



ICTR-99-50-T  
10-11-2004  
(19088-19083)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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Or: ENG

**TRIAL CHAMBER II**

**Before:** Judge Khalida Rachid Khan, Presiding  
Judge Lee Gacuiga Muthoga  
Judge Emile Francis Short

**Registrar:** Mr. Adama Dieng

**Date:** 10 November 2004

JUDICIAL RECORDS/ARCHIVES  
ICTR  
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**The PROSECUTOR**  
v.  
**Casimir BIZIMUNGU**  
**Justin MUGENZI**  
**Jérôme-Clément BICAMUMPAKA**  
**Prosper MUGIRANEZA**  
*Case No. ICTR-99-50-T*

**DECISION ON MUGENZI'S CONFIDENTIAL MOTION FOR THE FILING,  
SERVICE OR DISCLOSURE OF EXPERT REPORTS AND/OR STATEMENTS  
(Rule 94bis)**

**Office of the Prosecutor:**

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

**Counsel for the Defence:**

Ms. Michelyne C. St. Laurent and Ms. Alexandra Marcil for Casimir Bizimungu  
Mr. Howard Morrison, Q.C. and Mr. Ben Gumpert for Justin Mugenzi  
Mr. Pierre Gaudreau and Mr. Michel Croteau for Jérôme-Clément Bicamumpaka  
Mr. Tom Moran and Mr. Christian Gauthier for Prosper Mugiraneza

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the "Tribunal"),

**SITTING** as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuga Muthoga and Judge Emile Francis Short, (the "Trial Chamber");

**BEING SEIZED** of the "Highly Confidential Justin Mugenzi's Urgent Motion for the Filing, Service or Disclosure of Expert Reports and/or Statements" (the "Motion") filed on 19 October 2004;

**NOTING** (i) the "Memorandum from Casimir Bizimungu in support of Justin Mugenzi's Highly Confidential Motion for the Filing, Service or Disclosure of Expert Reports and or Statements" filed on 21 October 2004 AND (ii) the "Prosecutor's Response to Mugenzi's Urgent Motion for the Filing, Service or Disclosure of Expert reports and/or Statements" filed on 22 October 2004;

**HAVING BEEN SEIZED** of "Justin Mugenzi's Urgent Motion for the Filing, Service or Disclosure of Expert Reports and/or Statements" on 15 October 2004;

**NOTING** the Correspondence from the Prosecution to the Registry regarding Justin Mugenzi's Urgent Motion for the Filing, Service or Disclosure of Expert Reports and/or Statements dated 18 October 2004 in which the Prosecution brought to the attention of the Defence that the Motion of 15 October 2004 contained closed session material that should be removed from the public domain;

**NOTING** that the Defence brought this issue to the attention of the Chamber who, during the 18 October 2004 proceedings, directed the Registry to mark as **CONFIDENTIAL** the annexes to the Motion filed on Friday 15 October 2004 as confidential.

**NOTING** that the Defence's request to withdraw the Motion filed on 15 October 2004 from the role was granted by the Chamber on 20 October 2004;

**NOTING** the letter by Ms Saint Laurent to Mr. Ng'arua, Counsel for Bizimungu filed on 3 November 2004 acknowledging receipt of three expert reports and requesting the curriculum vitae of those experts;

**NOTING** the "Prosecutor's Response to Notices Filed Under Rule 94bis (B) of the Rules of Evidence and Procedure by Casimir Bizimungu, Jerome Bicamumpaka, and Justin Mugenzi Objecting to the Qualification and Statements of Prosecutor's Expert Witnesses Deo Mbonyinkebe, Binaifa Nowjoree, and Jean Rubaduka" filed on 8 November 2004 (the "Prosecutor's Response to Notices");

**NOTING** that the Annexes A-1, A-2 and A-3 to the Prosecutor's Response to Notices were filed on 10 November 2004;

**CONSIDERING** the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Rule 94bis of the Rules;



**NOW DECIDES** the matter solely on the basis of the briefs of the parties pursuant to Rule 73(A) of the Rules.

**SUBMISSIONS OF THE PARTIES**

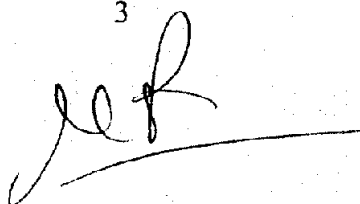
*The Defence for Bicamumpaka*

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1. The Defence argues that on 5 March 2004, the Prosecution indicated that the reports of the scheduled expert witnesses would be supplied to the Chamber and to the Defence by 15 April 2004. The Defence cites extracts of closed session transcripts annexed to the Motion in support.
2. The Defence states that since then, it has received nothing. As the proceedings would be adjourned soon and until mid-January 2005, the Defence adds that this would be an ideal period to prepare itself for the testimonies of those experts.
3. The Defence argues that while Rule 94*bis* allows the Prosecution to file such reports with the Chamber no later than 21 days before the expert is to testify, this is only a minimum requirement; the same Rule indicates that the full statements shall be disclosed to the opposing party as early as possible.
4. The Defence adds that the Prosecution has a duty to control and require expert witnesses to act with expedience in the preparation of their reports and that in the case of Justin Mugenzi, the Prosecution has had some six years to prepare such reports.
5. The Defence therefore submits that the Chamber should order the Prosecution to file the reports of all expert witnesses it intends to call by 28 October 2004, failing which the Prosecution should be barred from calling or relying upon the said evidence.

*The Defence for Bizimungu*

6. The Defence for Bizimungu supports the Motion and adds that it has reminded the Prosecutor of the urgency in disclosing the Expert Reports on 23 July 2004, making reference to the 5 March 2004 Status Conference discussion on this issue.
7. The Defence alleges that it needs to absorb the content of any expert report to prepare for the research of counter-expert material for cross-examination.
8. The Defence recalls that it is expected to be the first Defence team in this joint trial to present its case and it cannot enlist witnesses before having analysed the Prosecution expert reports. Therefore, any delay in disclosing the reports, might cause delays in the presentation of the Defence case. The Defence submits that it is in the interests of justice to disclose those reports by 28 October 2004.



9. The Defence for Bizimungu in a letter filed on 3 November 2004 requested the Prosecution to file the curriculum vitae of the three experts for which reports had been filed.

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***The Prosecution's Response***

10. The Prosecution recalls that during the 5 March 2004 Status Conference, it identified the following four expert witnesses to be called to testify: Alison Desforges, Jean Rubaduka, Binaifa Nowrojee and Deo Bonyinkebe.

11. The Prosecution cites Rule 94bis (A) of the Rules and a Decision in the *Semanza* Case<sup>1</sup> to indicate that the rule does not set a specific deadline for disclosure whereas in the *Nyiramasuhuko* case<sup>2</sup>, the Chamber had set a deadline for disclosure of the expert reports. In the instant proceedings, the Prosecution argues that no such deadlines have been set.

12. The Prosecution cites the *Nahimana* Case<sup>3</sup> in which the Chamber considered the element of surprise and whether there was enough time for the opposing party to prepare.

13. The Prosecution states that it has intimated to the Defence that the Report of Alison Desforges will be similar to her previous reports in the *Military I*, *Akayesu*, *Media*, *Ndindabahizi*, *Simba* and *Gacumbitsi* cases and that it disclosed to the Defence her testimony in the *Akayesu*, *Military I*, *Media* and *Gacumbitsi* cases on 18 September 2003. The Prosecution adds that the draft expert report of Deo Mbonyinkebe was disclosed to the Defence on 22 October 2004 and that it undertakes to disclose the draft expert reports of Jean Rubaduka and that of Binaifa Nowrojee on 25 October 2004.

14. Therefore, the Prosecution concludes that it has complied with its disclosure obligations, that the Defence has sufficient material to prepare and will not be taken by surprise.

**HAVING DELIBERATED**

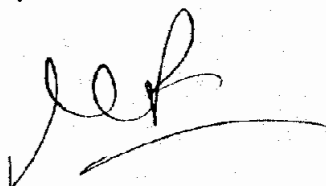
15. The Chamber recalls that Rule 94bis (A) states that:

Notwithstanding the provisions of Rule 66(A)(ii), Rule 73bis(B)(iv)(b) and Rule 73ter (B)(iii)(b) of the present Rules, the full statements of any expert witness called

<sup>1</sup> *The Prosecutor v. Semanza*, Decision on Defence Extremely Urgent Motion for Extension of Time and for an order of Cooperation of the Government of Rwanda, 13 December 2001.

<sup>2</sup> *The Prosecutor v. Nyiramasuhuko et al.*, Decision on the Defence Motion for an Extension of the Time Limit for Filing the Notice in Respect of Expert Witness Statements, 25 May 2001.

<sup>3</sup> *The Prosecutor v. Nahimana et al.*, Decision on the Prosecutor's oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001.



by a party shall be disclosed to the opposing party as early as possible and shall be filed with the Trial Chamber not less than twenty-one days prior to the date on which the expert is expected to testify.

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16. The Chamber further recalls that pursuant to Rule 94*bis* (B), the opposing party shall file a notice to the Chamber within 14 days of the filing of the statements indicating whether it accepts (i) the qualification of the witness as an expert, (ii) the expert witness statement and if it wishes to cross-examine the expert witness.

17. Rule 94*bis* clearly addresses disclosure and filing obligations. As stated in the *Bagosora et al.* case, "its purpose is to ensure that the opposing party has sufficient notice of the content of the expert witness's testimony to effectively prepare for cross-examination and make objections thereto".<sup>4</sup>

18. Considering that those witnesses have not been scheduled to testify within 21 days, the Chamber is of the view that there is no legal basis for the remedy sought by the Defence, insofar as they seek to bar the Prosecution from calling or relying upon the evidence of witnesses whose reports have not been filed by 28 October 2004.

19. The Chamber notes that the experts will be called during the last trial session scheduled to start on 1 February 2005. Nonetheless, the Chamber recalls that during the 5 March 2004 Status Conference, discussions on the issue of disclosure of the expert reports took place and the Prosecution gave indications that it had asked the experts to file their reports at least by 15 April 2004. The Chamber had reminded the Prosecution that it should adhere to that date.<sup>5</sup> The Chamber wishes to further remind the Prosecution that disclosure of the full statements of the expert witnesses should be made, as a matter of principle, as early as possible.

20. The Chamber also notes that since the filing of the Motion, (i) the draft Expert Report of Deo Mbokyinkebe was filed in French with the Registry on 21 October 2004, (ii) the draft Expert Report of Binaifer Nowrojee was filed with the Registry on 25 October 2004 in both languages, and (iii) the Expert Report of Jean Rubaduka was filed in French with the Registry on 25 October 2004. The Defence for Bicumumpaka, Mugenzi and Bizimungu have filed their notice pursuant to Rule 94*bis* (B) of the Rules. With respect to the two draft expert reports, the Chamber does not find that a draft form satisfies the filing obligation, and orders the Prosecution to indicate by 15 December 2004 any variance between the draft Reports and any eventual final Reports to be filed pertaining to Deo Mbokyinkebe and Binaifer Nowrojee to allow the Defence sufficient time to prepare.

21. The Chamber further notes that no report has yet been filed with respect to Alison Desforges. The Prosecution's indication that Desforges' Report will be similar to previous reports filed in six other cases does not satisfy the disclosure obligations

<sup>4</sup> *The Prosecutor v. Bagosora et al.*, Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, ICTR-98-41-T, 28 September 2004.

<sup>5</sup> T. 5 March 2004 (ICS).

envisaged under Rule 94bis (A). The Chamber orders that the final Report by Alison Desforges be filed by 15 December 2004 at the latest so as to allow sufficient time both for its translation and the preparation of the Defence.

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22. Finally, with respect to Bizimungu's request for the filing of the curriculum vitae of the three expert witnesses, the Chamber notes that in the Prosecutor's Response to Notices, the Prosecution indicates that it has attached the curriculum vitae of expert witnesses Deo Mbonyinkebe, Binaifa Nowrojee and Jean Ruboduka. The Chamber notes that those documents were not attached to the said Response but were filed a day later, on 10 November 2004. Without going into the substance of this Response, the Chamber recalls the *Nahimana et al.* case in support of the contention that the curriculum vitae of expert witnesses should be submitted "as verification or in support of their expert status."<sup>6</sup> Consequently, the Chamber orders the filing of the curriculum vitae of Alison Desforges by 15 December 2004

**FOR THE ABOVE REASONS, THE TRIAL CHAMBER**


**GRANTS** in part the Defence Motion ordering the Prosecution to disclose the Expert Reports within a certain deadline;

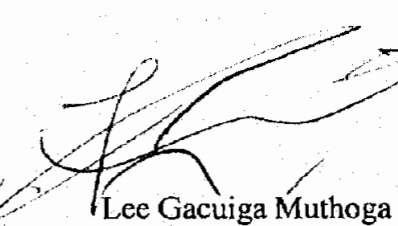
**ORDERS** the Prosecution to file the final statement and the curriculum vitae of Alison Desforges by 15 December 2004 at the latest;

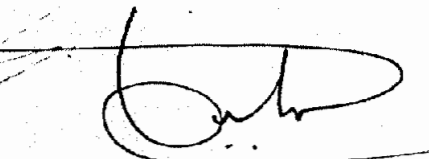
**ORDERS** the Prosecution to indicate by 15 December 2004 any variance between the draft Reports and any eventual final Reports to be filed pertaining to Deo Mbonyinkebe and Binaifer Nowrojee.

**DENIES** the Defence Motion in all other respect.

Arusha, 10 November 2004

  
Khalida Rachid Khan  
Presiding Judge

  
Lee Gacuiga Muthoga  
Judge

  
Emile Francis Short  
Judge



<sup>6</sup> *The Prosecutor v. Nahimana et al.*, Decision on the Expert Witnesses for the Defence, Case ICTR-99-52-T, 24 January 2003.