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ICTR-98-44-T  
20-10-2008  
(38044-38021)  
International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda

38044  
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IN TRIAL CHAMBER III

Before: Hon. Dennis C. M. Byron, Presiding  
Hon. Gberdao Gustave Kam  
Hon. Vagn Joensen

Registrar: Mr. Adama Dieng

Date Filed: 20 October 2008

**The PROSECUTOR**

v.

**Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA**

Case No. ICTR-98-44-T

JUDICIAL RECORDS SECTION  
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**Prosecutor's Response to Joseph Nzirorera's  
Motion for Remedial and Punitive Measures – Rule 66(B) – Mudahinyuka**

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*For the Prosecutor:*

Mr. Don Webster  
Ms. Alayne Frankson-Wallace  
Mr. Iain Morley  
Mr. Saidou N'Dow  
Ms. Gerda Visser  
Ms. Sunkarie Ballah-Conteh  
Mr. Takeh Sendze

*For the Accused:*

Ms. Dior Diagne and Mr. Moussa Félix Sow for *Édouard Karemera*  
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for *Mathieu Ngirumpatse*  
Mr. Peter Robinson and Patrick Nimy Mayidika Ngimbi for *Joseph Nzirorera*

1. The Prosecutor files this response to Nzirorera's 19<sup>th</sup> *Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Jean-Marie-Vianney Mudahinyuka*, filed 6 October 2008.

2. The Prosecution submits that the motion is unfounded and should be dismissed.

3. As Nzirorera rightfully asserts in his present motion, this Chamber denied his previous *Motion to Compel Inspection and Disclosure* of 13 July 2005 wherein he sought "reports of all information obtained from Jean Marie Vianney Mudahinyuka".<sup>1</sup> In that decision this Chamber held that:

"The Defence has made a bare assertion that the Prosecution has obtained a statement from Jean-Marie Vianney Mudahinyuka. The prosecution has specifically denied its possession of such a statement. No evidence was adduced to support the assertion; as conceded by the Defence there is no basis to make an order in this regard. There is no basis to make such an order."<sup>2</sup>

4. Now, after having spoken directly with Mudahinyuka on 27 September 2008, Nzirorera renews his motion and demands sanctions against the Prosecution. However, the Prosecution once again denies having recorded a statement or any Investigator's Note from Mudahinyuka.

5. Admittedly the Prosecution met with Mudahinyuka on three occasions: (i) in 2004, when former Chief of Prosecutions Stephen Rapp met with him in Chicago in the presence of his defence counsel; (ii) in July 2006, after this Chamber decided Nzirorera's initial motion, when OTP investigators Jacques Baillergeon and Rejean Tremblay met with him in the presence of his defence counsel in Pennsylvania; and (iii) in late 2006 or early 2007, when STA Jonathan Moses met with him in the presence of his defence counsel in Pennsylvania.

6. The undersigned senior prosecution counsel is reliably informed as follows: In every instance, Mudahinyuka was represented by defence counsel. All three meetings were in the nature of a "proffer" of information. The objective was to explore matters of cooperation with the Prosecution and the possibility of entering into a plea agreement. When Stephen Rapp first met with Mudahinyuka in 2004, Mudahinyuka's defense counsel explicitly warned him against taking notes of their conversation. When OTP investigators Baillergeon and Tremblay met with Mudahinyuka in July 2006 Mudahinyuka avoided substantive comments in

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<sup>1</sup> *Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records* (14 September 2005)

<sup>2</sup> *Ibid*, at para 16.

response to their inquiries and simply indicated whether or not he would be able to provide information about the matters that interested the Prosecution. When STA Moses met with Mudahinyuka a few months thereafter, it quickly became apparent that Mudahinyuka had no serious interest in providing information to the Prosecution and the interview was abandoned. The undersigned senior prosecution counsel has been informed by the aforementioned colleagues that Mudahinyuka did not provide exculpatory information during their meetings with him. Appended hereto in annexure is e-mail correspondence from each of the OTP staff-members who met with Mudahinyuka which clarifies that they did not document Mudahinyuka's responses to their inquiries.<sup>3</sup>

7. Investigator Jacques Baillergeon filed a mission report at the conclusion of a lengthy mission in July 2008 which specifically mentions his encounter with Mudahinyuka in Pennsylvania on 11, 12 and 13 July 2006. In the interest of absolute transparency, excerpts from that mission report are also appended hereto in annexure.<sup>4</sup> While the topics of inquiry are documented in the mission report, Mudahinyuka's responses are not. This is because the inquiry was simply intended to explore how Mudahinyuka could be of assistance in OTP investigations; the interview was not intended to elicit his accounts of events as Mudahinyuka insisted upon concluding an agreement with the OTP and clarifying how his cooperation would affect his immigration status in the United States before he would provide substantive information. The mission report did not summarize Mudahinyuka's comments.

8. The Prosecution maintains there was no violation of Rule 66(B) or Rule 68(A). Firstly, there was no record of any conversation with Mudahinyuka before 2006. This Chamber's decision of 14 September 2005 was appropriate when it was rendered because the only contact that the Prosecution had had with Mudahinyuka at that time was Stephen Rapp's fifteen minute conversation, which was never documented. The Prosecution trial team has been informed by the persons who investigated Jean Marie Vianney Mudahinyuka, that Mudahinyuka's comments in the two subsequent encounters with the OTP were tentative, did not include exculpatory information, and were never documented in a witness statement or Investigator's Note. The third mission that was planned for STA Jonathan Moses was intended to last several weeks so that a detailed statement could be recorded. That did not happen because, apparently, Mudahinyuka was not satisfied with the arrangements that were proposed and no statement was taken. Secondly, the Prosecution has never refused to provide inspection under Rule 66(B), which is ongoing.

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<sup>3</sup> See Annexes A1, A2, B1, B2 and C, appended hereto.

<sup>4</sup> See Annex D, appended hereto.

**The issue of timing and completion of inspection**

9. After much prodding from the Chamber, Nzirorera filed *ex parte* a list of 241 prospective defence witnesses on 2 June 2008, which this Chamber subsequently ordered the Registry to disclose to the Prosecution on 30 July 2008. Nzirorera's motion for inspection under Rule 66(B) was filed the very next day, 31 July 2008. The Prosecution did not oppose that motion, which this Chamber then granted on 22 August 2008. Since then, Nzirorera made a *Fifth Rule 73ter Filing* on 8 September 2008, wherein he dropped 26 witnesses, but then added 13 new witnesses and substituted 10 new witnesses to give evidence on similar facts. At last count, Nzirorera final witness list for the trial consists of 226 witnesses. The Prosecution has undertaken to provide inspection for these witnesses and has made incremental, continuing disclosure of copies of their "statements, immigration records and judicial records". The Prosecution has never maintained that this inspection was complete. Nzirorera is simply mistaken when he infers, at paragraph 24 of his current motion, that the inspection was completed on 10 September 2008 and that the Prosecution has violated Rule 66(B) because no statement from Mudahinyuka was produced. Although the Prosecution disclosed copies of a Rwandan arrest warrant dated 23 April 2004 for Mudahinyuka on 9 September 2008, there was no representation that inspection under Rule 66(B) was complete. Indeed, searches that will lead to inspection are ongoing. It is patently unreasonable to expect that thorough searches for 226 witnesses could be completed in a mere six weeks. The parties, and the Trial Chamber, should be mindful that while the Prosecution endeavors to assist the Accused in the preparation of their cases, it must also attempt to prepare the Prosecution case and must apportion its finite, and declining, material and human resources for disparate, and often competing, tasks. Given the long delays from the Defence in providing identifying information for their prospective witnesses, it is unreasonable to expect the Prosecution to search through its voluminous database for the excessive number of witnesses that are currently listed in just a few weeks.

10. The Prosecution maintains that it has complied with Rule 66(B) for Mudahinyuka. No statement or record of Mudahinyuka's statements was offered for inspection because none was taken. Should this Chamber view the excerpts from the September 2006 mission report filed by OTP investigator Jacques Baillergeon as falling within the ambit of Rule 66(B), the current filing should satisfy the parties. It bears noting that Mudahinyuka was represented by

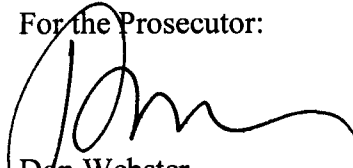
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defence counsel during his conversations with the ICTR Prosecutor. Presumably, Mudahinyuka would have also informed Counsel Robinson that he benefited from legal counsel who were present to protect his interests when he spoke to the ICTR Prosecutor, which may not have been the case when Mr. Robinson spoke to him on behalf of Joseph Nzirorera.

WHEREFORE, the Prosecutor prays that Nzirorera's motion will be dismissed in its entirety.

Dated in Arusha, this 20<sup>th</sup> day of October 2008.

For the Prosecutor:



Don Webster  
Senior Trial Attorney

# ANNEXURES

A 1  
38038

**Don Webster**  
10/15/2008 03:15 PM

To:  
cc:  
Subject: Mission in Canada and Robinson letter

----- Forwarded by Don Webster/ICTR/UNO on 10/15/2008 03:17 PM -----



**Stephen Rapp**  
07/05/2005 10:03 AM

To: Don Webster/ICTR/UNO@UNICTR  
cc:  
Subject: Mission in Canada and Robinson letter

Dear Don,

\*\*\*\*\* [unrelated matter]

Regarding the letter from Robinson (another copy of which I have attached), I have drafted a possible response. I have shared my draft with Zuzu's USA attorney to make sure that it was in accord with his recollection, and have received no response. What do you think?.

SR



robinson.letter.docjmvvm.letter.doc



**International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda**



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**OFFICE OF THE PROSECUTOR  
BUREAU DU PROCUREUR**

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4 July 2005

Mr. Don Webster  
Senior Trial Attorney  
Office of the Prosecutor  
International Criminal Tribunal for Rwanda  
Arusha, Tanzania

Re: Letter of 27 June 2005 from Peter Robinson, Defense Attorney  
For Joseph Nzirorera

Dear Don:

I have received an electronic copy of a letter dated 27 June 2005 from Peter Robinson, Defense Attorney for Joseph Nzirorera, asking for any information subject to disclosure that I may have been obtained from a meeting with Jean-Marie-Vianney Mudahinyuka. I can provide the following professional statement:

I met Mr. Mudahinyuka for approximately one-half hour on 16 February 2005 in the presence of his attorney, Roger Dusberger, at the federal detention facility in Chicago, Illinois, USA. Mr. Dusberger is the attorney appointed to represent Mr. Mudahinyuka under the U.S. Criminal Justice Act on U.S. immigration and assault charges. The meeting was conducted with the cooperation of the U.S. Attorney's Office for the Northern District of Illinois.

At the request of Mr. Dusberger no recording or notes were taken at the meeting. It was also agreed that we would not discuss events that took place after 6 April 1994. I did discuss with Mr. Mudahinyuka his activities before 6 April 1994, and the possibility that he would be willing to provide a full statement regarding his knowledge of those events in Rwanda that are within the jurisdiction of the International Criminal Tribunal for Rwanda (ICTR). I have had no other meeting with Mr. Mudahjnyuka and he has provided no statement to myself or any person working with the Office of Prosecutor of the ICTR.

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Nothing that Mr. Mudahinyuka said to me during our brief meeting constituted information subject to disclosure under ICTR Rule 68.

Best regards.

Sincerely,

Stephen J. Rapp  
Chief of Prosecutions

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Rejean Tremblay  
10/15/2008 02:46 PM

To: Don Webster/ICTR/UNO@UNICTR  
cc: dxyz50@googlemail.com  
Subject: Re: Defence Motion re-Zuzu interview

Dear Don,  
According with your request the following is my answer to your questions.

Reply to your questions:

1. Yes, during a mission to Pennsylvania, USA in July 2006, I met Zuzu, for two (2) days in the presence of his lawyers. However, I didn't meet Zuzu in 2007.

2. No statements or investigator's notes were taken.

Best Regards.  
Don Webster

Don Webster  
10/14/2008 06:06 PM

To: dxyz50@googlemail.com, Rejean Tremblay/ICTR/UNO@UNICTR  
cc:  
Subject: Defence Motion re-Zuzu interview

Dear Jacques Baillergeon and Yogi Tremblay

Peter Robinson, the Defence Counsel for Joseph Nzirorera, met with Zuzu a few weeks ago and has filed a motion alleging that the OTP violated its disclosure obligations by failing to provide copies of any statements or internal memoranda that include Zuzu's responses to the questions you put to him.

**The relevant portion of Robinson's motion is excised below:**

9. On 27 September 2008, lead counsel for Mr. Nzirorera interviewed Jean-Marie Vianney Mudahinyuka. Mr. Mudahinyuka advised that he had been interviewed by representatives of the ICTR Office of the Prosecutor on several occasions and believed that some of his interviews had been recorded.

10. Mr. Mudahinyuka advised that while held at the Metropolitan Corrections Center in Chicago, Illinois, USA in 2004, he was interviewed by Stephen Rapp. He answered numerous questions about the 1994 Rwandan events, the Interahamwe, and the acts and conduct of Joseph Nzirorera, Mathieu Ngirumpatse, and Edouard Karemera. He said that at the conclusion of the interview, Mr. Rapp told him that his information was not of any value to the prosecution.

11. Mr. Mudahinyuka advised that he was contacted by the Office of the Prosecutor a

second time in 2007 while he was incarcerated at the Federal Correctional Institution at Allenwood, Pennsylvania. This time he was interviewed by two investigators, who he believed were Canadians. He did not recall their names.

**12. During this interview, which he believed was recorded, and took place over the course of two full days, Mudahinyuka answered their questions about the Rwandan events including the Interahamwe, MRND, and the three accused, as well as information concerning Prefet Tharcisse Renzaho and Georges Rutaganda. Mudahinyuka was a close friend of Rutaganda and was with him during much of the time.**

13. Mr. Mudahinyuka advised that the two investigators returned about three months later with two other persons who were lawyers with the Office of the Prosecutor. He recalled that one was named Jonathan and was from New Zealand. He believes the other may have been from Somalia. He was then interviewed again by the four individuals and they also offered him a plea agreement. The interview took place over two or three days, and he ultimately told them that he was not guilty of killing anyone and therefore could not plead guilty.

**14. Among the information that Mr. Mudahinyuka said he provided to the representatives of the Office of the Prosecutor was the fact that the Interahamwe was never formed for the purpose of killing Tutsis, that the killing of Tutsis was never discussed in Interahamwe committee meetings, that he knew of no military training or distribution of weapons to Interahamwe prior to the death of President Habyarimana, that the Interahamwe never compiled lists of Tutsis, that he had attended MRND rallies and never heard any of the accused call for the extermination of Tutsis, that Georges Rutaganda never distributed weapons and in fact saved many Tutsis after the death of the President, that he knew of no orders by the MRND to establish roadblocks or kill Tutsis, and that he**

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**had no contact with any of the accused after the death of the President.**

**Would you kindly reflect on this matter a bit and comment in regard to the following issues:**

- 1.  
Did you meet with Zuzu over a 2-day period? In 2007?**
- 2.  
Did you make a record of what Zuzu said to you? If you have any statement or investigator's notes that document what Zuzu said to you, kindly provide copies to me.**

**Your response to this inquiry will accompany my response to Nzirorera's motion, which must be filed by Friday 17 October 2008. Your prompt assistance in this matter will be greatly appreciated.**

Thanks and regards

*This Message has been scanned by Symantec Antivirus, EDP-UNICTR*