

ICTR-98-44-T
29-1-2007
(28358-28349)

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-T

Before: Judge Erik Mose, President

Registrar: Mr. Adama Dieng

Date Filed: 29 January 2007

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS ARCHIVES
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JOSEPH NZIRORERA'S REQUEST FOR
DESIGNATION OF TRIAL CHAMBER
TO CONSIDER REFERRAL TO NATIONAL JURISDICTION

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 requests that, pursuant to Rule 11 *bis*, the President designate a Trial Chamber which can consider, *proprio motu*, the referral of this case to an appropriate national jurisdiction other than Rwanda.

2. Rule 11 *bis* (A) provides:

If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:

- (i) in whose territory the crime was committed; or
- (ii) in which the accused was arrested; or
- (iii) having jurisdiction and being willing and adequately prepared to accept such a case,

so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

3. Rule 11 *bis* (B) provides that the Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, the accused, the opportunity to be heard.

4. With the resignation of Judge Emile Francis Short from the Government I trial, it is obvious that the trial cannot be completed within the mandate of this Tribunal. That mandate, which the President has consistently assured the Security Council will be met, requires that all trials be completed by the end of 2008.

5. The prosecution had indicated even before the resignation of Judge Short that it would not be in a position to complete its case until December 2007 and recognized that it would not be possible to complete the defence case by the end of 2008.¹ Likewise, Mr.

¹ *Prosecution Motion for a Scheduling Order and for Practice Directions for the Duration of the Trial* (11 September 2006) at para. 17

Nzirorera had repeatedly represented that he would not be able to complete his defence case by the end of 2008.²

6. It is respectfully submitted that given the inability to complete the trial in accordance with the mandate of the Security Council, other options must be considered. One option is referral of the case to a national jurisdiction pursuant to Rule 11 *bis*. This would free up a Trial Chamber which would otherwise be occupied for the next 22 months and allow for several individual trials to be heard during that period. This would have a significant impact in reducing the number of cases which the Tribunal would otherwise have to refer to national jurisdictions.

7. Mr. Nzirorera would be willing to agree to referral to certain national jurisdictions other than Rwanda. He has requested that the prosecutor make a motion for referral pursuant to Rule 11 *bis*.³ However, the prosecutor has declined to do so.⁴

8. Therefore, the only mechanism for such a transfer to be considered is the power of a Trial Chamber to act *proprio motu* pursuant to Rule 11 *bis* (B). Since, unlike the ICTY, the ICTR does not have a permanent referral bench to whom the accused could address a request to act *proprio motu*, Mr. Nzirorera respectfully requests that the President designate a Trial Chamber to act as a referral bench in his case.⁵

9. Once a Trial Chamber is designated, it can receive submissions from the parties concerning the appropriateness of referring the case to a national jurisdiction, and can

² Transcript of 5 June 2006 @ 38-39; *Joseph Nzirorera's Response to Prosecution Motion for a Scheduling Order and for Practice Directions for the Duration of the Trial* (13 September 2006) at paras. 8,9,14

³ See letter to Prosecutor attached as Annex "A".

⁴ See letter from Prosecutor attached as Annex "B"

⁵ At the ICTR, the President has appointed ad hoc Trial Chambers on as needed basis to serve as a referral bench. *Prosecutor v Bagaragaza*, No. ICTR-05-86-PT, *Designation of Trial Chamber Under Rule 11 bis* (21 February 2006) appointing Judges Byron, Reddy, and Silva and *Designation of Trial Chamber Under Rule 11 bis* (13 December 2006) appointing Judges Kahn, Egorov, and Weinberg

request submissions from the Registrar, if necessary, on the willingness of national jurisdictions to accept referral of the case.⁶

10. Failure to designate a Trial Chamber to consider a referral of the case would result in the monopolization of the Rule 11 *bis* power in the hands of the Prosecutor because there is no Trial Chamber with the authority to act *proprio motu* as provided for in Rule 11 *bis*. Mr. Nzirorera's own Trial Chamber is without power to consider such a transfer.⁷

11. The Appeals Chamber has recently noted that the power to decide on transfer of a case pursuant to Rule 11 *bis* properly rests with a designated Trial Chamber and not with the Prosecutor.⁸ Therefore, such a Trial Chamber should be designated so that the decision whether or not to transfer the case can be made by a competent body.

12. Mr. Nzirorera also contends that because Rule 11 *bis* allows only the prosecution to request a transfer of a case, the rule on its face violates the principle of equality of arms between the accused and the prosecution. This principle has been held to be a component of the right to a fair trial.⁹

13. The President is respectfully requested to designate a Trial Chamber to consider the possible referral of this case to a national jurisdiction pursuant to Rule 11 *bis*.

⁶ In his most recent address to the Security Council, the Prosecutor advised that there were at least two European countries which were willing to receive referrals of ICTR cases.

⁷ *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Defence's Motions for Separate Trials and Severance of Counts* (1 July 2005) at para. 6

⁸ *Prosecutor v Bagaragaza*, No. ICTR-05-86-AR11bis, *Decision on Rule 11 bis Appeal* (30 August 2006) at para. 10

⁹ *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 44; *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 67; *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Decision on the Motion to Stay Proceedings in the Trial of Ferdinand Nahimana* (5 June 2003) at para. 4.; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Peter Robinson". The signature is written in black ink and is positioned above the printed name.

PETER ROBINSON

Lead Counsel for Joseph Nzirorera

ANNEX "A"

PETER ROBINSON
International Criminal Law
P.O. Box 1844
Santa Rosa, California 95402
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E-mail: peter@peterrobinson.com

24 January 2007

The Honorable Hassan Jallow
Prosecutor
International Criminal Tribunal for Rwanda
Arusha, Tanzania

Re: *Prosecutor v Nzirorera*
No. ICTR-98-44-T

Dear Justice Jallow,

The parties in the Government I trial were officially notified today of the resignation of Judge Emile Francis Short from our Trial Chamber for health reasons. I am writing in the hope that we might be able to work together to turn this unfortunate development into an opportunity.

I am asking you to file a request, pursuant to Rule 11 *bis*, for the assignment of a Referral Bench to consider the transfer of Mr. Nzirorera's case to a national jurisdiction other than Rwanda.

I note that on 15 December 2006 you informed the United Nations Security Council that there were at least two European countries which were willing to accept referrals from the ICTR. I suggest to you that it makes sense to allow a Referral Bench to consider Mr. Nzirorera's case as a candidate for such a transfer.

The plain fact is, as your own prosecutors will tell you, that there is no reasonable prospect for completing Mr. Nzirorera's case by the end of 2008 as required by the Security Council. In the last working session between the parties and the Trial Chamber's Judgement Coordinator in December 2006, the prosecution team advised that it was about ¼ complete with its witnesses and would need at least three more trial sessions to complete its evidence.

The team estimated that it would need to call 40 more witnesses, including experts. Since we have been lately proceeding at a pace of five witnesses per trial session, its time estimate of three more trial sessions appears to be optimistic at best.

The Honorable Hassan Jallow
--page two--

The defence case will take at least as long as that of the prosecution, probably longer. The prosecution will thus have taken more than two years to present its case if it is able to rest by the end of the year. That leaves only one year for the defence case. There is simply no reasonable expectation that we could complete our case in that period, and in fact would likely run over by at least one year.

Therefore, we seem to be at a crossroads—either continue the trial as it is and tell the Security Council that the completion strategy has failed, or find another solution.

In the 22 months between now and the end of 2008 that the Trial Chamber would otherwise be occupied with Mr. Nzirorera's case, instead another 7 accused could probably be tried in individual trials averaging three months in length. This would virtually wipe out the backlog of cases at the ICTR and allow the Tribunal to complete its work as promised.

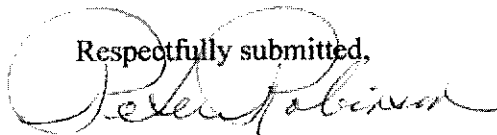
By taking on Mr. Nzirorera's case pursuant to transfer under Rule 11 bis, a national jurisdiction would save itself and the other member States of the United Nations the cost of continuing to fund the ICTR past 2008. Surely the benefits of ridding itself of this bureaucracy would outweigh the modest imposition of one more case upon an already functioning and funded national criminal justice system.

Mr. Nzirorera's son is living in France, and he has daughters living in The Netherlands and Belgium. He may well be willing to consent to a transfer to a European country so that he can be close to his family and receive a fair trial.

As you know, Rule 11 *bis* does not contain a provision for a referral upon motion of the accused. Therefore, I am requesting that you bring such a motion and that we work together with the Registry to persuade a national jurisdiction to take Mr. Nzirorera's case. I am available to meet with you, your staff, or representatives of any national jurisdictions to accomplish this.

Thank you for your consideration.

Respectfully submitted,



PETER ROBINSON
Lead Counsel for Joseph Nzirorera

cc: Constant Hometowu for distribution to the
Judges and parties

ANNEX "B"

Ref: OTP/P/2007/016

Date: 25 January 2007

Mr. Peter Robinson
P.O. Box 1844
Santa Rosa, California 95402
Fax: 1-208 6946161

Dear Mr. Robinson,

Re: Prosecutor vs Nzirorera No. ICTR 98-44-T

I am unable to accede to your request in your letter of 24th January 2007 to file a Rule 11bis application for your client's case to be referred for trial to a national jurisdiction other than Rwanda.

Negotiations have already been concluded with the two European jurisdictions you referred to and the cases proposed for Rule 11bis already agreed upon.

Our position is that the case should continue at the ICTR with a substitute judge being appointed in the light of Judge Short's resignation. There is a very good prospect in my view of the case being concluded within the Completion Strategy time frame and all parties should strive to that end.

With best regards.

Hassan Bubacar Jallow
Prosecutor, ICTR



Cc: - Constant Hometowu, Legal Officer, ICTR
- Don Webster, Senior Trial Attorney, OTP
- Alayne Frankson-Wallace, Trial Attorney, OTP



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"/> Appeals Chamber / Arusha F. A. Talon
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Deputy Chief, CMS M. Diop	<input type="checkbox"/> Chief, JPU, CMS M. Diop	<input type="checkbox"/> Appeals Chamber / The Hague R. Muzigo-Morrison K. K. A. Afande
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: 28 January 2007		Document's date: 29 January 2007	
No. of Pages:	10	Original Language: <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda		
Title of Document:	JOSEPH NZIRORERA'S REQUEST FOR DESIGNATION OF TRIAL CHAMBER TO CONSIDER REFERRAL TO NATIONAL JURISDICTION (for filing with the President and disclosure as a public document)			
Classification Level:		TRIM Document Type:		
<input type="checkbox"/> Strictly Confidential / Under Seal		<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence
<input type="checkbox"/> Confidential		<input type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal
<input checked="" type="checkbox"/> Public		<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
		<input type="checkbox"/> Submission from non-parties		
		<input checked="" type="checkbox"/> Submission from parties		
		<input type="checkbox"/> Accused particulars		

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

CMS SHALL take necessary action regarding translation.			
<input checked="" type="checkbox"/> Filing Party hereby submits only the original, and will not submit any translated version.			
<input type="checkbox"/> Reference material is provided in annex to facilitate translation.			
Target Language(s):			
<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda	
CMS SHALL NOT take any action regarding translation.			
<input type="checkbox"/> Filing Party hereby submits BOTH the original and the translated version for filing, as follows:			
Original	in	<input 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.			
<input type="checkbox"/> Filing Party will be submitting the translated version(s) in due course in the following language(s):			
<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda	
KINDLY FILL IN THE BOXES BELOW			
<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:	

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: