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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 30 September 2009

THE PROSECUTOR

v.

Édouard KAREMERA
Matthieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

DECISION ON JOSEPH NZIRORERA'S MOTION FOR SELECTIVE PROSECUTION DOCUMENTS

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

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INTRODUCTION

1. Joseph Nzirorera moves, pursuant to Rule 66(B) of the Rules of Procedure and Evidence ("Rules") for an order directing the Prosecution to allow him to inspect:

(i) 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

(ii) 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.[1]

2. Joseph Nzirorera argues that these documents are material to his defence as they may demonstrate that his rights under the Statute have been violated as a result of selective prosecution. He argues that, if such a violation is made out, he may be entitled to a reduction of sentence if he is convicted.[2]

3. The Prosecution opposes the Motion in its entirety, arguing that the documents sought by Joseph Nzirorera are not material to his defence within the meaning of Rule 66(B) and, further, that he has not satisfied the requirements of a claim of selective prosecution.[3]

DELIBERATIONS

4. Rule 66(B) imposes an obligation upon the Prosecution, after receiving a request from the Defence, to allow the Defence to inspect any books, documents, photographs, and tangible objects in its custody or control, which: (1) are material to the preparation of the defence; or (2) are intended for use by the Prosecution as evidence at trial; or (3) were obtained from or belonged to the accused.

5. For a Trial Chamber to order inspection of documents considered material to the preparation of the Defence case, the Defence must: (1) demonstrate that the material sought is in the custody or control of the Prosecution; (2) establish *prima facie* the materiality of the document sought to the preparation of the Defence case; and (3) specifically identify the

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1 Joseph Nzirorera's Seventh Rule 66(B) Motion: Selective Prosecution Documents, filed 3 March 2008 ("Motion"); Reply Brief: Joseph Nzirorera's Seventh Rule 66(B) Motion: Selective Prosecution Documents ("Reply"). Joseph Nzirorera also incorporates by reference the arguments made in Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution Documents, filed 19 August 2008 ("Fifth Rule 66(B) Motion") and Reply Brief: Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution Documents, filed 25 August 2008.

2 Motion, paras. 3-4.

3 Prosecutor's Response to Nzirorera's Seventh Rule 66(B) Motion: Selective Prosecution, filed 9 March 2009 ("Prosecution Response").

requested material.[4] The only issue in dispute is the materiality of the documents to the preparation of Joseph Nzirorera's defence.

6. Joseph Nzirorera claims that the Prosecutor has improperly exercised the discretion accorded to him under the Statute by engaging in selective prosecution. Nzirorera alleges that the lack of prosecutions against RPF members or Tutsis is not based on legitimate prosecutorial choices, but rather is the result of impermissible discrimination based on political grounds.[5] This would be a violation of Article 20(1) of the Statute, for which Nzirorera argues he is entitled to a remedy. Although the jurisprudence holds that dismissal of an indictment or even reversal of any convictions is not a remedy for selective prosecution, Nzirorera argues that a reduction of sentence may well be. Consequently, Nzirorera argues that the documents sought are relevant to the sentencing portion of his defence.[6]

7. The Prosecution argues that Joseph Nzirorera had not made the required *prima facie* demonstration of materiality because such information must reasonably invoke a substantive defence to the merits of the case that the accused has to answer. The Prosecution submits that the Chamber should interpret this requirement to mean preparation to answer the prosecution case through the type and quality of evidence to be adduced from witnesses, or, at minimum, in relation to a recognized legal defence. The prosecution characterises Nzirorera's claim of selective prosecution as a *tu quoque* defence, which has been rejected at the Tribunal.[7]

8. The Chamber sees no merit in the Prosecution's argument. It is well-settled that, within the framework of Rule 66(B), "the test for materiality is the relevance of the documents sought to the preparation of the defence case."[8] Further, "preparation is a broad concept and does not necessarily require that the material itself counter the Prosecution evidence."[9] The

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4 *The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse, and Joseph Nzirorera ("Karemera et al.")*, Case No. ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008, para. 12.

5 Motion, paras. 20-22; Fifth Rule 66(B) Motion, paras. 3, 7, 8.

6 Motion, paras. 7-13; referring to *Karemera et al.*, Decision on Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution Documents, 21 November 2008, para. 6; *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision on Prosecutor's Request for Review of Reconsideration, 31 March 2000, para. 75; *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 320; *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgement, 31 May 2005, paras. 127-130.

7 Prosecution Response, para. 6.

8 *Karemera et al.*, Case No. ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations (AC), 23 January 2008, para. 14.

9 *The Prosecutor v. Théoneste Bagosora et al.* ("*Bagosora et al.*"), 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.

Appeals Chamber has cautioned that Rule 66(B) should not be given an unduly restrictive interpretation, but rather should be interpreted in accordance with its plain meaning.[10]

9. First, the Chamber cannot accept that Rule 66(B) would not compel disclosure of material that may be relevant to a breach of an accused's rights under the Statute. Second, as pointed out by Joseph Nzirorera, Rule 85(A)(vi) permits each party to present evidence that may assist the Trial Chamber in determining an appropriate sentence, if the accused is found guilty. Such evidence therefore forms part of the Defence case, and if it is in the possession of the Prosecution, the Chamber sees no principled reason why it should not be required, pursuant to Rule 66(B), to produce it for inspection upon a request by the Defence. In other words, if Nzirorera is able to make a *prima facie* demonstration that the documents sought are material to any sentencing determination, Rule 66(B) compels their disclosure.

10. The Prosecution next argues that the documents sought are protected from disclosure pursuant to Rule 70(A).[11] The Chamber notes that the plain language of Rule 70(A) protects only internal documents from disclosure. As this Chamber has previously found, when a document has been disclosed to a party who is not a member or representatives of the Office of the Prosecutor, it can no longer be regarded as an internal document.[12] Consequently, the first category of documents sought by Joseph Nzirorera is not protected from disclosure by Rule 70(A) as they have been disseminated to third parties.

11. The Chamber is also not convinced that the second category of documents sought by Joseph Nzirorera falls into the ambit of Rule 70(A). In particular, it is not apparent that these documents were prepared in connection with an investigation or preparation of a case. The Chamber considers that such a determination must be made on a case-by-case basis. Further, the Chamber recalls that, although Rule 70(A) is important because it is in the public interest that information related to the internal preparation of a case, including legal theories, strategies, and investigations, remain privileged and not be subject to disclosure to the opposing party,[13] it must nonetheless be interpreted restrictively as it is an exception to the

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10 *Bagosora et al.*, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence, para. 8.

11 Prosecution Response, para. 11.

12 *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Inspection of Report on *Interahamwe*, 28 June 2007, para. 14. *See also Eliézer Niyitegeka v. Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004, para. 34.

13 *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Decision on Vidoje Blagojević's Expedited Motion to Compel the Prosecution to Disclose its Notes from Plea Discussions with the Accused Nikolić & Request for an Expedited Open Session Hearing, 13 June 2003, p. 6.

Prosecutor's normal disclosure obligations, which aim to further the proper administration of justice and trial fairness.[14]

12. In any event, as explained below, the Chamber is not convinced that Joseph Nzirorera has made the required *prima facie* demonstration of the materiality of these documents for his Defence case. The Chamber finds that, in order to do so, Nzirorera is required to make a *prima facie* showing that there has been selective prosecution.[15]

13. It is trite that the Prosecution enjoys a broad discretion in relation to the initiation of investigations and the preparation of indictments. Combined with the Prosecutor's statutory independence, there is an implied presumption that the prosecutorial functions under the Statute are exercised regularly. However, the Appeals Chamber has held that the Prosecutor's discretion is not unlimited and in particular is subject to the principle of equality before the law and the requirement of non-discrimination.[16]

14. An accused has the burden to demonstrate that the Prosecutor's discretion has not been exercised in accordance with the Statute. With respect to an allegation that the principle of equality before the law guaranteed by Article 20(1) has been violated, such as by engaging in selective prosecution, an accused must bring evidence from which "a clear inference can be drawn that the Prosecutor was motivated in that case by a factor inconsistent with that principle."[17] This involves two criteria: (1) establishing an unlawful or improper (including discriminatory) motive for the prosecution and (2) establishing that other similarly situated persons were not prosecuted.[18]

15. The Chamber finds that Joseph Nzirorera has failed to make a *prima facie* showing of either criteria.

16. First, Joseph Nzirorera essentially makes a systematic claim – that all prosecutions at the Tribunal are tainted by the failure of the Prosecutor to indict any RPF member or Tutsi.

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[14] *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Inspection of Report on *Interahamwe*, para. 12.

[15] The Chamber notes that in the United States, where the doctrine of selective prosecution originates, the Supreme Court has required a rigorous standard for granting discovery in order to substantiate a claim of selective prosecution, namely, some evidence tending to show the existence of the essential elements of the defence, discriminatory effect and discriminatory intent: *U.S. v. Armstrong*, 517 U.S. 456, 468-69 (1996). While the Chamber does not find any reason to depart from the usual requirements of Rule 66(B), it notes the U.S. Supreme Court's holding, at 457, that "[t]he justifications for a rigorous standard for the elements of a selective prosecution claim ... require a correspondingly rigorous standard for discovery in aid of such a claim."

[16] *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Judgement"), paras. 602 and 605; *see also* Articles 15, 17 and 20(1) of the Statute.

[17] *Čelebići* Judgement, para. 611.

[18] *Čelebići* Judgement, para. 611.

However, what is required of Nzirorera is a showing that *his* prosecution would not have occurred *but for* invidious discrimination.[19] By arguing that the Prosecutor's failure to prosecute others is politically motivated, Nzirorera fails to offer any support for an inference that there was an improper motive in prosecuting him. As this Chamber has previously held, "[i]n establishing that there was discrimination, it is not sufficient to merely show that other crimes were not prosecuted."[20] The Chamber finds that there is no *prima facie* evidence that Nzirorera's prosecution was based on political or otherwise improper grounds.

17. Even if it could be said that Joseph Nzirorera's prosecution is discriminatory because he is a member of a group that was targeted by the Prosecution while another group was not, Nzirorera also fails to appreciate that, in order to be objectionable, such discrimination must also be invidious.[21] The Prosecutor is permitted to engage in non-arbitrary selective enforcement, as made clear by the *Čelebići* Judgement. The Prosecution "cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted."[22] For instance, as found by the Appeals Chamber, a decision to prosecute persons because they are alleged to have committed exceptionally brutal offences is not discriminatory or otherwise impermissible.[23]

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[19] The Chamber notes that in *Celebići*, para. 615, the Appeals Chamber required evidence from the accused Landžo establishing that the "Prosecution had a discriminatory or otherwise unlawful or improper motives in indicting or continuing to prosecute *him*" (emphasis added). Both parties agreed that the issue in this respect was whether the accused was singled out for an impermissible motive: paras. 608, 609. Such an approach appears to be consistent with American jurisprudence. *See Wayte v. United States*, 470 U.S. 598, 610 (1985) in which the Supreme Court found that the petitioner had failed to make a showing of selective prosecution based on the exercise of his First Amendment rights because the "petitioner has not shown that the Government prosecuted him *because of* his protest activities" (emphasis in original). The Court cited *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 297 (1979), where it explained: "'[D]iscriminatory purpose'...implies more than...intent as awareness of consequences. It implies that the decisionmaker...selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *See also McCleskey v. Kemp*, 481 U.S. 279, 292 (1987); *Jones v. White*, 992 F.2d 1548, 1573 (11th Cir. 1993); *Boone v. Spurgess*, 385 F.3d 923, 932 (6th Cir. 2004); *Jose Guadalupe Murguia et al. v. The Municipal Court for the Bakersfield Judicial District of Kern County*, 15 Cal.3d 286, 290 (1975).

[20] *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Dismiss for Selective Prosecution, 22 March 2005, para. 11. *See also The Prosecutor v. Augustin Ndindiliyimana*, Case No. ICTR-2000-56-I, Decision on Urgent Oral Motion for Stay of the Indictment, or in the Alternative a Reference to the Security Council, 26 March 2004, para. 26: "the Chamber rejects the Defence contention that it is sufficient to show that only one group is selectively targeted while another is not."

[21] *Čelebići* Judgement, paras. 605, 607. *See also Oyler v. Boles*, 368 U.S. 448, 456 (1962): "[T]he conscious exercise of some selectivity in enforcement is not itself a federal constitutional violation."; *Jose Guadalupe Murguia et al. v. The Municipal Court for the Bakersfield Judicial District of Kern County*, 15 Cal.3d 286, 300 (1975): "[I]t is only 'deliberate' (i.e. 'purposeful or intentional') discriminatory enforcement based on an 'unjustifiable' (i.e. 'invidious') standard which is proscribed by the equal protection clause."

[22] *Čelebići* Judgement, para. 602.

[23] *Čelebići* Jud gement, para. 614; *Jose Guadalupe Murguia et al., v. The Municipal Court for the Bakersfield Judicial District of Kern County*, 15 Cal.3d 286, 304 (1975): "[A] defendant charged with

18. Indeed, this is what the requirement of identifying similarly situated perpetrators seeks to uncover.[24] Persons are similarly situated when "their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them."[25] Joseph Nzirorera argues that because there are allegations that RPF soldiers committed serious offences, and constitute one party to the Rwandan civil war in 1994, they are similarly situated to him.[26] Even if the Chamber were to accept that the similarly situated standard is met by such a general articulation of other offenders, rather than pointing to specific individuals,[27] the Chamber finds that this does not establish on a *prima facie* basis that there were no legitimate prosecutorial factors that led to differential treatment.

19. The Chamber notes that in Resolution 1534 (2004), the Security Council requested the Tribunal "in reviewing and confirming any new indictments to ensure that such indictments concentrate on the most senior leaders suspected of being most responsible for crimes." The Prosecutor has publicly discussed prosecutorial policy, and has taken the view that the genocide is the main crime base of his mandate.[28] Consequently, the "primary targets for prosecution inevitably are therefore the political, administrative and military leadership at the time, which planned and oversaw the execution of the genocide."[29] Indeed, the Chamber could deduce from the indictments issued at the Tribunal thus far that this statement accurately depicts prosecutorial strategy. The Chamber notes that the Prosecution case

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murder...would obviously find it extremely difficult to demonstrate that, but for a law enforcement officer's discrimination or bias, he would not have been prosecuted for his criminal act."

[24] *See United States v. Aguilar*, 883 F.2d 662, 706 (9th Cir. 1989): "The goal of identifying a similarly situated class of lawbreakers is to isolate the factor allegedly subject to impermissible discrimination.... If all other things are equal, the prosecution of only those persons [to whom the factor applies] ... gives rise to an inference of discrimination. But where the comparison group has less in common with defendant, then [other] factors ... may very well play a part in the prosecution."

[25] *U.S. v. Olvis*, 97 F.3d 739, 744 (4th Cir. 1996). The Fourth Circuit United States Court of Appeals outlined factors which may legitimately influence prosecutorial decisions as "the strength of the evidence against a particular defendant, the defendant's role in the crime, whether the defendant is being prosecuted by state authorities, the defendant's candor and willingness to plead guilty, the amount of resources required to convict a defendant, the extent of prosecutorial resources, the potential impact of a prosecution on related investigations and prosecutions, and prosecutorial priorities for addressing specific types of illegal conduct."

[26] Motion, paras. 15-22; Reply, para. 6.

[27] *See*, for instance, *United States v. Armstrong*, 517 U.S. 456, 470 (1996), where the Supreme Court held that the respondents failed to bring some evidence of selective prosecution because a study indicating that all of the prosecutions brought for the crime at issue were against black defendants failed to meet the "similarly situated" standard. The Court held that the "study failed to identify individuals who were not black and could have been prosecuted for the offenses for which the respondents were charged, but were not so prosecuted."

[28] Letter dated 22 June 2009 from Chief Prosecutor Hassan B. Jallow to Kenneth Roth, Executive Director Human Rights Watch.

[29] Hassan B. Jallow, *Prosecutorial Discretion and International Criminal Justice*, 3 J. Int'l Crim. Just. 145, 152 (2005).

against Joseph Nzirorera plainly falls within this category.[30] As in *Čelebići*, the Chamber is unable to find that such selectivity is discriminatory or otherwise impermissible.

20. Consequently, the Chamber finds that Joseph Nzirorera has failed to establish the *prima facie* materiality of the documents he seeks to the preparation of his Defence case.

FOR THESE REASONS, THE CHAMBER

DISMISSES Joseph Nzirorera's Motion in its entirety.

Arusha, 30 September 2009, done in English.

Dennis C. M. Byron	Gberdao Gustave Kam	Vagn Joensen
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

[30] The Indictment alleges, at para. 3: "During 1994 Joseph NZIRORERA was National-Secretary of the MRND political party and a member of its Steering Committee, serving in that capacity since July 1993. Joseph NZIRORERA was also a member of the *Chambre des Députés* in the *Assemblée Nationale*, representing the MRND and Ruhengeri *préfecture* in that capacity, and served as *Président* of the *Assemblée Nationale* in the Interim Government of 8 April 1994. Previously Joseph NZIRORERA was Minister of Public Works in the MRND government of 15 January 1989 and was Minister of Industry, Mines and Artisanry in the MRND governments formed on 9 July 1990 and on 4 February 1991. Joseph NZIRORERA was a member of the MRND Steering Committee throughout the period 1992 – 1994 and even prior to 1991."