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: 9 May 2007

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JOSEPH NZIRORERA'S RESPONSE TO PROSECUTION MOTION TO ADMIT EXHIBITS FROM THE BAR TABLE

The Office of the Prosecutor:
Mr. Don Webster
Ms. Allayne Frankson-Wallace
Mr. Iain Morley
Ms. Gerta 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 respectfully opposes the *Prosecutor's Motion for Admission of Certain Materials Under Rule 89(C) of the Rules of Procedure and Evidence* (27 April 2007).[1] Mr. Nzirorera contends that this is not a routine matter within the meaning of Rule 15 *bis* (F) and that the motion should be decided by the full Trial Chamber when constituted.

Annex A—UNAMIR documents

2. The admission of UNAMIR documents is governed by the Trial Chamber's *Decision on Admission of UNAMIR Documents* (21 November 2006). The Trial Chamber held that:

> "The Chamber is also of the view that UNAMIR documents could be admitted without being tendered during the examination of a witness, provided that the moving party shows that for each document, its relevancy and probative value."[2]

3. The prosecution seeks admission of 50 UNAMIR documents. In Annex A to its motion, it has provided a generic showing of relevancy and probative value.

4. Documents 20, 23-28, and 30 are said to simply "reflect the views of United Nations officials as to the political and military context of Rwanda in 1994."

5. The showing of relevance and probative value for the other UNAMIR documents contain this same refrain, with an additional phrase as follows:

--Documents 1,2,4,5, and 7: "government's stance concerning militia activities."

--Documents 21, 22, 31-38, 42-44, 46, and 48: "militia activities in government controlled areas"

--Documents 9-19, 39-41, 49-50: "collaboration between militia and RGF"

[1] The documents filed with the motion were not received until 7 May 2007. Therefore this response is timely.
[2] Para. 11

--Documents 3,6,8,29,45, and 47 contain a combination of two of these stock phrases

6. This paltry effort to demonstrate the relevance and probative value of the documents contrasts sharply with the showing made for the admission of the UNAMIR reports as exhibits on behalf of Mr. Nzirorera. Each document was shown, during the examination of Witness ALG, to relate directly to the assertions made by the witness as to specific events taking place in Kigali during the genocide.[3]

7. A typical example was the following exchange:

"Q Now, Witness ALG, turning to the 19th of April 1994, I am referring now to document No. 15 in my group of exhibits, and this is a UNAMIR daily situation report of the 19th of April, and it indicates in paragraph 2 that the government is yet to be in full control of the situation. And in paragraph 3, they report that the RPF troops continue to infiltrate into the city of Kigali, and that the troops carried out rescue operations in the area of Nyamirambo overnight to extricate over a hundred of their sympathisers. And so I want to ask you, first of all, do you agree that as of the 19th of April, which happens to be the day of President Sindikubwabo's speech in Butare, that the government was yet to be in full control of the situation in Rwanda?

A. Yes, that is true."[4]

8. Another example was the following exchange:

"Q. Now, on 5th of May 1994 -- and I am going to refer to a cable that was sent by General Dallaire to Kofi Annan, which is number 26 in my package of material, and General Dallaire said that there is a third element or force that has significantly affected the overall situation behind the RGF lines and it has been mixing with the general population, and it seems to have its base in the political militia, the youth wings and the local quota self-defence groups. And he describes that these groups have demonstrated fanatical and ruthless actions and quite often are under the influence of alcohol and drugs while at the barricades or while roving the streets and hillsides, and that these people have been the principal authors as far as it can be ascertained of the destruction -- of the terrible atrocities and destruction throughout most of the country. And he goes on to say

[3] See Transcript of 2 November 2006 @ pp. 48-49; 51-52; 56; 59-60; Transcript of 6 November 2006 @ 27, 32-34; 38; 42; 57-59; 67-68; 73-75; Transcript of 7 November 2006 @ 32-33

[4] Transcript of 6 November 2006 @ 57

> that each individual cell seems to have a self-appointed leader who does not necessarily obey or take orders from anyone in the normal chain of authority. And he goes on to say that even if a ceasefire were brought into effect, it might be difficult to control these groups. Does that appear to you to be an accurate assessment of the situation in Kigali in early May 1994?
>
> A. Counsel, that was the situation that prevailed at that time."[5]

9. For each of the UNAMIR documents offered by Mr. Nzirorera, the Trial Chamber was directed to the particular portion of the report, it was simultaneously translated into French by the interpreters, and its relevance and probative value to a particular assertion being made by the defence was apparent.

10. The prosecution's motion accomplishes none of those things. Each UNAMIR document is several pages in length and encompasses a myriad of topics from political assessments to UNAMIR supplies. The prosecution has failed to point to that portion of the document which makes the relevant point that the prosecution wishes to establish. This leaves the parties and the Trial Chamber in the position of having to guess or speculate on what portion of the document the prosecution contends is probative to what proposition in its case.

11. This is the very reason why two Trial Chambers at the ICTY have rejected similar requests for admission of documents from the bar table. In those cases, the Trial Chamber refused wholesale admission of otherwise authentic documents. They held that the prosecution must present its exhibits to a witness at trial, or show cause why it is not able to do so. The Trial Chambers' reasoning was that the wholesale admission of

[5] Transcript of 7 November 2006 @ pp. 32-33

exhibits without in-court debate would make it difficult for the Trial Chamber to assess the relevancy and context of the documents and would prejudice the accused.[6]

12. This Trial Chamber, itself, has already held that:

> "The Prosecution's suggestion to provide the Chamber with a bundle of UNAMIR documents so that the Chamber determines which document has probative value is not appropriate. For evidence to be admissible, each party must demonstrate its relevance and probative value."[7]

13. With respect to the UNAMIR documents, the prosecution has several options. It can discuss them during the testimony of General Dallaire, who is the author or recipient of all of them. Or, upon a showing of cause why that cannot be done, such as the withdrawal of General Dallaire as a witness, it can orally make a specific showing as to the probative value of each document by pointing to the relevant portion of the document and explaining how it advances its case. Mr. Nzirorera may well withdraw his objection to many of these exhibits once the relevance and probative value is properly established.

14. It should also be pointed out that none of the UNAMIR documents are translated into French and their admission without in-court translation of the relevant portions of the document could violate the rights of the accused.

15. Mr. Nzirorera respectfully submits that if the prosecution truly wants these documents to be admitted, it needs to do a better job of establishing their relevance and probative value. On this record, the prosecution's motion to admit the UNAMIR documents from the bar table should be denied.

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[6] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Admission of Evidence* (13 July 2006) at p. 6; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion to Admit Documentary Evidence* (10 October 2006)

[7] *Decision on Admission of UNAMIR Documents* (21 November 2006) at para. 12

Annex B—Rwandan documents

16. The prosecution seeks admission of ten documents purportedly authenticated during testimony at other ICTR trials. Mr. Nzirorera notes that one of the documents, identified as item (g), Prefet Kayishema's telegram of 12 June 1994, is already admitted in evidence in this trial as exhibit P53.

17. The other nine documents suffer from the same failure to show relevance and probative value. For each of them, the entire showing consists of the phrase "civil defence—author of the document is member of the JCE."

18. Mr. Nzirorera notes that four of the documents are authored by Ignace Bagilishema, the former bourgmestre of Mabanza commune who was acquitted at the ICTR. Mr. Bagilishema is not alleged to be a member of the JCE in this case.[8]

19. The prosecution alleges that the authenticity of the Bagilishema documents is established by the fact that they were admitted at his trial and that no objections were raised on the grounds of authenticity. This is a fallacious argument, since the decision not to object to a document may be based on a number of tactical reasons unrelated to the document's authenticity. The prosecution has cited no authority for its claim that authenticity of a document can be established by the failure of the purported author to object at his own trial.

20. The relevance and probative value of each document cannot be established by alleging that its author is a member of the JCE and that the document somehow relates to "civil defence." Again, the prosecution simply must do better if it is serious about admission of these documents. On the present record, the Trial Chamber has an

[8] See indictment at paragraph 6(ii)

insufficient basis to determine the relevance and probative value of the documents sought to be admitted from the bar table.

21. This is particularly well-illustrated by item (f), a letter from Alfred Musema to Mr. Karemera. The entire text of the letter is:

> "Further to our discussion of /06/94 at the Gisovu bureau communal, I am sending you a copy of the Report which was sent to the Director of OCIR-The.
> "The implementation of the recommendations on page 4 need the backing of Mr. Michel Bagaragaza, director of OCIT-The. Otherwise the marketing of tea will be blocked and a current stock of over 1000t will be depreciated and congested in the factories which will stop their activities ipso facto.
>
> "Thank you most sincerely for your understanding."[9]

21. Absent testimony from a witness with knowledge of the circumstances, this letter has no probative value and no connection to civil defence. To admit a document such as this without a foundation witness would simply reduce the trial to a game of speculation and innuendo.

22. The attempt to admit these documents from the bar table rather than through a witness is a guise. This is not a case of the prosecution being able to withdraw a witness if the exhibits are admitted from the bar table and thus saving time. In fact, there are no witnesses on the prosecution's witness list who can identify these documents or speak to their content.

23. The admission of these documents will therefore add time to the trial, rather than save time. If the four Bagilishema documents are admitted, and the events of Mabanza commune thus become relevant to the trial, the defence will be obligated to call Bourgmestre Bagilishema to explain what was meant by the documents and what other

[9] The report referred to in the text is not an exhibit and has not been disclosed to the defence.

instructions he received from higher authorities as well as the persons who received the authorizations contained in some of the exhibits.

24. If the Musema document is admitted, the defence will be obligated to call Mr. Musema as a witness to explain its context and meaning, as well as possibly other witnesses to activities at Gisovu Tea Factory.

25. Thus, no time savings will result from admission from the bar table of documents such as those in Annex B, which cannot otherwise be admitted in the prosecution's case.

26. The document described in item (j)—handwritten statement of former Butare prefet Sylvain Nsabimana, is particularly inadmissible. It is a statement written by Mr. Nsabimana in exile after the events. Admission of this document without the accused being able to cross-examine its author would be fundamentally unfair.

27 Mr. Nsabimana is not on the prosecution's witness list, and the prosecution can not admit his statements any more than it could admit the out of court statements of any other potential witness without meeting the requirements of Rule 92 *bis* or bringing the witness to testify. In this case, the statement would not be admissible under Rule 92 *bis* because it includes evidence on the acts and conduct of the accused Karemera.[10]

28. It is respectfully requested that admission from the bar table of the nine documents in Annex B be denied.

[10] See page 4 of the English version.

Annex C—Statements of the Accused

Nzirorera

29. The prosecution seeks to admit from the bar table the recorded interview of Mr. Nzirorera made by OTP investigators on 12-13 June 1998, a week after his arrest in Cotonou, Benin.

30. Mr. Nzirorera recognizes that, if otherwise admissible, the transcripts of his interview can be admitted from the bar table, as opposed to calling an authenticating witness.[11] However, he contends that admission of the interview should be refused by the Trial Chamber pursuant to Rule 95 as a result of the denial of his rights to silence and to the assistance of counsel during the interview, as well as in connection with his arrest and seizure of his property in Benin.

31. Rule 95 provides that:

> "No evidence shall be admissible if obtained by methods which cast substantial doubt upon its reliability or it its admission is antithetical to, and would seriously damage, the integrity of the proceedings."

32. Two Trial Chambers at the ICTY have excluded statements of the accused pursuant to Rule 95 when it was established that his rights were not respected.[12] Mr. Nzirorera contends that the same result should occur in his case.

[11] *Prosecutor v Halilovic*, No. IT-01-48-AR73.2, *Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table* (19 August 2005) at para. 17

[12] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C)* (14 October 2004) at para. 21; *Prosecutor v Zigiranyirazo*, No. ICTR—2001-73-T, *Decision on the Voir Dire Hearing of the Accused's Curriculum Vitae* (29 November 2006) at para. 13

Arrest Without a Warrant

33. Mr. Nzirorera first contends that the custodial statements taken from him by the OTP were the fruits of his illegal arrest without a warrant or other form of judicial review.

34. Article 17(4) of the ICTR Statute provides that:

> "Upon determination that a *prima facie* case exists, the Prosecutor **shall** prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a Judge of the Trial Chamber." (emphasis added)

35. Article 18 of the Statute provides for review of the indictment by a Judge, who may, if satisfied that a *prima facie* case has been established, issue a warrant or order for the arrest of the accused.

36. Article 19(2) further provides that:

> "A person against whom an indictment has been confirmed shall, pursuant to an order or arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her, and transferred to the International Tribunal for Rwanda."

37. Therefore, the ICTR Statute envisioned that the prosecutor would investigate, and that when he developed sufficient evidence to prosecute, would present that evidence to a Judge. The Judge, after reviewing the evidence, was given the power to order the arrest of a person. Such a person could be taken into custody pursuant to a warrant or order of the International Tribunal for Rwanda.

38. The Prosecutor was not given the power in the Statute to accomplish the arrest of a person without a warrant or order of a judge of the Tribunal.

39. When the judges of the Tribunal adopted the Rules of Procedure and Evidence, they enacted a similar scheme to that contained in the Statute.

40. Rule 47(B) provides that:

> "The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material."

41. Rule 47 (H) provides that:

> "Upon confirmation of any or all counts in the indictment:
> (i) The Judge may issue an arrest warrant…"

42. This procedure was not followed in Mr. Nzirorera's case. No judge reviewed the adequacy of the evidence before he was arrested and no warrant for his arrest was issued.

43. Instead, Mr. Nzirorera was arrested on a mere letter written by the Deputy Prosecutor asking that he be arrested. The letter contained no facts setting forth reason to believe that Mr. Nzirorera had committed a crime within the jurisdiction of the Tribunal.

44. The request for the arrest of Mr. Nzirorera was based upon Rule 40(A), which provides that:

> "In case of urgency, the Prosecutor may request any State
>
> (i) To arrest a suspect and place him in custody
> (ii) To seize all physical evidence
> (iii) To take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.
>
> The State concerned shall comply, forthwith, in accordance with Article 28 of the Statute."

45. Mr. Nzirorera contends that this rule is clearly an exceptional measure limited to the condition "in case of urgency". The Appeals Chamber has held that this rule must be "restrictively interpreted".[13]

46. Mr. Nzirorera contends that such a condition did not exist in his case. He was arrested in 1998, four years after the alleged offences, not as "a case of urgency", but as part of a carefully planned and coordinated operation by OTP which resulted in the simultaneous arrest of ICTR suspects throughout West Africa. There was sufficient time for the prosecutor to have sought an indictment and warrant of arrest pursuant to Rule 47 in Mr. Nzirorera's case.

47. This issue was raised and addressed in a different context in 2000 when Mr. Nzirorera filed a motion to have his arrest declared illegal and to be released. Trial Chamber II, comprised of Judges Kama, Sekule, and Dolenc, held that it lacked jurisdiction to review the legal circumstances of Mr. Nzirorera's arrest because the arrest had been made pursuant to the laws of the arresting state.[14]

48. The situation is now different where the prosecution seeks to affirmatively use the fruits of that arrest as evidence in its case. Pursuant to Rule 95, the Trial Chamber has the power, indeed the duty, to exclude Mr. Nzirorera's statement if it believes its admission would be antithetical to, and would seriously damage the integrity of the proceedings.

49. In addition, the Trial Chamber's decision in 2000 was implicitly overruled by the Appeals Chamber in 2005 in its judgement in the related case of Juvenal Kajelijeli. In its judgement, the Appeals Chamber held that the Trial Chamber had erred in holding that

[13] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 233
[14] *Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized* (7 September 2000) at para. 27

there was no jurisdiction to review the circumstances of the arrest of the accused in Benin at the request of the Prosecutor.[15]

50. In *Kajelijeli*, the accused was found unexpectedly in Mr. Nzirorera's home during the arrest of Mr. Nzirorera. The Appeals Chamber found that Kajelijeli's rights were not violated by his arrest without a warrant "given the exigencies of the circumstances in which he was arrested."[16] However, no such exigencies existed for the long-planned arrest of Mr. Nzirorera. Therefore, his arrest without a warrant was illegal.

Failure to Inform Mr. Nzirorera of Reasons for his Arrest

51. The illegal warrantless arrest of Mr. Nzirorera in the absence of urgency is just one of the numerous violations of his rights in connection with his arrest in Benin.

52. At the time of his arrest, two OTP investigators were present. Before and during his interview with OTP seven days later, Mr. Nzirorera was never informed of the reasons for his arrest, in violation the requirements of Article 19(2) of the Statute.[17] Mr. Nzirorera has made this contention since his arrest, and it has never been refuted by the prosecution.[18]

53. The Appeals Chamber held in the *Kajelijeli* appeal noted that Article 9(2) of the International Covenant on Civil and Political Rights stipulates that "everyone who is arrested shall be informed promptly in a language he or she understands of the reason for the arrest and shall also be informed promptly of any charge against him or her."[19] This

[15] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 231
[16] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 226
[17] "A person against whom an indictment has been confirmed shall, pursuant to an order or arrest warrant of the International Tribunal for Rwanda, be taken into custody, **immediately informed of the charges against him or her**, and transferred to the International Tribunal for Rwanda."
[18] See *Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized* (7 September 2000) at paras. 3-4
[19] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para.224

right has been held by the Appeals Chamber to apply to arrests made on behalf of the ICTR.[20]

54. The Appeals Chamber held, therefore, that "the manner in which [Kajelijeli's] arrest was carried out was not according to due process of law because [Kajelijeli] was not promptly informed of the reasons for his arrest."[21] It ordered that Kajelijeli's sentence be reduced because of this violation of this right, among others.

55. The facts involving Mr. Nzirorera are the same. The same OTP investigators failed to inform him of the reasons for his arrest. When Mr. Nzirorera specifically said during the interview that "I would like to know the charges against me", he was told only that "there is no official indictment".[22] Therefore, the same violation of his rights was committed.

56. The Appeals Chamber in *Kajelijeli* explained the reasons for the requirement that a person be promptly informed of the reasons for his or her arrest:

> "The suspect's right to be promptly informed of the charges against him or her serves two purposes: 1) it "counterbalances the interest of the prosecuting authority in seeking continued detention of the suspect" by giving the suspect "the opportunity to deny the offence and obtain his release prior to the initiation of trial proceedings"; and 2) it "gives the suspect information he requires in order to prepare his defence."[23]

57. Had the investigators informed Mr. Nzirorera of the reasons for his arrest, he may well have "prepared his defence" differently, by declining to speak with them without a lawyer, or declining to answer some of the questions which he did answer. To allow the prosecution to profit from this violation by admitting Mr. Nzirorera's interview

[20] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Decision* (31 May 2000) at para. 78
[21] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 226
[22] Transcript of interview tape #4 at page 27
[23] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 229

into evidence against him would be antithetical to and would seriously damage the integrity of the proceedings.

Failure to Promptly Bring Mr. Nzirorera Before a Judicial Officer

58. Before the interview, Mr. Nzirorera spent a week in a Benin jail, in deplorable conditions, and was not promptly taken before a judge who could determine the cause for his continued detention and see that his rights, including the right to counsel, were respected. At the time of his interview with OTP, Mr. Nzirorera had been held in custody for a full week without any judicial officer, in Benin or at the ICTR, reviewing the grounds for his arrest and continued detention. He was in custody based only on a letter of the ICTR Deputy Prosecutor. Mr. Nzirorera did not see a Judge until his arrival in Arusha more than a month after his arrest.

59. In the *Kajelijeli* case, the Appeals Chamber held that:

> "Article 9 of the ICCPR provides that upon arrest and provisional detention, everyone has the right to be brought promptly before a Judge or official authorized to exercise judicial power.[24] The Human Rights Committee has interpreted Article 9 to mean that any delay in being brought before a Judge should not exceed a few days.[25] The Human Rights Committee has decided that under this article, four-days' delay is too long,[26] let alone l apses of 11 days, 22 days, or ten weeks.[27] Article 5(3) of the ECHR also requires that the suspect be brought promptly before a Judge or officer able to exercise judicial power upon arrest. The European Court of Human Rights has specified that two days' delay under this article is permissible;[28] however, four days and six hours constitute a violation even in complex

[24] Article 9(3) of the ICCPR states that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release...." *See also* ACHR, art. 7(5).
[25] *See* U.N. Human Rights Committee, General Comment No. 8, para. 2.
[26] *Freemantle v. Jamaica*, para. 7.4.
[27] *Lobban v. Jamaica*, para. 8.3; *Casafranca v. Peru*, para. 7.2; *Jones v. Jamaica*, para. 9.3.
[28] *Graužinis v. Lithuania*, para. 25.

cases, let alone one week or longer."[29]

60. At the time of his OTP interview on 12 June 1998, Mr. Nzirorera had been held for seven days without being brought before a Judge. Therefore, under international law, his right to be taken promptly before a Judge was violated.

61. The Appeals Chamber in *Kajelijeli* held that when requesting the arrest of a suspect, the ICTR Prosecutor had an affirmative duty to include in the request to the authorities of the cooperating State "a notification to the judiciary, or at least, by way of the Tribunal's primacy, a clause reminding the national authorities to promptly bring the suspect before a domestic Judge in order to ensure that the apprehended person's rights are safeguarded by a Judge of the requested State."[30] This was not done in Mr. Nzirorera's case.

62. The Appeals Chamber explained that this would enable a State to bring the suspect promptly before a Judge who would "communicate to the detainee the request for surrender (or extradition) and make him or her familiar with any charge, to verify the suspect's identity, to examine any obvious challenges to the case, to inquire into the medical condition of the suspect, and to notify a person enjoying the confidence of the detainee[31] and consular officers."[32]

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[29] *Brogan and Others v. The United Kingdom*, paras. 6, 62; *Tepe v. Turkey*, paras. 64-70; *Öcalan v. Turkey*, para. 106 cited at *Prosecutor v Kajelijeli*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 230.

[30] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 222

[31] Numerous international bodies have condemned incommunicado detention. *See* Standard Minimum Rules for the Treatment of Prisoners, art. 92; U.N. Human Rights Commission Resolutions 1998/38, para. 5, and 1997/38, para. 20; U.N. Commission on Human Rights, Report of the Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment, para. 926(d); Inter-American Commission on Human Rights, Annual Report of the Inter-American Commission, 1982-1983; *Mukong v. Cameroon*, para. 9.4; *El-Megreisi v. Libyan Arab Jamahiriya*, para. 5.4; *Suárez Rosero Case*, para. 91 (describing detainee's being cut off from communication with his family as cruel, inhuman, and degrading treatment). *See also* Art. 104(4) of the German Constitution (the "Grundgesetz"): "A relative or a person enjoying the confidence of the person in custody *shall* be notified without delay of any judicial decision imposing or continuing a deprivation of freedom." (Emphasis added). The rationale behind this constitutional norm is that it is an inalienable duty to inform relatives or good friends of a person as to any deprivation of liberty.

63. Had these rights been afforded to Mr. Nzirorera within the seven days before his interview, he or his family may well have contacted a lawyer to advise him on the necessity and wisdom of consenting to an interview with the OTP. The ICTR Prosecutor's failure to ensure that Mr. Nzirorera was promptly brought before a judge after his arrest violated his rights. To allow the Prosecutor to profit from this violation by admitting Mr. Nzirorera's statements into evidence against him would be antithetical to and would seriously damage the integrity of the proceedings.

Failure to Promptly Inventory and Return Seized Property

64. At the time of his arrest, virtually all of Mr. Nzirorera's papers were seized without a warrant and without any effort to particularize the evidence being seized. At the time of his interview, the Prosecutor had also violated Rule 41(B) which provides that:

> "The Prosecutor shall draw up an inventory of all materials seized from the accused, including documents, books, papers, and other objects, and shall serve a copy thereof on the accused. Materials that are of no evidentiary value shall be returned without delay to the accused."

65. In fact, the material was not returned to Mr. Nzirorera for five years. The violation of Mr. Nzirorera's rights under Rule 41(B) was documented in *Joseph Nzirorera's Motion to Exclude Evidence Seized in Benin* (14 July 2005), which is incorporated by reference herein. The Trial Chamber ruled that the motion was

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This provision is based upon lessons learned in Germany from World War II whereby legal safeguards must exist such that never again should the judiciary be able to abuse its power by causing human beings to just disappear.

[32] *See* Vienna Convention on Consular Relations, art. 36(b) cited in *Prosecutor v Kajelijeli*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 221

premature since the prosecution was not offering any of the evidence seized in Benin at that time.[33]

66. While the instant motion does not seek to admit any of the seized evidence, the violation of Mr. Nzirorera's rights with respect to his property by the same OTP investigators who interviewed him is further evidence of the unlawful circumstances of his arrest and detention in Benin and supports his contention that admission of the OTP interview would be antithetical to and would seriously damage the integrity of the proceedings.

Failure to Record Questioning

67. Rule 43 provides that "whenever the Prosecutor questions a suspect, the questioning shall be audio-recorded or video recorded." This rule was not fully respected when OTP representatives met with Mr. Nzirorera on 12 June 1998. As can be seen from the portions of the interview which were recorded, the OTP representatives had met with Mr. Nzirorera before the recording began and had a substantive discussion with him concerning his rights and the charges against him.

68. At the outset of the recording, one of the investigators says, "before we begin, **as we explained previously…**"[34] When Mr. Nzirorera inquired about the waiver of rights form which he was being asked to sign, one of the investigators said, "That means for now, and until you change your mind, **as we explained**, you accept for now to speak with us."[35]

[33] *Decision on Joseph Nzirorera's Motion to Exclude Evidence Seized in Benin* (9 September 2005)
[34] Transcript of interview tape #1 at page 1
[35] Transcript of interview tape #1 at page 3

69. When discussing the waiver of rights form, Mr. Nzirorera remarked, "and this goes exactly against **what I was telling you earlier**."[36] The OTP investigator replied, "That's correct! And **when we explained**…that's exactly **what I said earlier**."[37] Mr. Nzirorera also alluded to the investigators having asked him to prepare something to say during their earlier discussion when he said "since **you asked me to think of something**."[38]

70. The following day, in response to Mr. Nzirorera's request to know the charges against him, the investigator replied, "You are being reminded of Article 40, that is, the arrest warrant, there is no official indictment. **You remember, I explained that to you**."[39] Since there is no previous explanation concerning the reasons for Mr. Nzirorera's arrest which is recorded on the tapes, this must refer to the portion of the interview before it was recorded.

71. The very purpose of the recording requirement is to document the contact between the prosecution and a suspect so that a Trial Chamber can be assured that the rights of the suspect have been respected. The burden of establishing that those rights have been respected is on the prosecution.[40] The Appeals Chamber has held that where off-the-record discussions take place, the Trial Chamber is, at a minimum, required to hold an evidentiary hearing on whether the unrecorded portion of the conversation affected the voluntariness of the statement of the accused.[41]

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[36] Transcript of interview tape #1 at page 6
[37] Transcript of interview tape #1 at page 6
[38] Transcript of interview tape #1 at page 12
[39] Transcript of interview tape #4 at page 27
[40] *Prosecutor v Delalic*, No. IT-96-21-PT, *Decision on Zdravko Mucic's Motion for the Exclusion of Evidence* (2 September 1997) at para. 42
[41] *Prosecutor v Halilovic*, No. IT-01-48-AR73.2, *Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table* (19 August 2005) at para. 45

72. If the Trial Chamber is otherwise inclined to admit the statement of Mr. Nzirorera, he requests an evidentiary hearing at which the Trial Chamber would hear testimony from the investigators and Mr. Nzirorera concerning the contents of those discussions and their effect on Mr. Nzirorera's decision to answer questions.

Voluntariness of the Statement

73. Mr. Nzirorera contends that the recorded portion of his statement demonstrates that he was misled by the OTP investigators into waiving his right to counsel and answering their questions.

74. It is clear from the recording that Mr. Nzirorera simply wanted to make a statement. However, the investigators insisted that he waive his right to counsel before doing so, informed him that the could not listen to his statement unless he waived his right to counsel, and proceeded to question him at length before he made the statement at the end of the interview.

75. The following portions of the interview demonstrate that despite his reservations about waiving his right to counsel, the investigators manipulated the situation in such a way as to obtain answers to all their questions before allowing Mr. Nzirorera to make a statement:

76. When discussing the waiver of rights form, the following discussion took place:

J[42]: "And if I refuse to speak to you what will happen?

R[43]: Nothing, we will stop and then leave. Err, we'll go home.

J: So I can make a statement?

[42] Joseph Nzirorera
[43] OTP Legal Advisor Robert Petit

R: Ah yes! You can. But before you make a statement we have to be able to prove that when you made the statement, your rights were respected that you gave the statement of your own free will. Do you understand? Thus we cannot record your statement or take note of your statement as long as you have not stated that you understood your rights and the purpose of what we are doing now is to waive your right of silence, okay? Or the right to have your counsel present because you wish to make a statement. You wish to tell us something. We have no particular reason to question why. Err, ha, ha, ha. Nor force you to waive anything at all, as we explained before. This is to give you the opportunity, if you wish to do so, to make a statement, which will be recorded. Thus, if you accept, if you wish to do so, so as to accomplish your goal, that is really none of our business, we have to take your statement. But to take it legally, we have to do so in accordance with our rules. Therefore, initially, this first passage, as I have just done, to comply with our rules."

J: That's it

R: Then you have to read it and we have to sign it. At that stage, from that point on, we can legally take your statement, we can legally proceed with recording your statement. If you, if you do not accept to sign, or if there is something, or a problem with the formulation that is in front of you

J: Uh-huh

R: according to our rules we will have to stop. It's a formality, but it's a formality that we cannot overlook. Okay. All, all the accused, all the suspects who have given us statements, we first had to explain this form to them, to read it so it could be recorded, and to have it signed so that we could take the statement."

J: Okay. Thus when it says that I affirm with full knowledge of the facts…

R: Uh-huh

J: that I waive my right to counsel for the moment, what will happen?

R: What will happen, for now, is that for the purpose of your statement, and until you decide otherwise, i.e. until you change your mind, for now you are saying that you do not require the presence of counsel to say what you have to say for now. And for now you accept to give a statement without the presence of counsel. At

any time, you can, as is mentioned here, at any time you can change your mind. You can say, "No, that's enough. I wish to have counsel present. At that point we must stop. We cannot ask you any other questions. We must stop everything and make appropriate arrangements so that if we resume the interview your counsel will be present. As we have already explained, you are in full control of this procedure, you can stop at any moment. You can refuse to answer a specific question; you can refuse to answer all the questions, you can even choose to make a statement without having to answer any questions. You are in full control of this interview.

L[44]: You can answer one question and not the following one, then answer another question and not the one that follows, etc. etc. You are the one who, you are the one who decides…

J: So…this text here, this is the one which launches the whole process?

R: That is correct.

J: Okay.

R: If we don't go through this process, we cannot take the statement, that's clear. Because not only do we need to have the security/guarantee of the audio recording, but also to have the guarantee of uh a recording or even of a written statement that you also wish to speak with us. This allows us to have two independent pieces of evidence, okay, but that are also linked. We cannot take your statement without recording it. Do you understand? We cannot record your statement without your signing this piece of paper. The two, the two formalities, the two procedures, are inextricable; this allows us to proceed with, to continue this statement."[45]

77. The OTP investigators continued to insist that they would not accept his statement, which Mr. Nzirorera had written out, unless he signed the waiver of his rights:

R: "this procedure allows us to continue with the statement"

R: "…and this allows us to take your statement"[46]

78. Mr. Nzirorera expressed his doubts when he said, "I hope there is no trap." He was assured that "there is no trap…in any case, you are the one in control." He

[44] Investigator Jacques Legros
[45] Transcript of interview tape #1 at pages 1-5
[46] Transcript of interview tape #1 at page 6

continued to express his doubts, which the investigators continued to persuade him to ignore.[47] When he finally agreed, Mr. Nzirorera announced, "Then I am ready to make my statement"[48] He signed the form.

79. However, instead of allowing Mr. Nzirorera to make his statement, the investigator announced that he would "cover for now the second bibliographical part and then we will see how to proceed." The following discussion took place:

> J: Okay, I am not going to give you my statement right away?
>
> R: Give your statement, what do you mean?
>
> J: It's one short paragraph, maybe I will give it to you later.
>
> R: Please explain. I am sorry. I don't understand. You can't give me your statement?
>
> J: Yes, since you asked me to think of something…
>
> R: yeah, yeah
>
> J: That I can state.
>
> R: yeah, yeah
>
> J: Will I be given another opportunity, or…
>
> R: Yeah, yeah. You will be given the opportunity. You will be given the opportunity to…to…to…Ah yes, you have to in fact. We have to remain here as long as you…until you have finished speaking with us. So…
>
> J: No, I will speak very…very quickly. Because as I said, I would have liked to share a few issues with you, and then after, without taking up too much of your time, this way you will know where I stand in that regard.

80. Thus, the investigator originally just contemplated receiving Mr. Nzirorera's written statement. Therefore, he affirmatively misled Mr. Nzirorera into believing that he

[47] Transcript of interview tape #1 at page 7
[48] Transcript of interview tape #1 at page 10

had to waive his right to silence, his right to counsel, and submit to a formal interview, before his statement could be received.

81. Instead the investigators began the questioning, telling Mr. Nzirorera that he would be given the opportunity to make a statement at the conclusion of the interview.[49]

82. Mr. Nzirorera expressed his reluctance, saying that "this is a delicate matter, I would have liked to speak in detail about this subject in the presence of counsel…I would prefer to go into all the details with a lawyer…I do not want to venture alone into an arena where I do not know the dangers." The investigators simply told him that he could choose to wait until he had counsel to answer a particular question.[50] They then launched into the interview.[51]

83. The investigators violated Mr. Nzirorera's rights when they failed to cease questioning upon his expression of his wish to have counsel present. Instead they fended off his request by persuading him to decide on a question-by-question basis. This was a violation of Rule 42(B) and of Mr. Nzirorera's right to the assistance of counsel.

84. Rule 42(B) provides that:

> "Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel."

85. In the *Bagosora* case, the Trial Chamber confronted a situation similar to that of Mr. Nzirorera when General Gratien Kabiligi challenged the admissibility of his post-arrest interview with OTP investigators. The Trial Chamber first noted that the right to counsel during questioning "is deeply and eloquently inscribed in the annals of many

[49] Transcript of interview tape #1 at page 13
[50] Transcript of interview tape #1 at page 14
[51] Transcript of interview tape #1 at page 15

national and international legal systems" and "is rooted in the concern that an individual, when detained by officials for interrogation, is often fearful, ignorant and vulnerable; that fear and ignorance can lead to false confessions by the innocent; and that vulnerability can lead to abuse of the innocent and guilty alike, particularly when a suspect is held incommunicado and in isolation."[52]

86. The Trial Chamber went on to hold that a waiver of the right to counsel and the right to silence must be "express and unequivocal"[53] and that "any implication that the right is conditional, or that the presence of counsel may be delayed until after the questioning, renders any waiver defective."[54] Since General Kabiligi, like Mr. Nzirorera, had indicated that he would like counsel at some point, but was willing to go ahead with the interview, the Trial Chamber found that the prosecution did not discharge its burden of proving that the waiver was voluntary.[55]

87. The *Bagosora* Trial Chamber also based its decision on the fact that General Kabiligi was under the impression that the interview was "preliminary", but the investigators proceeded to ask important questions of substance.[56] Similarly, Mr. Nzirorera was also under the impression that the interview was simply for him to make a prepared statement, yet the investigators forged ahead with questions of substance, postponing his statement until after they had finished their questioning.

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[52] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C)* (14 October 2004) at para. 16
[53] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C)* (14 October 2004) at para. 18
[54] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C)* (14 October 2004) at para. 17
[55] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C)* (14 October 2004) at para. 19
[56] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C)* (14 October 2004) at para. 20

88. The *Bagosora* Trial Chamber concluded that, as a result of the failure of the prosecution to establish that General Kabiligi's statement was voluntary, exclusion of the statement under Rule 95 was required.[57] The same result is required here.

Conclusion

89. Mr. Nzirorera's rights were violated by his arrest without a warrant, failure to be informed of the reasons for his arrest, failure to promptly bring him before a Judge, failure to promptly inventory and return his seized property, failure to record the complete interview with him, and failure to respect his rights to silence and the assistance of counsel. Had these rights been respected, Mr. Nzirorera may well have declined to be interviewed at all, declined to answer some of the questions, or obtained the assistance of counsel. Admission of his interviews, whether from the bar table or otherwise, should be denied pursuant to Rule 95.

Ngirumpatse

90. The same violation of rights occurred with respect to the arrest of Mathieu Ngirumpatse. Therefore, the Trial Chamber should also exclude his statements pursuant to Rule 95.

91. However, regardless of the circumstances of Mr. Ngirumpatse's post-arrest interviews, their admission during the prosecution's case at a joint trial with Mr. Nzirorera would violate Mr. Nzirorera's right to confront witnesses against him since Mr. Nzirorera would have no opportunity to cross examine Mr. Ngirumpatse.

92. As far as can be determined, this issue has been decided on only one occasion at the *ad hoc* Tribunals. In the *Blagojevic & Jokic* case, the ICTY Trial Chamber made

[57] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C)* (14 October 2004) at para. 21

an oral decision in which it held, pursuant to Rule 89, that an OTP interview of one accused could not be admitted against the co-accused because it violated the co-accused's rights to cross-examine.[58]

93. In another case at the ICTY, the prosecution conceded that a post-arrest statement of one accused could not be used to establish the acts, conduct, or mental state of a co-accused.[59]

94. Exclusion of a co-accused's statement at a joint trial is also the rule in common law national jurisdictions. In *Bruton v United States*, 391 U.S. 123 (1968), the United States Supreme Court held that admission of an interview of one accused at a joint trial was a denial of the right to confrontation and reversible error. This was also described as a "general rule of law" in the United Kingdom case of *R. v. Hayter,* 2005 UKHL 6 at para. 7.

95. The OTP interview with Mr. Ngirumpatse makes reference to the acts and, conduct of Mr. Nzirorera. For example, Mr. Ngirumpatse says that:

- Nzirorera undertook a mission to Belgium without Ngirumpatse's knowledge to gauge the extent of Ngirumpatse's support abroad because the people from the north wanted to maintain control of the MRND[60]

- President Habyarimana suspected Ngirumpatse's wife and Robert Kajuga of plotting a coup against him and Nzirorera was involved in summoning Kajuga to a meeting with the President to explain this[61]

- President Habyarimana placed Nzirorera as Secretary General of the MRND to protect the interests of the north[62]

[58] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, Transcript of 22 May 2003 @ pages 735-36
[59] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Prosecution's Reply to Defence Responses to Motion for Admission of Documentary Evidence* (18 August 2006) at para. 22
[60] Transcript of Ngirumpatse interview tape #1 at page 11
[61] Transcript of Ngirumpatse interview tape #1 at page 11
[62] Transcript of Ngirumpatse interview tape #1 at page 12

96. It is respectfully submitted that admission of the statement of Mathieu Ngirumpatse during the prosecutor's case would violate Mr. Nzirorera's right to cross examination enshrined in Article 20(e) of the ICTR Statute.

97. Even if admissible, Mr. Ngirumpatse's statement to OTP investigators would require the foundational testimony of a witness. The Appeals Chamber held that the OTP interview of an accused could be admitted from the bar table in a single accused case on the grounds that the accused would know the circumstances of his own statement.[63] This logic would not apply to a co-accused. Mr. Nzirorera does not know the circumstances of Mr. Ngirumpatse's statement and the transcript of its recording contains numerous illegible portions.

98. Therefore, the OTP interview of Mr. Ngirumpatse should not be admitted from the bar table as the prosecution has requested.

Conclusion

99. For all of the above reasons, the prosecution's motion for admission of exhibits should be denied in its entirety.

Respectfully submitted,

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[63] *Prosecutor v Halilovic*, No. IT-01-48-AR73.2, *Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table* (19 August 2005) at para. 17