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INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

TRIAL CHAMBER III

Case No. ICTR-98-44-T

ENGLISH
Original: FRENCH

Before: Judges Dennis C.M. Byron, presiding
Judges G. Gustave Kam
Judges Vagn Joensen

Registrar Adama Dieng

Date: 3 June 2008

THE PROSECUTOR

v.

ÉDOUARD KAREMERA

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MOTION FOR RECONSIDERATION OF THE ORDER OF 5 MAY 2008 – ORDER
RELATING TO DEFENCE WITNESS *BERNARD LUGAN* –

Counsel for the Defence:

Dior Diagne Mbaye
Moussa Felix Sow

Office of the Prosecutor:

Don Webster
A Frankson-Wallace
Iayn Morlei (sic)
Saidou N'Dow
S Ballah-Conteh
Takeh Sendze
Gerda Wisser

Counsel for the Co-Accused:

Peter Robinson and Patrick Nimy Mayidika Ngimbi
Chantal Hounkpatin and Frédéric Weyl

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Background

Mr Bernard Lugan was chosen by the Defence as expert witness, to provide useful clarification to the Defence in the Karemera et al Defence case.

His appearance before the Tribunal had initially been scheduled for 15 May 2008.

On 5 May, the Trial Chamber made an order barring him from appearing as expert witness in the aforementioned trial.

Rule 94 *bis* of the Rules of Procedure and Evidence defines the procedure for accepting or not accepting testimony from expert witnesses sets forth.

It is silent on whether the Trial Chamber can, by its own discretion, without any prior *inter partes* hearing, rule that the status of expert witness is not conferred on the “expert”.

By order of 5 May 2008, Trial Chamber III stated that [verified] “...**Bernard Lugan is not considered an expert...**”.

The Trial Chamber advances the following reasons:

- “The points¹ raised do not require the opinion of an expert;”
- Points 2, 3 and 6 fall within the remit of the Chamber and “no specific expertise is required for it to rule on the merits”;
- For point 5, expert opinion is not at all necessary;
- Regarding points 1 and 4, the Chambers finds that they **[Verified] “are of no relevance in the strict determination of the responsibility of the indictees, which, in the present case, includes Edouard Karemera.” Regarding the likely factual considerations in this trial, “The Chamber believes that**

¹ [Verified] 1- To explain to the Court the basis for introducing multi party politics in a situation of war as was the case in Rwanda as well as the problems that then arose. The expert will refer to the position adopted by the main political parties in relation to the Arusha Negotiations.

2- Would it still be possible to assert, as the Prosecutor does, that the genocide was planned?

3- The expert will provide his opinion on the civil defence issue. Did it amount to a military strategy or was it preparation for the massacre of the civilian population?

4- What was the constitutional status of Rwanda at 8:30 pm on 6 April 1994. Was the Rwandan Interim Government legitimate according to the Constitution?

5- Why was it that between 6 April and early July 1994, the Rwandan authorities, both military and civilian, (RIG) were helpless in dealing with the chaos?

6- The expert will give his opinion on the following two documents relating to changes in knowledge and historiography:

a. ICTR-98-44-I, Amended Indictment of 24 August 2005

b. ICTR-98-44-T, Prosecutor’s Consolidated Response to Defence Motions for Acquittal Pursuant to Rule 98 bis of the Rules of Procedure and Evidence, 31 January 2008.

adequate information already exists in record to assist the Chamber on its assessment.”

- **The order of 5 May 2008 fails to comply with the Rules of Procedure and Evidence.** Firstly it should be noted that the order by Trial Chamber III is not in response to any submission by the parties in this case. Indeed, the Prosecutor did not object to the testimony of the expert through a formal motion.
- Further, regarding the reasons set forth by the Chamber, Edouard Karemera’s Defence remarks as follows:
 - The Defence begins with the last point made by the Chamber, and expresses concern about the statement made.
 - It should be noted that this trial commenced in September 2005 with the presentation of evidence by the Prosecutor.
 - The Prosecutor concluded his case in April 2008. Shortly thereafter, Defence commenced adducing evidence. At the date of the order of the Chamber, namely 5 May, barely four defence witnesses had been heard, and the fourth was still giving evidence.
 - At this stage, Edouard Karemera’s Defence is concerned as to whether **Chamber is satisfied with the evidence so far adduced, although Defence witnesses have barely started to set the context, as described in the pre-defence brief for Édouard Karemera’s Defence.**
 - The Chamber asserts that regarding factual considerations admissible in this case [Verified] **“The Chamber believes that adequate information already exists on record to assist the Chamber in its assessment”**
 - Does that clearly imply, that regarding some facts, the Judges already have sufficient information and it is not necessary for the Defence to adduce further and mostly cross-evidence?
 - If such were the case should it be construed by Defence that **“...adequate information already exists on record...” provided by the Prosecutor to clarify the Chamber?**

The Defence began adducing evidence only on 21 April, **after the last prosecution witness had been cross-examined that same day.**

Indeed, as in all trials, each party makes allegations and adduces evidence to establish plausibility.

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It is incumbent upon the Bench to assess the probative value after granting all parties in the case the opportunity to present their case.

Whereas the Bench exercises its discretion in assessing evidence after all parties have concluded their cases, we are not yet at that stage in the Karemera case.

Unfortunately, some points in the order of 5 May tend to suggest prejudgement.

Indeed, Rule 73 *ter* of the RPE does not empower the Chamber to reject a witness from the list proposed by Defence. At best, it could invite Defence either to shorten the duration of the examination-in-chief of some witnesses, or to reduce the number of witnesses. Rule 85 of the aforementioned Rules further buttresses this point by stipulating that "Each party is entitled to call witnesses and present evidence."

There is no iota of doubt that the Prosecution has made a selective and biased presentation of events that occurred in Rwanda during the period from October 1994 to July 1990 whereas Rule 68 of the RPE compels the Prosecutor to disclose all material which is exculpatory or likely to affect the credibility of prosecution evidence.

Needless to say that all Prosecution witnesses against the accused Édouard Karemera are people in detention for numerous charges who confessed and pled guilty prior to coming to testify.

Thus, it is in the interest of Édouard Karemera's Defence and in the interests of justice that a third party, with the requisite skills in the field clarify the Chamber on the facts concealed by the Prosecutor.

In depriving Édouard Karemera's Defence of the contribution of an expert who is capable of supporting evidence of the facts and clarifying the Bench over issues they are presumed not to be aware of as they were discarded by the Prosecutor, the Chamber has failed to comply with the RPE and, pursuant to Rule 5 of the aforementioned Rules caused material prejudice to the Accused, Édouard Karemera.

Legal basis and submissions for reconsideration

According to established jurisprudence, a motion for reconsideration filed by a party to the decision may be granted where:

- The impugned decision contains a discernable error in law, or if at the time it was made it constituted an abuse in the exercise of discretion²
- There has been a change in circumstance since it made its original decision

In essence, the Defence motion is founded on discernable abuse in the exercise of discretion.

² Ref Karemera et al Case, 98-44-T; Decision on Joseph Nzirorera's Motion for stay of proceedings while he is unfit to attend trial or certification to appeal, 11 July 2007.

Mr. Bernard Lugan has previously testified as expert witness in the Renzaho, Military I, Ndindabahizi, Zigiranyirazo cases.

In the case of the Prosecutor v. T. Renzaho, the Bench plainly acknowledged Mr Lugan's qualification as an expert in the following terms: **"This Chamber has previously found Professor Lugan to fulfil the criteria of being an expert both in Ndindabahizi and Military I. We are reaching the same conclusion now."**³

In the case of *The Prosecutor v. P Zigiranyirazo*, the Chamber heard the testimony of Bernard Lugan on the basis of Defence's terms of reference to him as follows: **"to clarify, the general background and the general facts" [Translation] considering "changes that occurred between 2000 and 2007;"** new facts such as **"confessions and statements by some RPF members [Translation];"** and, according to the **"document which is in fact the only truly comprehensive study in the present state of knowledge which puts the events into new perspective, [...] Judge Brugière's order"**. [Translation]⁴

The freedom to adduce evidence implies that in their quest for the truth, the parties can tender all evidence they deem relevant. Apart from testimonial evidence, they may also call experts.

In the Mohan ruling, the Supreme Court of Canada upheld four rules relating to admissibility of expert evidence, namely: relevance, necessity to clarify the Bench on the facts, absence of any other rule of exclusion and qualification of the expert.

a) **Relevance**

As with all evidence adduced, that of the expert has to be relevant. Beyond the international or domestic nature of the war in Rwanda, it is public and established knowledge that the conflict itself involved various protagonists. The contribution of an expert in military matters is all the more important on account of the stakes of the conflict. Further, it provides the Tribunal information exceeding the experience and the knowledge of the Bench.

b) **Necessity**

This presupposes that the expert testimony or report intends to provide the Tribunal with specific knowledge for its determination. To understand the war techniques that were used as well as the military strategy, defence or attack tactics and their impact, one needs the skills. The professor's skill in this regard is not in doubt.

c) **Absence of any rule of exclusion**

It has been extensively demonstrated that the RPE stipulates no rule for the exclusion of the expert witness.

³ Renzaho Trial, 03 September 2007; page 58; L18 and 19

⁴ Zigiranyirazo Trial, 26 November 2007, Page 5.

d) Adequate qualification of the Expert

In the Marquard ruling, the Supreme Court defined the rule as follows “The only condition for admissibility of expert opinion is that the witness has specific knowledge and experience exceeding that of the trier of facts.”

Regarding matters raised by the Defence as being under the ambit of the expert testimony, it is noteworthy that the Prosecutor failed to address some of them.

Such is the case for crucial matters to ensure Edouard Karemera’s Defence, namely matters related to civil defence, the issue of clandestine brigades and RPF infiltrators, the definition of the enemy, etc.

Contrary to the arguments set forth by the Chamber in the order of 5 May, **the expert testimony of Bernard Lugan is proposed, not to assist the Chamber in carrying out its duties, hence running the risk of usurping them, but for its probative value.**

As Defence witnesses are heard, the Prosecutor’s objections entered into the record, and Judges’ remarks as to the confines of the testimonies of factual witnesses are made, the Defence understood that it is timely to call the Expert Witness namely Bernard Lugan.

His contribution will inform and clarify the Chamber on matters in the Expert’s field; expected answers may ever trigger the witness’s opinion.

Nothing in the Chamber’s order outlines how the Judges arrived at the ruling that they had received enough evidence regarding the points to be addressed by the expert, especially as they are new in this case.

So far, the Chamber has heard only the Prosecutor’s version regarding some of the issues while some were basically concealed by the Prosecutor. Considering the foregoing conditions, it is crucial, and of vital interest that the Chamber be clarified.

It should be noted that testimonies of WSL and XTL on 7 and 8 May 2008⁵ added new information for a better understanding of the significance of the Expert’s contribution. The new material facts relate to the presence of infiltrators and RFP’s mopping up of the area. The context of such facts needs to be set.

Beyond being a historian and having specific knowledge of the history of Rwanda, Mr Bernard Lugan is an expert in military strategy in charge of *séminaire Afrique in the Collège Interarmées de Defense*, (Combined Defence College), *Université Lyon III*. He also lectures at the *Institut des Hautes Etudes de la Defense National* (Institute for Advanced National Defence Studies), (IHEDEN), as well as in the *Centre des Hautes Etudes Militaires*, (Centre for Advanced Military Studies) (CHEM).⁶

⁵ Ref, Karemera et al case, Transcript of 7 and 8 May 2008

⁶ Ref, CV of Bernard Lugan attached hereto.

There are existing indicia in the report he drafted under his terms of reference as expert witness, which portend probative value of his testimony. His experience and publications show his ability to discuss and elaborate the points in his terms of reference in an impartial manner.

There is no doubt that the degree of certainty expected from his testimony and the value of the proposed evidence will be useful to the Chamber in determining the criminal liability of the Accused.

Basically, it should be noted that the evidence he intends to adduce before the Chamber, is contemporaneous, providing it undisputed value with regard to clarifying the Chamber on the events of April 1994.⁷

Finally, it should be noted that the Chamber dismissed Edouard Karemera's motion for acquittal founding its decision on allegations against him in the Indictment. It is therefore in the interests of justice and equity that Edouard Karemera presents his defence case which translates in concrete terms in the testimony of the expert Bernard Lugan, to challenge the allegations in paragraphs 6, 13, 18, 28.3, 33.1, 36, 52, 56, 57 et 77 of the Prosecutor's Indictment.

Edouard Karemera respectfully prays the Chamber, in the interest of a full and unfettered defence and a fair and balanced trial, to reconsider its order of 5 May 2007, and to allow Bernard Lugan to testify as an expert before the International Criminal Tribunal for Rwanda.

All respectfully submitted

[Signed]

Dior Diagne Mbaye

⁷ "Expert witness allowed to be added where his testimony would be probative of an important issue." Ref *Prosecutor v. Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Prosecutor's Motion for Leave to Add a Handwritten Expert to his Witness List (14 October 2004)* at para. 18