



UNITED NATIONS
NATIONS UNIES

ICTR-00-55C-PT
11-01-2011
(5590-5587)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER III

Before Judges: Lee Gacuiga Muthoga, *Presiding*
Seon Ki Park
Robert Fremr

Registrar: Adama Dieng

Date: 11 January 2011

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ICTR

THE PROSECUTOR

v.

Ildephonse NIZEYIMANA

CASE NO. ICTR-2000-55C-PT

**DECISION ON URGENT PRE-TRIAL MOTION FOR DISCLOSURE RE BINAIFER
NOWROJEE**

Office of the Prosecution:

Drew White
Kirsten Gray
Yasmine Chubin
Zahida Virani

Defence Counsel for Ildephonse Nizeyimana:

John Philpot
Cainnech Lussiaa-Berdou
Myriam Bouazdi

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INTRODUCTION

1. The trial in this case is scheduled to commence on 17 January 2011.¹
2. On 19 December 2010 the Defence team of the Accused, Ildéphonse Nizeyimana, ("Defence" and "the Accused" respectively) filed an "Urgent Pre-Trial Motion for Disclosure re Binaifer Nowrojee" ("Motion"). The Motion concerns a report by Binaifer Nowrojee ("Nowrojee"),² which the Chamber found admissible under Rule 92*bis* of the Rules of Procedure and Evidence ("Rules").³ The Defence asserts that the Report is based on 405 statements concerning rapes ("Rape Statements") which are in the possession of the Office of the Prosecutor ("Prosecution").⁴ Citing Rule 66(B) of the Rules, the Defence requests that the Chamber order the disclosure of the Rape Statements,⁵ submitting that the Rape Statements are material to the Accused's defence,⁶ and asserting that they are essential to its cross-examination of Nowrojee.⁷
3. On 28 December 2010, the Prosecution filed a response to the Motion,⁸ maintaining that the Rape Statements are not material to the defence.⁹ More specifically, the Prosecution argues, *inter alia*, that other chambers of the Tribunal have held that sources cited in expert witness reports are not material to the defence,¹⁰ and that the Rape Statements are not a basis of the Report, and are thus not necessary to cross-examination.¹¹ The Prosecution also notes that should the Chamber decide to grant the Defence access to the Rape Statements, it will provide the information for inspection in "the usual manner [for] redacted materials".¹²

¹ Scheduling Order (TC), 3 November 2010, Order II.

² Binaifer Nowrojee, *Sexual Violence Crimes During the Rwandan Genocide* (New York: Human Rights Watch, 2004) ("Report").

³ Decision on Prosecutor's Motion to Admit Into Evidence the Report of Binaifer Nowrojee, 1 November 2010 ("Nowrojee Decision"), pp. 4-6. The Chamber noted that the Report was admissible on the condition that Nowrojee appear for cross-examination. Nowrojee Decision, p. 6.

⁴ Motion, paras. 2-4, 13.

⁵ Motion, paras. 7-9, 14.

⁶ See Motion, paras. 6, 12-14.

⁷ Motion, para. 6.

⁸ Prosecution Response to Defence Urgent Pre-Trial Motion for Disclosure Re Binaifer Nowrojee, filed on 28 December 2010 ("Response").

⁹ Response, para. 35.

¹⁰ Response, paras. 13-23.

¹¹ Response, paras. 24-30.

¹² Response, para. 34.

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DELIBERATIONS

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4. The Chamber recalls that Rule 66(B) of the Rules requires the Prosecution to “permit the Defence to inspect any books, documents, photographs and tangible objects” in its control which “are material to the preparation of the defence”. The Chamber further recalls that Rule 54 of the Rules authorises it to “issue such orders [...] as may be necessary [...] for the preparation or conduct of the trial.”

5. Having examined the Report, the Chamber observes that more than 20 per cent of the paragraphs in the Report are solely devoted to discussing the Rape Statements, and these are also cited as a basis for the Report’s conclusions.¹³ The Rape Statements thus appear to be a significant basis of the Report’s analysis, even though they are characterised as corroborative.¹⁴ Given the prominence of the Rape Statements in the Report, they could serve as an important source in preparing the cross-examination of Nowrojee, and are thus material to the preparation of the defence.

6. The Chamber notes the Prosecution’s argument that the Motion is similar to requests by defence counsel in other cases before the Tribunal for access to footnoted sources underlying expert reports or opinions, which were rejected.¹⁵ The Chamber observes that the Report is not a Rule 94bis expert report, but was found admissible pursuant to Rule 92bis of the Rules, as evidence of a witness in lieu of oral testimony.¹⁶ The Chamber further observes that in contrast to the sources considered in the decisions cited by the Prosecution, a significant portion of the Report’s body is explicitly devoted to analysis of the Rape Statements.¹⁷ Thus the Defence request in this case is very different from the requests considered in the previous decisions cited by the Prosecution.

¹³ See Report, paras. 33-45; 55.

¹⁴ See Report, para. 45.

¹⁵ See Response, para. 15, citing *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. 4 September 2002, p. 28; Response, para. 22, citing *Prosecutor v. Bizimungu et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye’s Request for Disclosure of All Sources Quoted in the Proposed Expert Report by Alison Des Forges, 14 July 2006 (“Des Forges Decision”), para. 13.

¹⁶ See Response, para. 5; Nowrojee Decision, pp. 4-6.

¹⁷ Compare Report, paras. 33-44, with Des Forges Decision, para. 13.



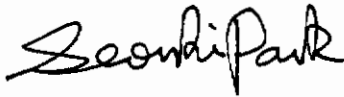
FOR THESE REASONS, THE CHAMBER

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- I. **GRANTS** the Motion in part;
- II. **ORDERS** the Prosecution make the Rape Statements available for inspection by the Defence in accordance with Rule 66(B) of the Rules; and
- III. **DENIES** the Motion in all other respects.

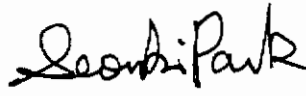
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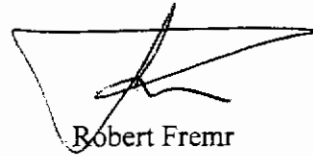


Lee Gacuiga Muthoga
Presiding Judge

[absent at the time
of signature]



Seon Ki Park
Judge



Robert Fremr
Judge