



ICTR-98-44-T  
21-11-2008  
(38408-38406)

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A

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

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

**Registrar:** Adama Dieng

**Date:** 21 November 2008

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**THE PROSECUTOR**

v.

**Édouard KAREMERA**  
**Mathieu NGIRUMPATSE**  
**Joseph NZIRORERA**  
*Case No. ICTR-98-44-T*

**DECISION ON JOSEPH NZIRORERA'S FIFTH RULE 66(B) MOTION:  
SELECTIVE PROSECUTION DOCUMENTS**

*Rule 66(B) of the Rules of Procedure and Evidence*

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## INTRODUCTION

1. Pursuant to Rule 66(B) of the Rules of Procedure and Evidence, Joseph Nzirorera moves the Chamber for an order directing the Prosecution to allow him to inspect: (1) certain documents generated by the Prosecution and disseminated to certain entities, including the government of Rwanda and the United Nations, explaining its reasons for not prosecuting members of the RPF or RPA for crimes committed in Rwanda in 1994; and (2) all memoranda in the possession of the Prosecutor containing the same information.<sup>1</sup> Nzirorera seeks this information in order to buttress his claim of selective prosecution on the part of the Prosecutor.

2. The Prosecution opposes the motion<sup>2</sup> on the ground that the documents identified are not material to the preparation of Nzirorera's defence, and thus fall outside the purview of Rule 66(B).

## DELIBERATIONS

3. Rule 66(B) states that the Prosecutor shall permit the Defence to inspect any documents in his custody or control, which are material to the preparation of the Defence. According to the Appeals Chamber, documents are material to the preparation of the Defence under Rule 66(B) if they are relevant to the preparation of the Defence case.<sup>3</sup> The Appeals Chamber has further held that preparation is a broad concept, and that it does not necessarily require that the material itself counter the Prosecution evidence.<sup>4</sup>

4. Joseph Nzirorera claims that the documents at issue are material to the preparation of his defence because they can be used to support a motion to dismiss the Indictment on the grounds of selective prosecution. However, the Appeals Chamber has expressly stated that reversal of a conviction is not an available remedy even in a case of proven selective prosecution.<sup>5</sup>

5. Of necessity, the instant motion is made with the ultimate goal of dismissal of the Indictment, rather than reversal of a conviction, because the trial is still on-going. Nonetheless, the Chamber finds no principled distinction between the two remedies and therefore also regards dismissal of an indictment as a disproportionate response to a proven claim of selective prosecution.

6. Thus, the Chamber finds that Joseph Nzirorera seeks the documents at issue to support a motion for an *unavailable remedy*. Because an unavailable remedy cannot be relevant to the preparation of a defence, the Chamber concludes that the requested documents

<sup>1</sup> Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution Documents, filed on 19 August 2008; Reply Brief: Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution Documents, filed on 25 August 2008.

<sup>2</sup> Prosecutor's Response to Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution Documents, filed on 22 August 2008.

<sup>3</sup> *Prosecutor v. Théoneste Bagosora, Gratién Kabligi, Aloys Mubakure, and Anatole Nsengiyumva*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence (AC), 25 September 2006, para. 9.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgement (AC), 20 February 2001, para. 618.

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cannot be material to the preparation of Nzirorera's defence, and that the Prosecution need not disclose them to him under Rule 66(B).

7. The Chamber recognizes that although "the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments," under Article 15(1) of the Statute, that discretion is circumscribed by recognised principles of human rights and fairness, under Article 20(1), which provides: "All persons shall be equal before the International Tribunal for Rwanda." But under *Delalic*, Nzirorera's definition of those "similarly situated" is simply too broad. The Appeals Chamber has rejected the contention that a defendant who has gone to trial is similarly situated to persons not in the custody of the Tribunal.<sup>6</sup> The same principle applies here. No viable claim of unequal treatment under Article 20(1) arises unless the persons compared are similarly situated.

8. The Appeals Chamber reaffirmed the disproportionality rationale of *Delalic* in a subsequent judgement in the *Akayesu* case.<sup>7</sup> In both judgements the Appeals Chamber recalled that generally the entity responsible for prosecutions in criminal justice systems "has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction." The Chamber further recalls that it has already addressed the subject of selective prosecution in a decision concerning a previous motion by Joseph Nzirorera.<sup>8</sup>

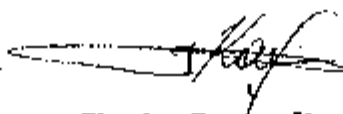
**FOR THESE REASONS, THE CHAMBER**

**DENIES** Joseph Nzirorera's motion in its entirety


Arusha, 21 November 2008, done in English.

  
Dennis C. M. Byron

Presiding Judge

  
Gberdao Gustave Kam

Judge

  
Vagn Johnsen

Judge



<sup>6</sup> In *Delalic*, indictments against 14 persons not yet in the custody of the ICTY were dismissed; Appellant Landzo claimed, unsuccessfully, that the failure to dismiss the indictment against him was discriminatory.

<sup>7</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgement (AC) 1 June 2001, paras. 93-97 (citing *Delalic* judgement, para. 602).

<sup>8</sup> *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, Décision relative à la requête de Joseph Nzirorera aux fins de rejeter l'acte d'accusation pour poursuites discriminatoires, 22 March 2005.