

ICTR-98-44-T
24-12-2008
(43864-43858)

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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: 24 December 2008

THE PROSECUTOR

v.

JOSEPH NZIRORERA

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JOSEPH NZIRORERA'S MOTION
FOR INDEPENDENT MEDICAL
EXAMINATION AND REPORT

The Office of the Prosecutor:

Mr. Don Webster
Ms. Allayne Frankson-Wallace
Mr. Iain Morley
Ms. Gerda 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. On this Christmas eve, Mathieu Ngirumpatse lies in a Nairobi hospital, where he has remained for the past two months with a serious illness. It is reported that he is not responding to the treatments there.

2. Joseph Nzirorera respectfully moves, pursuant to Rules 54 and 73, that the Trial Chamber appoint an independent medical expert to examine Mathieu Ngirumpatse and to report back to the Chamber on the following issues:

- (A) The likelihood that transfer of Mr. Ngirumpatse to a hospital in Europe would facilitate his recovery; and
- (B) Whether the prognosis for Mr. Ngirumpatse is such that it is necessary that his deposition be taken in order to preserve his testimony.

3. It is well established that the Trial Chamber has jurisdiction over matters normally entrusted to the Registrar when those matters affect the fair trial rights of the accused.¹

4. Mr. Nzirorera contends that his fair trial rights will be irrevocably compromised if Mr. Ngirumpatse does not rejoin the trial and mount a defence to the allegations made against him during the prosecution's case—allegations upon which Mr. Nzirorera can be convicted pursuant to joint criminal enterprise liability. Therefore, it is essential that all means be employed to facilitate Mr. Ngirumpatse's recovery.

5. Mr. Nzirorera has noted that Mr. Ngirumpatse's counsels have produced an opinion of a medical specialist that treatment exists in Europe that is not available in Nairobi which can facilitate Mr. Ngirumpatse's recovery. However, the Registrar has

¹ *Prosecutor v Krajisnik*, No. IT-00-39-A, *Decision on Motion Seeking Review of the Decisions of the Registry Relating to the Assignment of Counsel* (29 January 2007) at fn. 11; *Prosecutor v Seselj*, No. IT-03-67-AR73.3, *Decision on Appeal Against Trial Chamber Decision on Assignment of Counsel* (20 October 2006) at para. 16; *Prosecutor v Blagojevic*, No. IT-02-60-AR73.4, *Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team* (7 November 2003) at para. 7; *Prosecutor v Milutinovic et al*, No. IT-99-37-AR73.2, *Decision on Interlocutory Appeal on Motion for Additional Funds* (13 November 2003) at paras. 23-24

declined to transport Mr. Ngirumpatse to The Netherlands where the United Nations maintains a detention facility and has the experience and capacity to provide medical care to a person in U.N. custody.

6. Mr. Nzirorera contends that, to safeguard his right to a fair trial, as well as to do the right thing morally, the Trial Chamber should obtain an independent expert report so that it may intelligently review the decision of the Registrar.

7. Mr. Nzirorera's right to a fair trial will also be irrevocably compromised if the testimony of Mathieu Ngirumpatse is not available during the trial. Therefore, he requests that the Trial Chamber obtain an independent medical opinion on whether Mr. Ngirumpatse is likely to be sufficiently strong in the future to give testimony in this case, or whether it is necessary to preserve his testimony at this point by taking his deposition.

7. Mr. Nzirorera notes that a situation similar to that of Mr. Ngirumpatse has been taking place at the ICTY over the last year. Jovica Stanisic, former Chief of the Secret Service of Yugoslavia, has had a serious illness which delayed the start and resumption of his trial.²

8. In that case the Trial Chamber has taken a proactive approach, granting provisional release so the accused could be treated in Serbia³, accepting reports from independent medical experts who examined the accused⁴, and holding a hearing to resolve conflicting medical evidence.⁵

² *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-AR73.2, *Decision on Defence Appeal of the Decision on Future Course of the Proceedings* (16 May 2008)

³ *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Provisional Release* (26 March 2008)

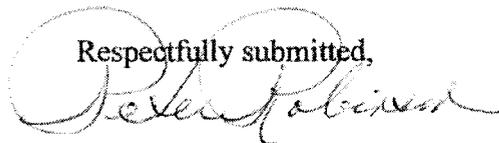
⁴ *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Order on Filing of Medical Expert Reports by Defence for Jovica Stanisic* (9 January 2008)

⁵ *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Order on Hearing and Further Instruction for Independent Experts* (11 February 2008)

9. In contrast, as far as Mr. Nzirorera can tell, this Trial Chamber has done nothing, even in the face of the 24 November 2008 letter from Mr. Ngirumpatse's counsels to the Presiding Judge in which they expressed their alarm over Mr. Ngirumpatse's situation.⁶

10. Therefore, Mr. Nzirorera files this motion to spur this Trial Chamber into action. The first logical step is to obtain detailed and reliable information from medical specialists. Mr. Nzirorera respectfully requests that the Trial Chamber do so forthwith. His right to a fair trial, and, indeed, Mathieu Ngirumpatse's life, depends on it.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera

⁶ A copy of that letter, in English, is attached as Annex "A" to this motion.

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ANNEX "A"

43859

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Judge Byron
President of the International
Criminal Tribunal for Rwanda

Mr. Adama Dieng
Registrar of the International Criminal
Tribunal for Rwanda

Paris 24 November 2008

Mr. President,
The Registrar,

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[Handwritten signature]

Further to our letter of 21 November, we attach herewith a supplementary report to the expert opinion on Ngirumpatse's condition, prepared by Dr. Dreyfus on 21 November 2008, to serve when and where necessary. The report shows:

- that M. Ngirumpatse is suffering from a serious infection;
- that the symptoms appeared when the patient was already in a serious pathological state;
- that when this infection sets in, the pathological state is already very advanced and serious;
- that a recurrence indicates that the illness is extremely seriousness and very advanced;
- that the cause of the infection is persistent and that recurrence is almost certain;
- that the vital prognosis is serious, and that there is **a serious risk of death if complex and difficult surgical treatment is not undertaken;**
- that this risky surgical operation is therefore possible and necessary, but very complex, and that **only a few hospitals in Europe** or the United States are able to perform it **without major risk of death;**

- that waiting for a relapse to occur without the safeguards necessitated by this condition is an enormous loss of an opportunity;
- that abstention will surely lead to a recurrence within a relatively short time and put M. Ngirumpatse at the risk of dying a violent death and that it would no longer be possible to carry out any operation to save his life, which seems to be still possible at this stage.

These findings are damning, since they mean that:

- either the various components of the Tribunal act without further delay and takes the necessary measures to safeguard M. Ngirumpatse's chances of being saved, which is possible provided that the chances are not comprised by this prolonged inertia;
- or the Tribunal's various components continue to pass the buck, by procrastinating and postponing measures which, as we have been reiterating, are urgent and cannot be the responsibility of the Defence, and which the Defence has no power to implement; therefore, each of the components concerned will individually and jointly bear responsibility - vis à vis their conscience, M. Ngirumpatse, his family, the Rwandan people, the international community and History - for what may happen to M. Ngirumpatse, and for depriving him of chances of recovery due to failure to heed these repeated warnings.

Since no one can claim that his Counsel remained silent, as they have continued to state and reiterate the obvious, we consider it our duty to make this letter public and to keep the report alone confidential, to avoid breaching the confidentiality of Ngirumpatse's medical record.

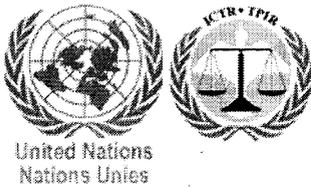
Yours faithfully

[Signed]

Frédéric Weyl
Co-Counsel

[Signed]

Chantal Hounkpatin
Lead Counsel



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input checked="" type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Trial Chamber III A. N'Gum
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Appeals Chamber / Arusha Chamber II F. A. Talon		<input type="checkbox"/> Appeals Chamber / The Hague K. K. A. Afandé R. Muzigo-Morrison
From:	<input type="checkbox"/> Chamber (names)	<input checked="" type="checkbox"/> Defence Peter Robinson (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
Case Name:	The Prosecutor vs. Joseph Nzirorera		Case Number: ICTR-98-44-T	
Dates:	Transmitted: 24 December 2008		Document's date: 24 December 2008	
No. of Pages:	7	Original Language:	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
Title of Document:	JOSEPH NZIRORERA'S MOTION FOR INDEPENDENT MEDICAL EXAMINATION AND REPORT			
Classification Level:		TRIM Document Type:		
<input type="checkbox"/> Ex Parte <input type="checkbox"/> Strictly Confidential / Under Seal <input type="checkbox"/> Confidential <input checked="" type="checkbox"/> Public		<input type="checkbox"/> Indictment <input type="checkbox"/> Warrant <input type="checkbox"/> Correspondence <input type="checkbox"/> Decision <input type="checkbox"/> Affidavit <input type="checkbox"/> Notice of Appeal <input type="checkbox"/> Disclosure <input type="checkbox"/> Order <input type="checkbox"/> Appeal Book <input type="checkbox"/> Judgement <input checked="" type="checkbox"/> Motion <input type="checkbox"/> Book of Authorities		

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II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

CMS SHALL take necessary action regarding translation.

Filing Party hereby submits only the original, and **will not submit** any translated version.

Reference material is provided in annex to facilitate translation.

Target Language(s):

English French Kinyarwanda

CMS SHALL NOT take any action regarding translation.

Filing Party hereby submits **BOTH the original and the translated version** for filing, as follows:

Original	in	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda
Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

CMS SHALL NOT take any action regarding translation.

Filing Party **will be submitting the translated version(s)** in due course in the following language(s):

English French Kinyarwanda

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<input type="checkbox"/> The OTP is overseeing translation. The document is submitted for translation to: <input type="checkbox"/> The Language Services Section of the ICTR / Arusha. <input type="checkbox"/> The Language Services Section of the ICTR / The Hague. <input type="checkbox"/> An accredited service for translation; see details below: Name of contact person: Name of service: Address: E-mail / Tel. / Fax:	<input type="checkbox"/> DEFENCE is overseeing translation. The document is submitted to an accredited service for translation (fees will be submitted to DCDMS): Name of contact person: Name of service: Address: E-mail / Tel. / Fax:
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III - TRANSLATION PRIORITISATION (For Official use ONLY)

<input type="checkbox"/> Top priority	COMMENTS	<input type="checkbox"/> Required date:
<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: