

ICTR-98-44-T
5-10-2009
(48270-48266)

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-T

IN TRIAL CHAMBER No. 3

Before: Judge Dennis C.M. Byron, Presiding
Judge G. Gustave Kam
Judge Vagn Joensen

Registrar: Mr. Adama Dieng

Date Filed: 5 October 2009

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS ARCHIVE
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JOSEPH NZIRORERA'S APPLICATION FOR
CERTIFICATION TO APPEAL DECISION
ON SELECTIVE PROSECUTION DISCLOSURE

The Office of the Prosecutor:

Mr. Don Webster
Mr. Saidou N'Dow
Mr. Arif Virani

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 applies, pursuant to Rule 73(B), for certification to appeal the Trial Chamber's *Decision on Joseph Nzirorera's Motion for Selective Prosecution Documents* (30 September 2009).

2. Rule 73(B) provides that:

“Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

3. In the Impugned Decision, the Trial Chamber denied Mr. Nzirorera disclosure of documents relating to his claim of selective prosecution so that he could use them during the sentencing phase of his case. It found that he had not made a *prima facie* showing that he could possibly prevail on a claim that his rights were violated by the prosecutor's failure to prosecute any Tutsis.

4. Mr. Nzirorera respectfully contends that this is an issue which significantly affects the fairness of his trial and its outcome. By denying him access to documents which could lead to a lesser sentence if convicted, the Trial Chamber is rendering Mr. Nzirorera's trial unfair and adversely affecting the outcome.

5. An interlocutory decision by the Appeals Chamber prior to the conclusion of the trial would allow the issue of disclosure to be resolved before the harm is realized. If the Trial Chamber is found to have erred, the error can be corrected, and the disclosure obtained, in time for use in the sentencing phase of the proceedings.

6. The prosecution has acknowledged in its own application for certification to appeal a disclosure issue earlier in the trial that “the duty to disclose and the manner of disclosure are integral matters of procedure...which affects the fairness and expeditiousness of the proceedings.”¹ The Trial Chamber agreed.²

7. This Trial Chamber also granted certification to the prosecution to appeal issues of the scope of its disclosure obligations under Rule 66(B) and the reciprocal disclosure obligations of the defence under Rule 67(C). It found that such issues touch upon the fairness of the proceedings.³ The same is true for the instant issue.

8. Therefore, as it has done for the prosecution, the Trial Chamber should grant Mr. Nzirorera certification to appeal this important issue of first impression before the Appeals Chamber.

9. While an application for certification does not turn on the merit of the appeal, it is worth noting that the Trial Chamber appears to have erred in applying both parts of the test for selective prosecution.

10. First, it found that the element of showing an improper motive for the prosecution was not satisfied by showing failure to prosecute others, but Mr. Nzirorera had to show an improper motive in prosecuting him.⁴ In making this finding, the Trial Chamber simply called the same glass half-empty instead of half-full.

¹ *Motion for Certification to Appeal Trial Chamber's Decision Given Orally on 16 February 2006 Regarding the Role of the Electronic Disclosure Suite in Discharging the Prosecution's Disclosure Obligations* (22 February 2006) at para. 14

² Transcript of 28 February 2006 @ 41

³ *Decision on Prosecutor's Application for Certification to Appeal The Chamber's Decision on Joseph Nzirorera's Motion for Inspection of Statement of Pierre Celestin Mbonankira and Decision on Prosecution Cross Motion for Enforcement of Reciprocal Disclosure* (2 October 2007)

⁴ Impugned Decision at para. 16

11. The accused in the *Armstrong*⁵ case, who were clearly found in possession of crack cocaine, didn't have to establish that they were not guilty. They simply had to show that whites were not being prosecuted for the same conduct. Similarly, Mr. Nzirorera has made a *prima facie*, indeed indisputable, case, that only one side of the conflict in Rwanda—Hutus—are being prosecuted at this Tribunal. That is enough to obtain disclosure.

12. Second, the Trial Chamber erred in comparing apples and oranges when looking to whether other similarly situated persons had not been prosecuted. Instead of comparing Mr. Nzirorera's case to that of a low ranking soldier, it failed to compare his case to that of a leader such as Paul Kagame. If Mr. Nzirorera can be prosecuted for crimes committed by the Interahamwe, over whom he is alleged to have had effective control, then President Kagame can be prosecuted for crimes committed by the Rwandan Patriotic Army, over whom he is alleged to have had effective control.

13. While the Trial Chamber cited the Security Council resolution calling for the prosecution of high-ranking accused,⁶ it failed to cite the operative language from Security Council Resolutions 1503 and 1534 in which the Security Council called "on all States, especially Rwanda...to intensify cooperation with and render all necessary assistance to the ICTR, including on investigations of the Rwandan Patriotic Army..."

14. Therefore, the Trial Chamber's analysis of the element of establishing that other similarly situated persons were not prosecuted was flawed by failing to consider persons actually similarly situated to Mr. Nzirorera—such as President Kagame.

⁵ *United States v Armstrong*, 517 US 456 (1996)

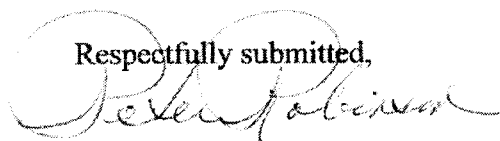
⁶ Impugned Decision at para. 19

15. It is important to the confidence held in this Tribunal by the international community that the issue of selective prosecution be fully litigated and resolved. By refusing to allow disclosure of documents which would reveal the motive for not prosecuting Tutsi leaders who may have committed crimes within the jurisdiction of the Tribunal, the Trial Chamber has done a disservice to transparency and justice.

16. As the Presiding Judge could not have helped but notice at his recent attendance at the International Symposium held in Geneva in July, the failure to prosecute RPF crimes is a major stain on the legacy of this Tribunal. The Trial Chamber's decision hides the stain instead of trying to remove it.

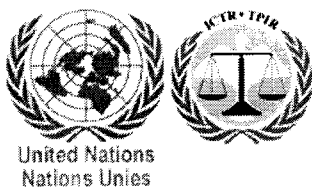
17. Therefore, it is respectfully requested that the Trial Chamber grant Mr. Nzirorera certification to appeal the *Decision on Joseph Nzirorera's Motion for Selective Prosecution Documents*. This issue, with its importance to the fairness of Mr. Nzirorera's trial and its outcome, and to the legacy of this Tribunal, ought to be decided by the Appeals Chamber.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera



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COURT MANAGEMENT SECTION
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Case Name:	The Prosecutor vs. Joseph Nzirorera		Case Number: ICTR-98-44-T	
Dates:	Transmitted: 5 October 2009		Document's date: 5 October 2009	
No. of Pages:	5	Original Language:	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
Title of Document:	JOSEPH NZIRORERA'S APPLICATION FOR CERTIFICATION TO APPEAL DECISION ON SELECTIVE PROSECUTION DISCLOSURE			
Classification Level:		TRIM Document Type:		
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