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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, Presiding
Judge Seon Ki Park
Sitting under Rule 15bis

Registrar: Mr Adama Dieng

Date: 14 July 2006

ICTR-00-56-T
14-07-2006
(22726-22723)

The PROSECUTOR

v.

Augustin BIZIMUNGU

Augustin NDINDILYIMANA

François-Xavier NZUWONEMEYE

Innocent SAGAHUTU

Case No. ICTR-00-56-T

DECISION ON NZUWONEMEYE'S REQUEST FOR DISCLOSURE OF ALL
SOURCES QUOTED IN THE PROPOSED EXPERT REPORT BY ABISON DES
FORGES

JUDICIAL
2006 JUL 14
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SECRET

Office of the Prosecutor:

~~Mr Ciré Aly Bâ~~

Mr Segun Jegede

Mr Moussa Sefon

Mr Abubacarr Tambadou

Ms Felistas Mushi

Ms Faria Rekkas

Ms Anne Pauline Bodley

Counsel for the Defence:

Mr Gilles St-Laurent and Mr Ronnie MacDonald for Augustin Bizimungu

Mr Christopher Black and Mr Patrick De Wolf for Augustin Ndindiliyimana

Mr Charles Taku and Mr Hamuli Rety for François-Xavier Nzuwonemeye

Mr Fabien Segatwa and Mr Seydou Doumbia for Innocent Sagahutu

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, and Judge Seon Ki Park (the "Chamber") pursuant to Rule 15*bis* of the Rules of Procedure and Evidence;

BEING SEIZED OF Nzuwonemeye's "Request for Disclosure of all Sources Quoted in the Proposed Expert Report by Alison des Forges", filed on 28 June 2006 (the "Motion");

HAVING RECEIVED AND CONSIDERED the

- (i) *«Réponse du Procureur à la Requête présentée par le conseil de François-Xavier Nzuwonemeye, demandant à la Chambre de première instance II d'ordonner à l'expert Alison des Forges de communiquer à la Défense l'ensemble des documents ou publications qui font l'objet des notes en bas de pages qui figurent dans son rapport»*,¹ filed on 3 July 2006 (the "Response");

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

HEREBY DECIDES the Motion on the basis of the written brief filed by the Parties pursuant to Rule 73(A) of the Rules.

SUBMISSIONS OF THE PARTIES*The Defence*

1. The Defence for Nzuwonemeye prays the Chamber to order Dr. Alison des Forges to disclose to the Defence documents mentioned in the footnotes of her expert report.
2. The Defence submits that the material quoted in support of the expert's report can be divided in three categories: books and reports that are in the public domain and therefore accessible by the Defence ('first category'); documents in possession of the office of the Prosecutor ('second category') and finally, documents that appear to be only in the possession of Dr. Alison des Forges ('third category').
3. The Defence acknowledges possession of the documents falling in the first category, and that it has asked the Prosecution to disclose to it the documents of the second category. With respect to the documents of the third category, the Defence submits that those documents are crucial for the Defence to conduct a proper cross-examination.
4. Finally, the Defence submits that it should not be required to search for all the documents, which form the basis of the report of the proposed expert witness.

The Prosecution Response

¹ "The Prosecution's Response to the Motion presented by Counsel for François-Xavier Nzuwonemeye praying Trial Chamber II to order the Expert Alison des Forges to disclose to the Defence all documents and publications mentioned in the footnotes of her report" (Unofficial Translation).

5. The Prosecution submits that there is no Rule requiring an expert to disclose to the Defence, prior to his or her testimony, the text of publications that he or she read or documents that the expert has consulted in order to form his or her opinion.

6. The Prosecution further submits that there is nothing to indicate that the expert is in possession of all of the documents to which he or she refers in the report at the time she files the report.

7. The Prosecution submits that it would have complied with all its obligations once it discloses to the Defence, as soon as possible, the documents that are in its possession and to which the footnotes of the expert report refer.

8. Finally, the Prosecution refers to an oral ruling in the *Bagosora et al.* case of 4 September 2004, in which Trial Chamber I held that it was incumbent upon the Defence to get hold of "materials that may, or may not, arise from footnotes" and that it was not the Prosecution's obligation to provide those documents.²

DELIBERATIONS

9. The Chamber notes that the Defence for Nzuwonemeye has not cited any Rule, jurisprudence or other authority in support of its Motion. The Defence's only contention is that the documents mentioned in the footnotes of Dr. Des Forges' report are "crucial" for its cross-examination of the expert witness.

10. The Chamber recalls Rule 94bis (A) which governs the disclosure of reports of expert witnesses:

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

11. The Chamber notes that Rule 94bis (A) is addressed to the Parties and that witnesses, be they factual or expert, are not party to the proceedings and therefore under no disclosure obligations.

12. The Chamber notes that in the *Nahimana et al.* case, Trial Chamber I instructed the Defence to disclose, in addition to the expert report, the *curriculum vitae* of expert witnesses "as verification or in support of their expert status".³ This finding was subsequently adopted in the *Bizimungu et al.* case.⁴ The Chamber notes that in the instant case, the Prosecution filed with the registry Dr. Des Forges' report in English together with a *curriculum vitae* on 13 June 2006, more than three months prior to the expected testimony of the Witness.

² *Le Procureur c. Bagosora et autres*, Affaire N ICTR-98-41-T, Transcription du 4 Septembre 2002, page 28.

³ *The Prosecutor v. Nahimana et al.*, Decision on the Expert Witnesses for the Defence, Case No. ICTR-99-52-T, 24 January 2003.

⁴ *The Prosecutor v. Casimir Bizimungu et al.*, Decision on Mugenzi's Confidential Motion for the Filing, Service or Disclosure of Expert Reports and/or Statements (Rule 94bis), Case No. ICTR-99-50-T, 10 November 2004, para. 22.

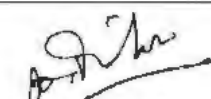
13. Therefore the issue before the Chamber is to determine whether the right of the Accused to cross-examine a witness as stipulated in Article 20(4)(e) of the Statute is infringed upon if the Defence is not in possession of the said 'third category' documents. The Chamber recalls the Decision of 28 September 2004 in the *Bagosora* case where Trial Chamber I held that it is the disclosure of the expert report itself that ensures that "the opposing party has sufficient notice of the content of the expert witness's testimony to effectively prepare for cross-examination".⁵ The Chamber recalls that the inclusion of footnotes in the report is done to put the opposing party on notice of what documents the expert used as the basis of her opinion.⁶ However the documents mentioned in the footnotes themselves are not part of her report or her expected testimony and therefore not part of the case against the Accused.

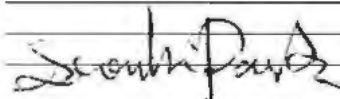
14. Accordingly, the Chamber concludes that the disclosure of the expert report, inclusive of footnotes and a *curriculum vitae*, more than three months prior to the expected date of the expert's testimony is sufficient for the Defence to prepare for cross-examination and to guarantee the rights of the Accused under Article 20(4)(e).

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 14 July 2006


Asoka de Silva
Presiding Judge


Seon Ki Park
Judge

[Seal of the Tribunal]



⁵ *The 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.

⁶ *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Oral Decision on Defense Motions Challenging the Qualification of Expert Witness Dr. Alison Des Forges, 4 September 2002, para. 11.