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ICTR-98-44-T
03-03-2009
(45298-45279)

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-T

IN TRIAL CHAMBER No. 3

Before: Judge Dennis C.M. Byron, Presiding
Judge G. Gustave Kam
Judge Vagn Joensen

Registrar: Mr. Adama Dieng

Date Filed: 3 March 2009

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS/ARCHIVES
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JOSEPH NZIRORERA'S SEVENTH RULE 66(B) MOTION:
SELECTIVE PROSECUTION DOCUMENTS

The Office of the Prosecutor:

Mr. Don Webster
Mr. Iain Morley
Ms. Gerda Visser
Mr. Saidou N'Dow

Defence Counsel:

Mr. Peter Robinson
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse

1. Joseph Nzirorera hereby moves, pursuant to Rule 66(B), for an order directing the prosecution to allow him to inspect the following items which are material to the preparation of his defence:

- (A) all documents from the prosecution disseminated to the government of Rwanda, United Nations, or any of its member States, non-governmental organizations, or any other ICTR organs, in which it has explained reasons for not prosecuting members of the RPF or RPA for crimes in Rwanda in 1994; and
- (B) all memoranda in the possession of the prosecution which includes reasons for not prosecuting members of the RPF or RPA for crimes in Rwanda in 1994.

2. In August 2008, Mr. Nzirorera sought inspection of these same documents to support a Motion to Dismiss on the grounds of selective prosecution.¹

3. The Trial Chamber rejected this motion on the grounds that since dismissal of an indictment is an *unavailable remedy* to a claim of selective prosecution, disclosure of documents establishing selective prosecution was not material to the defence of Mr. Nzirorera.²

4. Mr. Nzirorera now seeks disclosure of the documents on a different ground—as material to his defence that he should receive a reduction of sentence if convicted on the grounds that his rights under the ICTR Statute have been violated as a result of selective prosecution. He contends that such a reduction is an available, and appropriate remedy, for violation of his rights.

¹ *Prosecutor v. Karemera et al*, No. ICTR-98-44-T, *Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution Documents* (19 August 2008)

² *Prosecutor v. Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution Documents* (21 November 2008)

5. Mr. Nzirorera intends to present the evidence developed through this disclosure during the phase of the trial when he is given the opportunity to present evidence relevant to sentencing. Rule 85(A) provides that:

Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

- (i) evidence for the prosecution
- (ii) evidence for the defence
- (iii) Prosecution evidence in rebuttal
- (iv) Defence evidence in rejoinder
- (v) Evidence ordered by the Trial Chamber pursuant to Rule 98
- (vi) Any relevant information that may assist the Trial Chamber in determining an appropriate sentence, if the accused is found guilty on one or more of the charges in the indictment.

6. Disclosure of the information relevant to a claim of selective prosecution is necessary at this time so that Mr. Nzirorera can use the information in phase (vi) of the trial.

7. Article 20(1) of the Statute provides that “all persons shall be equal before the International Tribunal for Rwanda.” In the *Ndindiliyimana* case, the Trial Chamber held that selective prosecution, if made out, violates Article 20(1).³

8. The Appeals Chamber has held that “all violations demand a remedy”.⁴ While the Trial Chamber has held that dismissal of the indictment is not an available remedy for a violation of Article 20(1) through selective prosecution, Mr. Nzirorera may be entitled to the remedy of a reduction of sentence if convicted.

9. The ICTR has granted such a remedy in similar circumstances.

³ *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-I, *Decision on Urgent Oral Motion for a Stay of the Indictment or in the Alternative a Reference to the Security Council* (26 March 2004) at paras 23 and 24

⁴ *Barayagwiza v Prosecutor*, No. ICTR-97-19-AR72, *Decision on Prosecutor's Request for Review or Reconsideration* (31 March 2000) at para 74

10. In *Prosecutor v Barayagwiza*, the Appeals Chamber ordered a remedy to be fixed at the time of judgement for the violation of the accused's right to be charged promptly, right to prompt initial appearance and right to challenge the legality of his initial appearance.⁵

11. In *Kajelijeli v Prosecutor*, the Appeals Chamber ordered a sentence reduction for the violation of the accused's right to be informed of charges promptly, right to appear before a Judge after arrest, and right to prompt initial appearance.⁶

12. In *Prosecutor v Semanza*, the Appeals Chamber ordered a remedy to be fixed at the time of judgment for the violation of the accused's right to be informed promptly of the charges against him.⁷

13. These cases support the finding that, where an accused's rights are violated and dismissal of his indictment is a disproportionate remedy, a reduction of sentence may be ordered.

14. In support of his application for disclosure of information which is material to the selective prosecution issue, Mr. Nzirorera incorporates by reference the arguments presented in *Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution Documents*⁸ and *Reply Brief: Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution*.⁹

15. In addition, Mr. Nzirorera presents the following evidence of RPF crimes to demonstrate that persons similarly situated to him have not been prosecuted:

⁵ *Barayagwiza v Prosecutor*, No. ICTR-97-19-AR72, *Decision on Prosecutor's Request for Review or Reconsideration* (31 March 2000) at para 75.

⁶ *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para 320.

⁷ *Prosecutor v Semanza*, No. ICTR-97-20-A, *Judgement* (31 May 2000) at paras 127-30.

⁸ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution Documents* (19 August 2008)

⁹ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Reply Brief: Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution Documents* (25 August 2008)

16. Human Rights Watch has reported that during the course of combat and in the more lengthy process of establishing control throughout the country, RPF soldiers killed thousands of civilians. The exact number is estimated at between 25,000¹⁰ and 100,000 people.¹¹

17. In 1994, a UN Commission of Experts confirmed that serious violations of international criminal law and international humanitarian law had been committed by individuals on both sides of the conflict.¹²

18. In 1998, the Organisation for African Unity commissioned the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events. After its investigation, the panel published a report entitled *Rwanda: the Preventable Genocide*, which produced evidence implicating RPF officials in mass human rights violations.¹³

19. The report also included 'profoundly troubling accusations' of genocide made by former RPF Minister of Interior, Seth Sendashonga:

"Seth Sendashonga who became RPF Minister of the Interior and was therefore privy to the most sensitive secrets, was one of the two Hutu "political heavyweights" in the government. He was also responsible for liaison between these moderate Hutu and the RPF. Sendashonga apparently wrote a series of memoranda to Vice-President Kagame about the killings and disappearances and the resulting disaffection among those prepared to collaborate with the regime to form a new Rwanda based on national instead of ethnic loyalties the ostensible goal of the RPF. Along with the RPF's chairman, Sendashonga also met with the protesters and the two promised to convey their concerns to Kagame. The Vice-President, however, was allegedly unmoved.

It is necessary to know that Sendashonga made these accusations after he had fled

¹⁰ Alison Des Forges *Leave None to Tell the Story: Genocide in Rwanda* (Human Rights Watch, New York, 1999) at ch 20

¹¹ Gerard Prunier *The Rwanda Crisis: History of a Genocide 1959-1994 (revised edition)* (Burst and Company, London, 1997) at p 360 - 362

¹² *Final Report of the Commission of Experts established pursuant to Security Council resolution 935 GEN*, 49th sess, UN Doc S/1994/1405 (1994) at p 1

¹³ International Panel of Eminent Personalities, *Rwanda: the Preventable Genocide* (OAU, Kigali, 2000)

to exile in Nairobi in mid-1995 and had become a full- fledged opponent of the government. A first attempt to assassinate him was botched the following February, although his nephew was wounded; an armed Rwandan diplomat was arrested nearby. He was killed on the second try two years later. Although there is no concrete proof his murder was an attempt to shut him up, Sendashonga himself had no doubts. He knew too much, he told a British journalist about a "deliberate policy of ethnic cleansing," an attempt at "social engineering on a vast, murderous scale." The purpose was nothing less than "to even up the population figures. Look at the Rwandan equation. How can a minority tribe of one-plus million govern a country dominated by a tribe of enemies who outnumber them three to one? They want to make it Hutu 50 per cent, Tutsi 50 per cent. But to do that they will have to kill a lot of Hutu."¹⁴

20. In the face of the evidence presented here and elsewhere, the Tribunal has still not prosecuted a single RPF member or a single Tutsi.

21. The Prosecutor cannot credibly contend that he intends to prosecute RPF members or Tutsi at this stage of the life of the Tribunal, when the institution is in the process of shutting down.

22. The Prosecutor's inaction has only confirmed what former Prosecutor Carla del Ponte, and her spokesperson, Florence Hartmann, have stated. The decision not to prosecute RPF crimes is a political one, resulting from pressure brought against the ICTR Office of the Prosecutor by the United States and Rwanda.¹⁵

23. In her memoir, Carla Del Ponte refers to several meetings in May 2003, where she was put under enormous political pressure by Rwandan authorities and the United States Ambassador for War Crimes not to prosecute RPF crimes. When Del Ponte

¹⁴ International Panel of Eminent Personalities, *Rwanda: the Preventable Genocide* (OAU, Kigali, 2000) at para 22.22

¹⁵ Del Ponte, *Madame Prosecutor*, pp. 223-41; Hartmann, *Peace and Punishment*, pp 261-76. A copy of the relevant portions of Del Ponte's book is attached as Annex "A".

refused, Rwanda and the United States successfully lobbied the UN Security Council for her removal as Prosecutor of the ICTR.¹⁶

24. This motion seeks disclosure.. Transparency, not secrecy, is required when serious allegations of selective prosecution are made. As former ICTR Prosecutor Luc Cote notes:

It is not the political dimension of these decisions that is cause for concern. After all, is not the exercise of any discretionary power inherently a political act? What is really disturbing is their occult or secret nature. Their concealed practice based upon unknown criteria gives rise to criticism and casts doubt on their legitimacy and impartiality. Here we have to distinguish between the political dimensions of a decision from the political pressures exercised on a person who is making a decision. The former political component, which characterizes the exercise of prosecutorial discretion, may be acceptable while the latter is highly objectionable as it challenges the Independence not only of the Prosecutor but of the whole judicial institution. The international criminal tribunal, which has a mandate to examine armed conflicts of a political and/or ethnic nature where suspicion prevails and which needs to rapidly establish its credibility and independence, must exercise its powers in the most transparent way.

[...]

The case of the ICTR raised even more concerns insofar as all of those accused were from the same group (or associated with it), while crimes were committed on both sides of the conflict [...] Beyond the appearance of bias raised by this issue, that situation also challenges the image of independence of the Prosecutor.¹⁷

25. Absent disclosure and full consideration of the issue of selective prosecution, the legacy of the Tribunal will be stained by the perception that this is a victor's court. While the Prosecutor bears the responsibility for the charging decisions, the Trial Chamber has the ultimate responsibility to ensure that those decisions are not the product of political or ethnic criteria. The Trial Chamber can begin to exercise that responsibility

¹⁶ Del Ponte, *Madame Prosecutor*, pp. 231-4 and 236-9.

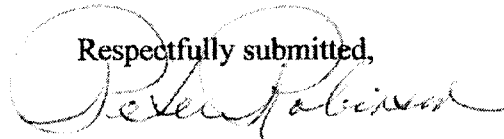
¹⁷ Luc Cote "Exercise of Prosecutorial Discretion in International Criminal Law" (2005) 3 JICL 162, at p 171 , 177

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by ordering disclosure of the documents which would reveal the reasons for the political and ethnic disparity among those charged.

26. It is therefore respectfully requested that the Trial Chamber order the prosecution to disclose the documents listed in paragraph 1 as material to the sentencing of Mr. Nzirorera if convicted.¹⁸

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera

¹⁸ The assistance of legal intern Sam Holden of New Zealand in the research and drafting of this motion is gratefully acknowledged.

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ANNEX "A"

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MADAME PROSECUTOR

*Confrontations with Humanity's Worst Criminals
and the Culture of Impunity*

A MEMOIR

CARLA DEL PONTE

with CHUCK SUDETIC

OTHER PRESS
NEW YORK



CONFRONTING KIGALI

2002 AND 2003

On April 2, 2002, six years after it had detained Théoneste Bagosora, the Rwanda tribunal opened his trial, the trial of accused *génocidaires* from the Rwandan military. This was the Rwanda tribunal's highest-profile media event, just as the Milošević trial was the Yugoslavia tribunal's. Colonel Bagosora had allegedly assumed de facto control of military and political decision making in Rwanda after surface-to-air missiles blew up the airplane carrying President Juvénal Habyarimana on the evening of April 6, 1994. The genocide began almost immediately. Unfortunately, on the day the trial opened, Bagosora and his three co-defendants refused to step outside their cells in protest, because their defense counsel had not received French translations of an expert report prepared for the prosecution and statements by prosecution witnesses. The judges allowed the prosecution to make its opening statement, but ruled out having the tribunal's security personnel bring Bagosora and the other three defendants to the dock.

"These four men are among the principal perpetrators of the genocide," I said in my prefatory remarks before the court. "Who is responsible for close to a million deaths in a few months? Who is responsible for all the other victims, mutilated, tortured, raped, left for dead?" The indictment alleged that Bagosora and the other commanders on trial were part of a group of senior Hutu officers who had, for several years, planned the systematic extermination of the Tutsis and moderate Hutus in order to secure the Hutu extremists' political dominance of the country. The indictment alleged that Bagosora was so opposed to peace talks with the Tutsi leadership in 1993 that he left one negotiating session saying he was returning to Rwanda to "prepare the apocalypse."

It would seem illogical that Rwanda's Tutsi leaders, the leaders of the community that had suffered the genocide, would want to stymie criminal