

ICTR-98-44-T  
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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: 19 August 2008

THE PROSECUTOR

v.

JOSEPH NZIRORERA

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

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The Office of the Prosecutor:

Mr. Don Webster  
Ms. Allayne Frankson-Wallace  
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. Rule 66(B) provides that:

At the request of the Defence, the Prosecutor shall, subject to Sub-Rule (C), permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

3. The requested items are material to the preparation of Mr. Nzirorera's defence because they can be used to support a Motion to Dismiss on the grounds of selective prosecution. Mr. Nzirorera can use the items to show that the failure to prosecute RPF or RPA members was not due to lack of evidence, but due to discrimination of the part of the prosecution.

4. The Appeals Chamber has held that the phrase "material to the preparation of the defence" in Rule 66(B) is broader than materials related to the prosecution's case-in-chief.<sup>1</sup> In support of that holding, the Appeals Chamber included the following footnote:

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<sup>1</sup> *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Rules of Procedure and Evidence* (25 September 2006) at para 8

In contrast, United States Federal Rule of Criminal Procedure 16(a)(1)(E) expressly states that the government's disclosure obligation is limited to items to be used in its "case-in-chief". The United States Supreme Court in turn seized on this language to similarly restrict the category "material to preparing the defense" as well to preparations to counter the government's case-in-chief. *See United States v. Armstrong*, 517 U.S. 456, 462 (1996). It is significant that the Tribunal's Rules omit this reference in favour of a more broad formulation.<sup>2</sup>

5. Therefore, at the ICTR, inspection may be ordered of items which are material to the preparation of a motion that challenges the prosecution's right to proceed against the accused.

6. In the *Armstrong* decision cited by the Appeals Chamber in *Bagosora*, the United States Supreme Court held that a defendant asserting a claim of selective prosecution would be entitled to disclosure from the prosecution if he could make a *prima facie* showing that similarly situated defendants could have been prosecuted but were not.<sup>3</sup>

7. While the decisions in United States national courts have focused on discrimination based upon race, in the international context discrimination based upon "national, political, ethnic, racial or religious grounds" is prohibited.<sup>4</sup> Therefore, discriminating in favor of the RPF would constitute impermissible selective prosecution on political grounds.

8. Mr. Nzirorera can make such a showing in this case. Since its inception, the Tribunal has publicly indicted 78 persons—all for crimes against Tutsis or opponents of the Habyarimana regime. 77 of them have been of Hutu ethnicity.<sup>5</sup> It has not prosecuted a single RPF member or a single Tutsi.

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<sup>2</sup> Fn. 30

<sup>3</sup> *United States v. Armstrong*, 517 U.S. 456, 469 (1996)

<sup>4</sup> Article 3 of the ICTR Statute

<sup>5</sup> The other is Georges Ruggiu, a Belgian. Information obtained from [www.ictor.org](http://www.ictor.org).

9. It is undisputed that members of the RPF, RPA, and Tutsi ethnic group committed crimes within the jurisdiction of this Tribunal during 1994. The prosecution's three principal expert witnesses, Alison Des Forges, Andre Guichaoua, and Filip Reyntjens, have detailed the widespread atrocities committed by the RPA when it invaded Rwanda on 6 April 1994.

10. In her book, *Leave None to Tell the Story*, Dr. Des Forges details the crimes committed by the RPA. She summarized her findings as follows:

“In their drive for military victory and a halt to the genocide, the RPF killed thousands, including noncombatants as well as government troops and members of the militia. As RPF soldiers sought to establish their control over the local population, they also killed civilians in numerous summary executions and in massacres.”

11. Similarly, Professor Reyntjens has produced a report entitled *Disturbing Developments in Rwanda in October 1994* in which he provided first-hand evidence of crimes committed by the RPF when they took control of Rwanda.

12. In lower court cases since *Armstrong*, courts in the United States have granted disclosure on a showing less than that made in this case.

13. In *United States v Jones*,<sup>6</sup> the Sixth Circuit Court of Appeals held that disclosure of data relating to prosecutorial decision making was required where black defendants were prosecuted, but white defendants in the same alleged conspiracy were not.

14. In *United States v Tuitt*,<sup>7</sup> the United States District Court for the District of Massachusetts ordered disclosure upon a showing that in four counties in the State, black

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<sup>6</sup> 159 F.3d 969 (6th Cir. 1998)

<sup>7</sup> 1999 WL 791927 (D.Mass. 1999)

defendants were more often prosecuted in federal court for crack cocaine violations than white defendants.

15. In *United States v Glover*,<sup>8</sup> the United States District Court for Kansas ordered disclosure upon a showing that the death penalty was sought for a greater number of black defendants than for white defendants.

16. These cases support the principle that where an accused can show that persons from a different group who appear to be similarly situated are not prosecuted, he is entitled to disclosure of information from the prosecution which would reveal the reason for the disparity. He can then use this information in a Motion to Dismiss for Selective Prosecution if warranted.

17. Mr. Nzirorera made such a motion in 2004.<sup>9</sup> At that time, the prosecution opposed the motion, claiming that its investigation of RPF was ongoing.<sup>10</sup> The Trial Chamber denied the motion, holding that Mr. Nzirorera had failed to establish that the prosecutor's motives for not prosecuting RPF or RPA crimes up until that time were discriminatory in nature.<sup>11</sup>

18. In June 2008, the prosecution appears to have finally acknowledged to the United Nations Security Council that it will not be prosecuting any RPF or RPA crimes at the Tribunal. The prosecutor announced that the Rwandan government had agreed to prosecute crimes committed in Kabgayi. When addressing the completion strategy, the

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<sup>8</sup> 43 F. Supp. 2d 1217 (D. Kan. 1999)

<sup>9</sup> *Motion to Dismiss for Selective Prosecution* (24 March 2004)

<sup>10</sup> *Prosecutor's Response to Nzirorera's Motion to Dismiss for Selective Prosecution* (26 March 2004)

<sup>11</sup> *Decision on Joseph Nzirorera's Motion to Dismiss for Selective Prosecution* (22 March 2005) at para. 11

prosecution has not projected that any additional time will be needed for prosecution of RPF cases at the Tribunal.<sup>12</sup>

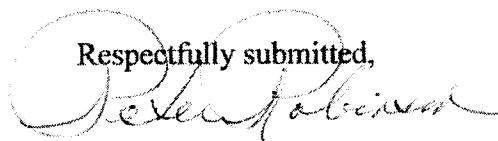
19. This action is consistent with comments made by former Prosecutor Carla del Ponte, and her spokesperson, Florence Hartmann, who have described the pressure brought against the ICTR Office of the Prosecutor by the United States and Rwanda not to prosecute RPF or RPA crimes.<sup>13</sup>

20. After the address of the Prosecutor to the United Nations Security Council, Mr. Nzirorera requested the prosecution to provide disclosure of material which would enable him to determine the prosecution's reasons for not prosecuting RPF and RPA members.<sup>14</sup> The prosecution has declined to do so voluntarily.<sup>15</sup>

21. Therefore, this motion is now necessary to compel the prosecution to make the items available for inspection.

22. The victor's justice being practiced at the ICTR will be a stain on the legacy of this institution forever. If there are legitimate reasons for not prosecuting RPF crimes, the prosecution should have no reason to hide them. The Trial Chamber is respectfully requested to order the requested inspection.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera

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<sup>12</sup> Statement by Justice Hassan B. Jallow to the United Nations Security Council (4 June 2008)

<sup>13</sup> Hartmann, *Peace and Punishment*, pp 261-76 (English translation attached as Annex "A")

<sup>14</sup> The letter to the prosecution is attached as Annex "B".

<sup>15</sup> The prosecution's response is attached as Annex "C". Follow-up e-mails are attached as Annex "D".

**ANNEX "A"**

FLORENCE HARTMANN

**PEACE AND PUNISHMENT**

**THE SECRET CONFLICT  
BETWEEN POLITICS AND  
INTERNATIONAL JUSTICE**

Flammarion

Extracts translated into English from the original French  
 Numbers on the left hand side of the page refer to the original pagination in the French  
 text

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 As for the ICTR, American interests were different, as was the environment. The United States wanted to ensure it had the support of its Rwandan allies for closing down the Tribunal in Arusha, even though it was far from having finished judging the high ups of the former Hutu administration, which instigated the genocide of 1994 in which nearly a million Tutsis and moderate Hutu perished in a hundred days. When it was made known, in November 2001, that the Tribunal would soon be closing, the Rwandan authorities protested, considering that the idea was premature. But President Paul Kagame was not difficult to convince. Carla Del Ponte, in December 1999, had opened investigations into Tutsi officers of the army of the Rwandan Patriotic Front (RPF) under Kagame's command. These investigations, known as "special investigations", did not relate to the genocide of Tutsis, the primary mandate of the ICTR, but to the massacres of the genocidaires and ordinary Hutu civilians who fled Rwanda in large numbers before the advance of the RPF. By virtue of their military victory, which put an end to the genocide, the President-General reckoned that his men were not to be held accountable to the justice of an international community which had allowed the Tutsis to be massacred. Prosper promised that the closing of the ICTR would put an end to these disturbing investigations. It would make it possible, at the same time, to short circuit the inclination of Judge Jean-Louis Bruguiere to have President Kagame indicted by the ICTR. Since 1998, the French judge had been in charge of the inquiry into the attack on the plane of Rwandan president Juvénal Habyarimana, which was shot down on

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April 6, 1994, a few hours before the genocide began. His inquiry was initiated by the families of the three French members of the crew who perished together with the Rwandan president and his Burundian counterpart. The Judge was convinced that Paul Kagame was the instigator of this attack. However, even though his investigations had reached the conclusion that the current Rwandan Président was involved, the immunity granted in France to Heads of State in situ prevented any prosecution there. Rather he would have to ask the UN to make the ICTR, or its prosecutor, use their power to begin a prosecution<sup>16</sup>. In November 2001, the Americans were interested in Judge Bruguiere's progress at the ICTR and questioned Del Ponte on what she knew about Kagame. But

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<sup>16</sup> On 17 November 2006 Judge Bruguiere officially delivered the conclusions of his inquiry, which had finished in 2004. He named Paul Kagame as having presumptively ordered the attack which was the event which caused the genocide to begin. Nine international arrest warrants were issued for "complicity in assassination" against those close to the Rwandan president, among them James Kabarebe, Chief of the General Staff of the Rwandan Defence Forces and Charles Kayonga, Chief of the General Staff of the Army. Rwanda immediately broke off diplomatic relations with France, accusing it of genocide denial and of wishing to hide its role in training Rwandan soldiers implicated in the massacres. France was an ally of the Hutu regime which prepared and put into action the genocide of 1994. On 19 April 2007 Rwanda began an action against France before the International Court of Justice (ICJ), accusing it of infringing international law in seeking to prosecute President Paul Kagame and some of those close to him.

they did not at this time make known their opposition to any proceedings against their ally in the area of the Great Lakes, or against his entourage. For the time being, the American strategy to precipitate the closure of the ICTR consisted in exerting pressures on African governments to give up the Rwandans who had fled and taken refuge on their territory. These steps were offered as proof of American support for the two International Tribunals and led to three arrests out of the twenty-two Rwandans indicted in their absence.

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The International Tribunals were by now perceived as providing justice at too high a price, without quantifiable impact and as having a destabilising effect both in Rwanda and in ex-Yugoslavia: they were simply obstacles to the management of the post-war period. Americans and Europeans intended to allow the Tribunals to continue their case work until 2008 but instructed the prosecution to finish its investigations by the end of 2004. And, imposing their authority, they voted budgetary cuts which mainly affected the prosecution. With her back to the wall, Del Ponte had to reduce her programme of prosecutions. Standing at one hundred and fifty suspects during 2000, the list was reduced by the end of 2001 to a hundred and eight priority suspects. It would still need until 2015 to try them. At the end of 2002, the list was divided into two categories. On one side, the cases which could not be tried elsewhere than at the International Tribunals; on the other, those cases which could be given up to local jurisdictions. The teams concentrated, from this time on, on the first list. The investigations concerning around fifty of suspects on the second list were put on ice. If time allowed, they would be worked on further before being transmitted to the ex-Yugoslav prosecutors. Del Ponte did not want to give up them because, for the moment, the local courts were not able to guarantee credible justice. Through fear of deterring co-operation, she did not publicly announce the drastic cuts which she had just made. On October 30, 2002, Del Ponte endeavoured to convince the Security Council not to let the completion strategy operate to the detriment of justice. She argued that if it ordered the prosecution to narrow the focus of its prosecutions, and the judges to prepare transfers, it must at the same time equip Bosnia-Herzégovina with a jurisdiction capable of taking over. It must also exert the pressure necessary to obtain the arrest of fugitives and gain access to the files and the witnesses that Belgrade and also Zagreb refused to give. "It is imperative that the highly placed civilians in power and soldiers are arrested without delay and that a special Court is created, since without this the time limits can not be complied with... Only in these circumstances will the International Tribunal be able to plan to conclude its mission with the certainty of having rendered justice", explained Del Ponte. The Security Council had been formally requested, on October 10, by the President of the International Tribunal to intervene in the lack of co-operation by Belgrade. The Security Council refused to pass a resolution requiring Serbia to arrest the fugitives and to stop blocking the work of international justice. Meanwhile Mladic remained in Belgrade, under the protection of the army, with the complicity of the Head of the State, Kostunica. Zoran Djindjic, the Serbian Prime Minister, did not have sufficient power to be able to arrest him. A mandatory resolution of the Security Council could have helped him to convince the Serb political community. However Pierre Richard Prosper reassured Del Ponte: American financial assistance, granted each year in Belgrade, was conditional on the arrest of the

fugitives: it would not be given if Mladic was not arrested before spring 2003. He did not keep his promise.

Prosper remained deaf to the recommendations of the International Tribunal. At the beginning of 2003, he made it more obvious than ever that the Americans wished to subject the court to an entirely political management of its exit strategy. At the time of a visit in Belgrade in January, he proposed to the authorities that they should arrest four of the twenty fugitives living in Serbia: Karadzic, Mladic as well as Slijivancanin and Radic, wanted in connection with the Vukovar affair. It promised them, in return, the suspension of the investigations in progress which were likely to put in the dock a good part of the Serbian government at the time of the war in Bosnia and in Kosovo, of whom certain members were still in power. The Belgrade press took note straight away of this disengagement with the International Tribunal by the American superpower. Most of the papers were delighted and believed they could see in the American move the sign of a desire not to allow the International Tribunal to govern the destiny of ex-Yugoslavia and bind the hands of the politicians. Del Ponte asked the Americans to state that this was not the case. A few weeks later Prosper complied, during a press conference at The Hague. But in fact he continued his secret negotiations with the purpose of deterring any co-operation by the local governments with the International Tribunal, who were aware that their dilatory manoeuvres had every chance of paying off.

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The Europeans evinced indifference to this meddling which was holding up to ridicule the principle of independent justice which they had previously defended. Del Ponte had told them in mid 2003: "I have reached a standstill. There are nineteen fugitives in Serbia, among them Karadzic and Mladic, but nobody wants to hear about the International Tribunal any more. As if I should close the doors after the Milosevic case [the end of which was then envisaged by the beginning of 2005]. "But the Europeans only want to talk about one thing: the courts are expensive and "do not produce a return on investment". Some go as far as to say: "They are worth neither the time nor the money which is devoted to them." A side effect of the ICC was to drive the International Tribunal out of the Europeans' concerns; they failed to understand that this abandonment suited the American administration's crusade against international justice. The great powers from now on had no further scruples in taking the decision to close the court. Informal discussions within the Security Council for the adoption of a resolution formalizing the calendar of closure of the two International Tribunals started in spring 2003. The year 2003 was to be the high point of international justice's difficulties in maintaining its principles in the face of political powerplay. The debates on Iraq had just divided the members of the Security Council. The glasshouse was in turmoil. The International Tribunal business was sorted out, and no delay was merited on that subject. The preparation of the resolution was a simple formality. At least for France, Russia and China. Although fixated by the war in Iraq, the United States and Great Britain saw the opportunity to kill two birds with one stone. In mid-May 2003, Prosper forced a meeting between the Rwandan leaders and the prosecutor of the International Tribunals Carla del Ponte. For a year relations between Kigali and Arusha had been at a low point. In the summer of 2002, the Rwandan government had, for several weeks, paralysed the genocide trials by preventing the arrival of the witness-victims in Arusha. Del Ponte