



UNITED NATIONS
NATIONS UNIES

ICTR-00-55C-T
15-02-2011
(5385-5382)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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AM

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 15 February 2011

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THE PROSECUTOR

v.

Ildephonse NIZEYIMANA

CASE NO. ICTR-00-55C-T

**DECISION ON MOTION TO STRIKE THE EVIDENCE OF DR. BINAIFER
NOWROJEE**

Rule 54 of the Rules of Procedure and Evidence

Office of the Prosecution:
Drew White
Kirsten Gray
Yasmine Chubin
Zahida Virani

Defence Counsel for Ildephonse Nizeyimana:
John Philpot
Cainnech Lussiaà-Berdou
Myriam Bouazdi

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INTRODUCTION

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1. On 7 February 2011 the Defence team of the Accused, Ildéphonse Nizeyimana, (“Defence” and “the Accused” respectively) filed a “Motion to Strike the Evidence of Dr. Binaifer Nowrojee” (“Motion”). The Motion concerns a report by Binaifer Nowrojee (“Nowrojee”);¹ the Chamber found the Report admissible under Rule 92*bis* of the Rules of Procedure and Evidence (“Rules”),² and subsequently ordered that a collection of statements concerning rapes (“Rape Statements”), which the Report is partially based on, be made available for inspection by the Defence.³ The Defence submits that it has been provided access to the Rape Statements only in redacted format, with some names removed.⁴ The Defence asserts that the Prosecution has no basis for withholding the redacted information,⁵ which it characterizes as necessary for its investigations with respect to the Report.⁶ The Defence further argues that the Prosecution’s “negligence” means that it no longer has time to conduct these investigations.⁷ It concludes that the Chamber should strike the admission of Nowrojee’s evidence,⁸ as its admission would compromise the Accused’s fundamental right to prepare his defence.⁹

2. On 11 February 2011, the Prosecution filed a response to the Motion,¹⁰ requesting that the Chamber dismiss the Motion.¹¹ More specifically, the Prosecution argues, *inter alia*, that in many cases the redacted information was provided in confidence, by individuals who did not consent to testify before the Tribunal;¹² that the redacted information is not material to the case;¹³ that Rule 66(B) of the Rules does not require “broad unredacted disclosure”;¹⁴ and

¹ Binaifer Nowrojee, *Sexual Violence Crimes During the Rwandan Genocide* (New York: Human Rights Watch, 2004) (“Report”).

² Decision on Prosecutor’s Motion to Admit into Evidence the Report of Binaifer Nowrojee, 1 November 2010 (“First 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.

³ Decision on Urgent Pre-Trial Motion for Disclosure Re Binaifer Nowrojee, 11 January 2011 (Second Nowrojee Decision), p. 4.

⁴ Motion, para. 5.

⁵ Motion, para. 6.

⁶ Motion, paras. 7-9.

⁷ Motion, para. 10.

⁸ Motion, p. 4.

⁹ Motion, para. 11.

¹⁰ Prosecution Response to Defence Motion to Strike the Evidence of Dr. Binaifer Nowrojee, filed on 11 February 2011 (“Response”).

¹¹ Response, paras. 31, 32.

¹² Response, paras. 15-18.

¹³ Response, paras. 19-22.

¹⁴ Response, para. 23. *See also* Response paras. 24-26.

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that the limited scope of the inspection rights enjoyed by the Defence was already decided in the Second Nowrojee Decision.¹⁵

DELIBERATIONS

3. 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”. In addition, Rule 54 of the Rules authorises it to “issue such orders [...] as may be necessary [...] for the preparation or conduct of the trial.”

4. The Chamber recalls its prior finding that [t]he Rape Statements [...] appear to be a significant basis of the Report’s analysis” and that given their “prominence [...] they could serve as an important source in preparing the cross-examination of Nowrojee”.¹⁶ In preparing for this cross-examination, the Chamber considers that the identity of individuals providing information underlying the Report could prove material. The Chamber further recalls that parties are expected to keep confidential materials designated as such, and that the use of closed session is available to the parties in order to protect confidential information.

5. The Chamber observes that the Defence has been in possession of the redacted Rape Statements since 31 January 2011,¹⁷ and should have initiated any investigations it meant to conduct at that time. The Chamber further observes that the Defence may apply to recall Nowrojee should it wish to conduct additional cross-examination after her currently scheduled appearance before the Chamber.¹⁸ In these circumstances, the Chamber is not convinced that the Defence will suffer any material harm from a relatively short delay in the disclosure of redacted information contained in the Rape Statements.

FOR THESE REASONS, THE CHAMBER

I. DENIES the Motion;

¹⁵ Response, paras. 27-30. The Chamber notes that this decision has been taken without awaiting a reply from the Defence in view of the urgency of providing clarity to the parties regarding the status of Nowrojee’s evidence.

¹⁶ Second Nowrojee Decision, para. 5, *citing* Report, paras. 33-45, 55.

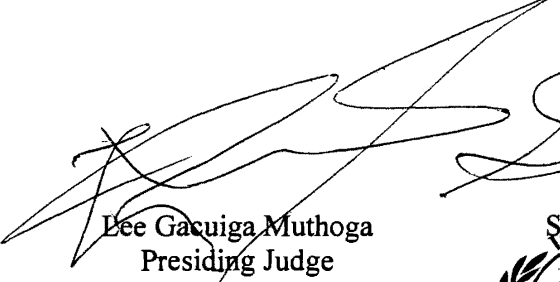
¹⁷ Motion, para. 5.

¹⁸ *Cf.* Rules 67(A)(ii), 85(A), and 90(F) of the Rules. *Cf. Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement, 7 July 2006, para. 253; *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 216.


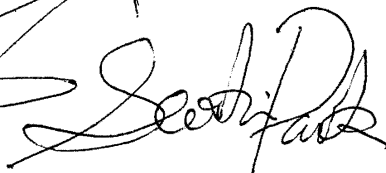
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- II. **ORDERS** that the Prosecution make an unredacted version of the Rape Statements available for inspection by the Defence in accordance with Rule 66(B) of the Rules by noon on 17 February 2011; and
- III. **REMINDS** the parties to take appropriate protective measures with respect to portions of the Rape Statements which are designated as confidential, as they should with all confidential materials.

Arusha, 15 February 2011, done in English.



Lee Gacuiga Muthoga
Presiding Judge



Robert Fremr
Judge