

ICTR-98-44-T
29-10-2007
(31695-31690)

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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: 29 October 2007

THE PROSECUTOR

v.

JOSEPH NZIRORERA

2007 OCT 29 A 9:48
m

JOSEPH NZIRORERA'S MEMORANDUM ON
THE APPLICABILITY OF THE ARUSHA ACCORDS TO
THE REPLACEMENT OF PRESIDENT HABYARIMANA

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 Ndirumpatse

1. On 25 October 2007, during the examination of Witness GOB, the Trial Chamber indicated it was interested in understanding the applicability of the Arusha Accords to the replacement of President Habyarimana in April 1994.¹

2. Mr. Nzirorera considers the question a pure issue of law which the Trial Chamber will determine in its final judgement. He files this memorandum so that the Trial Chamber understands his position on the issue as the trial moves forward.

3. The Arusha Accords are a series of agreements entered into between the government of Rwanda and the Rwandese Patriotic Front. Those agreements are:

Annex I	Peace Agreement Between the Government of Rwanda and the Rwandese Patriotic Front	4 August 1993
Annex II	The N'Sele Ceasefire Agreement	12 July 1992
Annex III	Protocol of Agreement on The Rule of Law	18 August 1992
Annex IV	Protocol of Agreement on Power-Sharing Within the Framework of The Broad-Based Transitional Government	30 October 1992
	Continuation Agreement on Power-Sharing	9 January 1993
Annex V	Protocol of Agreement on the Repatriation of Rwandese Refugees and Resettlement of Displaced Persons	9 June 1993
Annex VI	Protocol of Agreement on the Integration of the Armed Forces Of the Two Parties	3 August 1993
Annex VII	Protocol of Agreement on Miscellaneous Issues and Final Provisions	3 August 1993

¹ Transcript of 25 October 2007 @ 68 (draft)

4. Those agreements are now in evidence as Exhibit DNG-85.

5. The pertinent provisions of the Continuation of the Protocol on Power Sharing² of the Arusha Accords provides as follows:

“Section 1: Provisions relating to Executive Power

Sub-section 1: Replacement of the President of the Republic during the Transitional Period

...

Article 48: In the event of resignation or death, permanent impediment, or incapacitation of the President of the Republic:

1. The office shall be declared vacant by the Supreme Court upon request by the Broad-Based Transitional Government
2. The Interim Presidency shall be assumed by the Speaker of the National Assembly
3. The replacement of the President of the Republic shall be Conducted in the following manner:
 - a) The party of the former President of the Republic shall present two candidates to the Bureau of the Transitional National Assembly within three (3) weeks of the declaration of the vacancy
 - b) Within the fourth week, the election of the President of the Republic shall be conducted in a joint session of the Broad-Based Transitional Government and the Transitional National Assembly. The respective members of the two institutions shall elect the President of the Republic by secret ballot and by an absolute majority. The election shall be supervised by the Speaker of the Transitional National Assembly.
 - c) If the party of the former President of the Republic, for one reason or another, is not willing to present a candidate or cannot present any candidate, or if the President of the Republic has resigned from his party in the meantime, each political force represented in the Transitional National Assembly may submit one (1) candidate within six (6)

² Annex IV (2) in Exhibit DNG-85

weeks after the declaration of the vacancy. The election shall be conducted during the seventh week, at the latest, following the modalities provided for in point b) above.

- d) If the vacancy is declared three (3) months or less before the expiry of the transitional period, the Speaker of the Transitional Assembly shall assume the Interim Presidency of the Republic until the end of the Transition.

6. Article 3 of the Peace Agreement signed on 4 August 1993³ provides that the Arusha Accords and certain provisions of the 1991 Rwandan Constitution were to constitute the Fundamental Law “during the transitional period”.

6. As set forth in the heading of its sub-section, Article 48 also applies to the replacement of the President “during the transitional period.” The question of the applicability of Article 48, and the Arusha Accords in general, to the replacement of President Habyarimana on 8 April 1994 thus turns initially on whether the transitional period had commenced.

7. Article 22 of the Protocol on Miscellaneous Issues and Final Provisions⁴ provides in pertinent part that:

“The duration of the Transition period shall be twenty-two (22) Months from the date of the establishment of the Broad-Based Transitional Government...” (emphasis added)

8. The situation on 8 April 1994 was that the Broad-Based Transitional Government had not yet been established. Although the President had been sworn in on 5 January 1994, neither the ministers nor the Transitional National Assembly had been sworn in. Therefore, it cannot be said that the transitional period had commenced.

9. Since the transitional period had not commenced, neither the Arusha Accords in general, nor Article 48 of the Power-Sharing Agreement, applied.

³ Annex I in Exhibit DNG-85

⁴ Annex VII in Exhibit DNG-85

10. Indeed, it would have been impossible to apply Article 48 since there was no person holding the position of Speaker of the National Assembly (Article 48 (2)), no Bureau of the National Assembly (Article 48(3)(a)), no members of the Broad-Based Transitional Government and no members of the Transitional National Assembly (Article 48(3)(b)) to carry out the tasks of replacing the President set forth in Article 48.

11. Article 8 of the Peace Agreement⁵ provides in pertinent part that:

“The current Government shall remain in Office until the Broad-Based Transitional Government is established...”

12. Article 9 of the Peace Agreement⁶ provides in pertinent part that:

“The ‘Conseil National de Development (CND) shall remain in Office until the Transitional National Assembly is established.”

13. Therefore, since the Broad-Based Transitional Government and Transitional National Assembly had not yet been established, the President of the CND, Theodore Sindikubabwo, retained his post as of 8 April 1994.

14. Article 42(3) of the 1991 Constitution of Rwanda provided that in case of the death of the President, he should be replaced by the President of the Conseil National de Development (CND) for a period of 90 days.⁷

15. The resort to the provisions of Article 42 of the 1991 Constitution, and the appointment of the President of the CND Theodore Sindikubabwo was therefore the legally correct path to the replacement of the President of the Republic on 8 April 1994.

16. In addition, Mr. Nzirorera contends that as a matter of law, when one party to an agreement commits a material breach of the agreement, the other party is not bound to

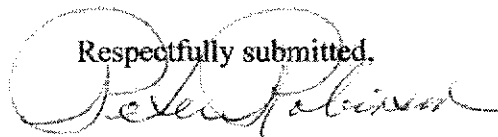
⁵ Annex I in Exhibit DNG-85

⁶ Annex I in Exhibit DNG-85

⁷ Exhibit DNZ-1

continue to abide by the agreement.⁸ He intends to lead evidence during his defence case that the Rwandese Patriotic Front assassinated President Habyarimana on 6 April 1994. Therefore, resort to the Arusha Accords by the Government of Rwanda was not required.

Respectfully submitted,



PETER ROBINSON
Lead Counsel for Joseph Nzirorera

⁸ See, for example, UNIDROIT Principles of International Commercial Law art. 7.3.1



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)

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Case Name:	The Prosecutor vs. Joseph Nzirorera			Case Number: ICTR-98-44-T
Dates:	Transmitted: 28 October 2007		Document's date: 29 October 2007	
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Classification Level:	<input type="checkbox"/> Strictly Confidential / Under Seal <input type="checkbox"/> Confidential <input checked="" type="checkbox"/> Public			
	TRIM Document Type: <input type="checkbox"/> Indictment <input type="checkbox"/> Warrant <input type="checkbox"/> Correspondence <input type="checkbox"/> Submission from non-parties <input type="checkbox"/> Decision <input type="checkbox"/> Affidavit <input type="checkbox"/> Notice of Appeal <input checked="" type="checkbox"/> Submission from parties <input type="checkbox"/> Disclosure <input type="checkbox"/> Order <input type="checkbox"/> Appeal Book <input type="checkbox"/> Accused particulars <input type="checkbox"/> Judgement <input type="checkbox"/> Motion <input type="checkbox"/> Book of Authorities			

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Reference material is provided in annex to facilitate translation.

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