oral ruling of 16 May 2005, the Chamber held that the material contained in Paragraphs 33-44 of Dr. Nowrojee’s report was inadmissible, on the ground that the opinions expressed therein were formed on

the basis of statements obtained by the Office of the Prosecutor, which were not entered into evidence.

The Defence Submissions

4. The Defence for Justin Mugenzi accepts that Dr. Nowrojee is an expert in the investigation of human rights abuses. It is submitted that Dr. Nowrojee expressed opinions on certain matters in her book and report that lie outside her field of expertise and in respect of which she lacks first-hand knowledge. It is further submitted that evidence pertaining to the culpability of the authorities is a matter upon which the Chamber, as the fact-finder, is alone competent to make a determination. The Defence requests that specified portions of Dr. Nowrojee's report and the whole of her book, save for the accounts of rape victims, be excluded.
5. The Defence for Casimir Bizimungu has put in issue Dr. Nowrojee's qualification as an expert. Characterizing Dr. Nowrojee as a human rights investigator, the Defence relies on a decision to the effect that a particular investigator was not an expert since his expertise did not extend to the subject matter to which he would testify.¹ It has further been submitted that Dr. Nowrojee testified on matters that extend beyond her area of expertise, and that parts of the report which do not relate to the charges in the case and which were not prepared by Dr. Nowrojee should be excluded.
6. The Defence for Jérôme Bicomumpaka accepts Dr. Nowrojee's expertise as a reporter of human rights violations. The Defence argues, however, that certain parts of Dr. Nowrojee's testimony extend beyond her expertise or provide opinions on ultimate issues in the case. The Defence also asserts that the evidence presented by Dr. Nowrojee is irrelevant since the Indictment contains no allegations of sexual crimes.
7. The Defence for Prosper Mugiraneza submits that Dr. Nowrojee's evidence should be excluded in its entirety since the Prosecution has failed to meet its burden in showing the evidence to be relevant and reliable.

The Prosecution Submissions

8. The Prosecution submits that Dr. Nowrojee's qualifications and experience are clearly demonstrative of her expertise, upon which her conclusions are based. The Prosecution submits that her expert testimony is of probative value and is, accordingly, admissible. Furthermore, the Prosecution emphasizes the "liberal approach" that the Tribunal has adopted to the admission of expert testimony which "may assist the Chamber in understanding the evidence".² The Prosecution challenges the Defence Motions to render inadmissible certain

¹ *Nyiramasuhuko et al.*, Oral Decision, 13 April 2005.

² *Bagosora et al.*, Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, 28 September 2004, para. 8.

portions of Dr. Nowrojee's evidence, and requests that the Chamber consider the totality of Dr. Nowrojee's evidence and attach varying weight to the evidence, as the Chamber deems appropriate.

DELIBERATIONS

(i) Qualification as an Expert

9. The first issue, raised by the Bizimungu Defence, concerns Dr. Nowrojee's qualifications as an expert. On the basis of her experience as an investigator of human rights violations and her publications on issues of sexual violence, the Chamber considers that Dr. Nowrojee is an expert in the field of sexual violence in Rwanda and that her testimony will assist the Chamber in better understanding and evaluating the evidence presented by factual witnesses.

(ii) Scope of Dr. Nowrojee's Expertise

10. The second, but related, issue is whether the evidence presented by Dr. Nowrojee's comes within the scope of her expertise. In this respect, the Chamber recalls its determination that Dr. Nowrojee possesses expertise in the investigation of sexual violence in Rwanda. Dr. Nowrojee does not purport to be an expert in Rwandan culture, language, history, or political affairs. Accordingly, the Chamber considers that the scope of Dr. Nowrojee's expertise is limited to matters that relate to her investigations of sexual crimes in Rwanda, based on her interviews and investigations in the field.
11. The Chamber considers that the testimony of an expert witness is admissible only to the extent that the testimony comes within the scope of the witness' expertise. The Chamber delimits the scope of Dr. Nowrojee's expertise to the investigation of sexual violence in Rwanda. The Chamber considers that such parts of Dr. Nowrojee's testimony relating to genocide propaganda, the political goals of perpetrators of the crimes, the culpability of authorities, and the knowledge that officials are alleged to have possessed are matters that lie beyond the scope of her expertise and are, accordingly, inadmissible.

(iii) Evidence on Ultimate Issues

12. The third issue arises from the Defence submission that Dr. Nowrojee's evidence is determinative of the culpability of the Interim Government. The Chamber observes that Dr. Nowrojee's opinions which relate to the activities of Rwandan political authorities fall outside the scope of matters on which she can properly provide an expert opinion. To the extent that Dr. Nowrojee expresses opinions on ultimate issues of fact, the Chamber considers such opinions to be inadmissible. Dr. Nowrojee's expert evidence serves the limited purpose of illuminating the broader context of the events alleged in the Indictment. Only the Chamber, as the finder of fact, is competent to make a judicial determination on the ultimate issues in the case.

(iv) *Probative Value of the Testimony*

13. The fourth issue raised by the Defence concerns the general probative value of Dr. Nowrojee's testimony. Rule 89 (C) of the Rules and Procedure and Evidence, which governs the admissibility of evidence, provides that: "A Chamber may admit any relevant evidence which it deems to have probative value". In ascertaining whether Dr. Nowrojee's evidence is of probative value, the Tribunal has distinguished between the evidence of experts and non-experts:

The Tribunal is of the view that that there is a fundamental difference between, on the one hand, a witness called to testify about the crimes with which the accused is directly charged and, on the other hand, an expert witness, whose testimony is intended to enlighten the Judges on specific issues of a technical nature, requiring special knowledge in a specific field.³

14. The Appeals Chamber has held that the:

purpose of expert testimony is to supply specialized knowledge that might assist the trier of fact in understanding the evidence before it.⁴

15. The Tribunal held in *Bagosora et al.* that:

In light of the complexity and scale of events in Rwanda in 1994, it is unsurprising that Chambers of this Tribunal have adopted a liberal approach to the admission of expert testimony. ... The standard for admission of expert testimony is whether the specialized knowledge possessed by the expert, applied to the evidence which is the foundation of the opinion, may assist the Chamber in understanding the evidence.⁵

16. The evolving standard of admissibility that these authorities disclose is whether the expert testimony assists the Chamber in evaluating the factual evidence presented during the proceedings. Indeed the Chamber considers Dr. Nowrojee's testimony to have probative value in assisting the court by illuminating the general context of events with which the present case is concerned.

(v) *Distinction between Admissibility and Weight*

17. The Chamber has determined that certain parts of Dr. Nowrojee's evidence are to be excluded. When considering evidentiary matters, the Chamber wishes to emphasize the distinction between questions of admissibility and weight. The Appeals Chamber has held that "a distinction must be drawn between, on the one hand, admissibility of evidence, and, on the other, the exact probative

³ *Akayesu*, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998, para. 2.

⁴ *Semanza*, Judgement (AC), 20 May 2005, para. 303.

⁵ *Bagosora et al.*, Decision of Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, 28 September 2004, para. 8.

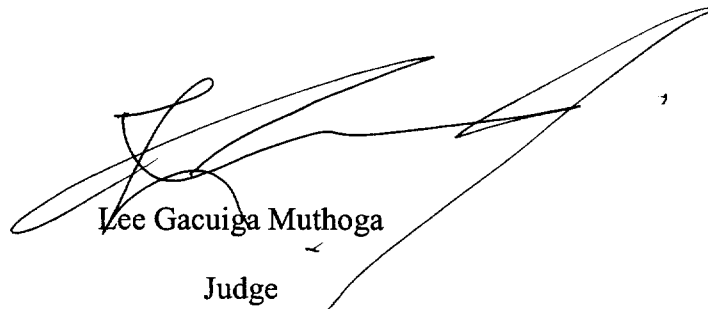
weight to be attached to it".⁶ The Chamber considers that Dr. Nowrojee's testimonial evidence and her book, *Shattered Lives*, when appraised in their totality, and to the extent that such evidence comes within the scope of her expertise and expresses no opinion on ultimate issues, are admissible. It is for the Chamber to evaluate such evidence and to determine the weight to be attached to it.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

GRANTS IN PART the Defence Motions, thereby ruling inadmissible those portions of Dr. Nowrojee's evidence that fall outside the scope of her expertise or express opinions on ultimate issues before the Chamber, and

DENIES THE REMAINDER of the Defence Motions.

Arusha, 8 July 2005



Lee Gacuiga Muthoga
Judge

[Seal of the Tribunal]

⁶ *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 6.

