

ICTR 98-44-T  
14-6-2010  
(S1478-51429)

S1478  
Zump

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: 14 June 2010

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS/ARCHIVES  
RECEIVED

2010 JUN 14 10:17

*[Handwritten signature]*

---

APPLICATION FOR CERTIFICATION TO APPEAL  
RE: ARREST OF PETER ERLINDER AND FOR  
STAY PENDING APPEAL

---

The Office of the Prosecutor:

Mr. Don Webster  
Mr. Takeh Sendze

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

## Introduction

1. Joseph Nzirorera and his Lead Counsel Peter Robinson respectfully apply, pursuant to Rule 73(B), for certification to appeal the decisions and orders of the Trial Chamber of 7 and 8 June 2010 arising from the arrest of Peter Erlinder in Rwanda. The decisions and orders sought to be appealed are:

- (A) Decision denying *Joseph Nzirorera's Motion for Continuance: Arrest of Peter Erlinder*<sup>1</sup>
- (B) Decision denying request for adjournment pending Registrar's adjudication of *Request for Withdrawal of the Assignment of Counsel*<sup>2</sup>
- (C) Decision imposing a warning on Lead Counsel and directing the Registrar to report the matter to his Bar Association<sup>3</sup>
- (D) Denial of request for postponement to allow Lead Counsel the opportunity to consult his Bar Association and Counsel<sup>4</sup>
- (E) Decision to initiate contempt proceedings against Lead Counsel<sup>5</sup>
- (F) Order that Lead Counsel submit an affidavit to show cause why he should not be held in contempt<sup>6</sup>

2. Mr. Nzirorera and his Lead Counsel Peter Robinson respectfully request that all proceedings be stayed pending a decision by the Appeals Chamber on this matter.

## Procedural History

3. On 28 May 2010, Peter Erlinder, lead counsel for Major Aloys Ntabakuze at the ICTR, was arrested by the Rwandan government for negation of genocide and endangering the national security.

---

<sup>1</sup> Transcript of 7 June 2010 at pp. 13-14

<sup>2</sup> Transcript of 7 June 2010 at p. 15

<sup>3</sup> Transcript of 8 June 2010 at p. 3

<sup>4</sup> Transcript of 8 June 2010 at pp 4-5

<sup>5</sup> Transcript of 8 June 2010 at p. 5

<sup>6</sup> Transcript of 8 June 2010 at p. 5

4. On 31 May 2010, Mr. Nzirorera filed *Joseph Nzirorera's Motion for Continuance: Arrest of Peter Erlinder*. In the motion, he requested that the three day trial sitting scheduled to commence on 7 June be cancelled and that the trial resume as scheduled on 21 June. In the motion, Mr. Nzirorera pointed out how his lawyer's personal interests were affected:

Mr. Nzirorera's defence team deems that it is no longer safe to advocate for an accused person at this Tribunal. Its members do not wish to subject themselves to prosecution in Rwanda, which could lead to Interpol arrest warrants as well as Bar disciplinary proceedings, simply for doing their jobs. Therefore, the defence team of Mr. Nzirorera is not in a position to proceed with his trial until matters relating to Mr. Erlinder's arrest are clarified and resolved.

5. Mr. Nzirorera attached to his motion an article from the New York Times in which quoted a spokesman for the Rwandan government as saying that Mr. Erlinder was accused of "denying the genocide" and "negationism" **from statements he had made at the tribunal in Arusha**, as well as "in his books, in publications." (emphasis added)<sup>7</sup>

6. On 3 June 2010, Mr. Nzirorera filed a supplemental submission in which he reported that on 2 June 2010, further statements were made by representatives of the government of Rwanda which re-enforced the position of Mr. Nzirorera's defence team.

The New York Times reported that:

"At that tribunal, Mr. Erlinder, who represented a top genocide suspect, disputed the standard characterization of the bloodshed in Rwanda as Hutu victimizers slaughtering innocent Tutsis. Instead, he said that the violence was more spontaneous and possibly the result of Tutsi rebels killing Hutu civilians. He even went as far to say that the Tutsi rebels, who now rule Rwanda, assassinated Rwanda's president in 1994, the event that set off the widespread murder.

Martin Ngoga, Rwanda's prosecutor general, called Mr. Erlinder a "denier" and "revisionist" of the genocide and said **it did not matter where the offensive remarks were made**.

---

<sup>7</sup> The entire article was reproduced as Annex "A" to the motion.

“We have jurisdictional links for statements and publications done outside Rwanda,” Mr. Ngoga said. (emphasis added)<sup>8</sup>

7. On 3 June 2010, the Prosecution filed its response to the motion.<sup>9</sup> Mr. Nzirorera replied on 7 June 2010, He informed the Chamber that according to the latest reports from the Associated Press, when Mr. Erlinder appeared in court on 4 June 2010, the charges were explained to Mr. Erlinder as “denying Rwanda’s 1994 genocide and publishing articles that threaten the country’s security.”<sup>10</sup> A broadcast on Radio Rwanda on 5 June 2010 at 6 am explicitly reported that Mr. Erlinder was being prosecuted for statements made in connection with the ICTR in Arusha.<sup>11</sup>

8. Mr. Nzirorera went on to demonstrate the link between Mr. Erlinder’s arrest and his work for the ICTR and the link between Mr. Erlinder’s arrest and the case of Joseph Nzirorera. He pointed out that it is his case that the killings which occurred in Rwanda in 1994 were not the result of a state-sponsored genocide, and that the Rwandan authorities and political party leaders never desired nor encouraged the killings, and in fact, tried their best to stop them.

9. Mr. Nzirorera recalled that in support of his case, he had called Ministers Pauline Nyiramasuhuko and Eliezer Niyitegeka as witnesses and hoped to call Ministers Casimir Bizimungu, Augustin Ngirabatware, and Andre Ntagerura to establish those facts. In addition, he had introduced prior testimony from Ministers Agnes Ntamabyaliro and Emmanuel Ndindabahizi to this effect pursuant to Rule 92 *bis*.

---

<sup>8</sup> The entire article was reproduced as Annex “B” to the Supplemental Submission.

<sup>9</sup> *Prosecutor’s Consolidated Response to Joseph Nzirorera’s Motion for Continuance: Arrest of Peter Erlinder and Requete pour M. Ngirumpatse en Ajournement de Proces*

<sup>10</sup> A copy of the Associated Press article was attached as Annex “C” to the reply brief.

<sup>11</sup> *Reply Brief: Joseph Nzirorera’s Motion for Continuance: Arrest of Peter Erlinder* (7 June 2010) at para.

10. Mr. Nzirorera further recalled that he had also elicited testimony from top military leaders General Augustin Bizimungu, Colonel Tharcisse Renzaho, and Colonel Anatole Nsengiyumva and hoped to call Colonel Theoneste Bagosora to the effect that the Rwandan authorities and political party leaders never encouraged the population to kill Tutsis.

11. Mr. Nzirorera noted that he, himself, had testified to those facts, as had Edouard Karemera, and that he expected Matthieu Ngirumpatse to do the same. He had also obtained the testimony of Interahamwe Vice President George Rutaganda and hoped to call another Interahamwe leader, Witness 31, to testify that the MRND and leaders of the Interahamwe never encouraged the killings and in fact tried to stop them.

12. Mr. Nzirorera further pointed out that he had also introduced considerable evidence in his trial that it was the Rwandese Patriotic Front which triggered the killings on 6 April 1994 by shooting down President Habyarimana's plane. That evidence consisted of prior testimony of RPA soldiers Abdul Ruzibiza and Aloys Ruyenzi, Witness BRA-1, Witness ALL-2, Witness ALPHA 1, and prior statements of four other RPA insiders, all admitted pursuant to Rule 92 *bis*.

13. Mr. Nzirorera informed the Chamber that if Peter Erlinder's publications on behalf of Aloys Ntabakuze could be the basis of criminal charges, then members of his own defence team were at risk for prosecution in Rwanda for genocide negationism if their work on behalf of Mr. Nzirorera is so interpreted by the Rwandan government.

14. Mr. Nzirorera noted that this was an unacceptable risk for the members of his defence team and their families. He requested a postponement of the trial session for the

week of 7 June as the most practical solution to diffuse what may otherwise lead to a breakdown in the proceedings.<sup>12</sup>

15. On 7 June 2010, the parties appeared before the Trial Chamber. The Chamber heard oral argument on the motion. Lead Counsel for Joseph Nzirorera indicated that it was impossible for him as defence counsel for Mr. Nzirorera to do his job, and for his client to have a fair trial, if the representation of his client could result in his own incarceration and loss of liberty, and that it was a risk he was not prepared to take.<sup>13</sup>

16. The Trial Chamber denied the motion to postpone the trial. In its oral decision, it relied upon a representation of the Rwandan Prosecutor General that the charges against Mr. Erlinder were not related to his work at the ICTR.<sup>14</sup>

17. Lead Counsel for Joseph Nzirorera then indicated he would file a *Request for Application to Withdraw as Counsel* before the Registrar pursuant to Article 19(A) of the *Directive on the Assignment of Defence Counsel*. He requested that the Trial Chamber adjourn the proceedings until that request could be decided.<sup>15</sup> He further requested that the Trial Chamber adjourn the proceedings to obtain more accurate information about the charges against Peter Erlinder in Rwanda, given the news reports he had submitted showing a direct link between the arrest of Mr. Erlinder and his work on behalf of his client at the ICTR.<sup>16</sup>

18. The Trial Chamber denied that request and summoned Mr. Nzirorera's witness, Janvier Busugi.<sup>17</sup> Lead Counsel for Mr. Nzirorera indicated he had no questions

---

<sup>12</sup> *Reply Brief: Joseph Nzirorera's Motion for Continuance: Arrest of Peter Erlinder* (7 June 2010) at paras. 6-11, 15

<sup>13</sup> Transcript of 7 June 2010 at pp. 2, 11

<sup>14</sup> Transcript of 7 June 2010 at p. 13

<sup>15</sup> Transcript of 7 June 2010 at pp. 14-15

<sup>16</sup> Transcript of 7 June 2010 at pp. 17-18

<sup>17</sup> Transcript of 7 June 2010 at pp. 18-19,

for the witness at that time and that he was not in a position to proceed to question the witness until his request to withdraw as counsel was adjudicated.<sup>18</sup> The Trial Chamber then took the luncheon recess.

19. Mr. Nzirorera's Lead Counsel thereupon filed his written *Request for Application to Withdraw as Counsel* with the Registrar.

20. In his request to withdraw, Lead Counsel noted that as a result of the arrest of Peter Erlinder, defence counsel at the ICTR are subject to a real risk of prosecution in Rwanda for their work on behalf of their clients. Lead Counsel never agreed to take such a risk when he accepted the assignment to represent Joseph Nzirorera in 2002, before the 2003 amendment to the Rwandan constitution and the 2008 genocide ideology laws were adopted. "Such a risk in unacceptable to Mr. Robinson and his family."<sup>19</sup>

21. Lead Counsel pointed out that the external pressure exerted upon defence counsel by the Rwandan government through its arrest of Peter Erlinder and application of its laws to ICTR defence counsel doing their jobs had compromised his independence and standards of what is necessary in the defence of his client. Therefore, under such conditions, he could no longer carry out the functions of defence counsel at the ICTR without violating Article 5 of the *ICTR Code of Professional Conduct for Defence Counsel*.<sup>20</sup>

22. Lead Counsel also pointed out that the action of the Rwandan government also creates a conflict of interest between him and his client in violation of Article 9(3)(c)(2) of the *ICTR Code of Professional Conduct for Defence Counsel*. He represented that his own personal interests in avoiding arrest and incarceration by the Rwandan government

---

<sup>18</sup> Transcript of 7 June 2010 at p. 23

<sup>19</sup> *Request for Application to Withdraw as Counsel* at paras. 5-6

<sup>20</sup> *Request for Application to Withdraw as Counsel* at para. 7-8

would unavoidably adversely affect his professional judgement on behalf of Mr. Nzirorera, since to continue to advance Mr. Nzirorera's defence subjected him to personal consequences which he was not willing to accept.<sup>21</sup>

23. When the proceedings resumed, Lead Counsel for Mr. Nzirorera advised the Chamber that he had been informed by Mr. Erlinder's counsel that when the charges had been read out in court on 4 June 2010 in Kigali, they had related to statements and publications Mr. Erlinder had made while he was representing Major Ntabakuze. He further informed the Chamber that he had filed his request to withdraw with the Registrar but had been unable to obtain an appointment with the Registrar thus far.<sup>22</sup>

24. The Trial Chamber indicated that the matter was one in which they were not prepared to intervene, even if it turned out that the charges against Mr. Erlinder were related to his work for the ICTR.<sup>23</sup> Lead Counsel for Mr. Nzirorera reiterated that the Chamber was not being asked to intervene on behalf of Mr. Erlinder, but to rule on the impact of his arrest on the fairness of Mr. Nzirorera's trial and his own ability to continue to defend his client.<sup>24</sup> The Trial Chamber adjourned the proceedings until the following morning so that "we have a calm and cool atmosphere".<sup>25</sup>

25. The parties convened again before the Trial Chamber on 8 June 2010. Lead Counsel informed the Chamber that the two witnesses who were in Arusha to testify on behalf of Joseph Nzirorera had agreed to return to give their testimony at a later date. He further advised the Chamber that he had again attempted to meet with the Registrar to discuss his request to withdraw but that the Registrar had been unable to see him. He

---

<sup>21</sup> *Request for Application to Withdraw as Counsel* at paras. 9-10

<sup>22</sup> Transcript of 7 June 2010 at p. 25

<sup>23</sup> Transcript of 7 June 2010 at pp. 28-29

<sup>24</sup> Transcript of 7 June 2010 at pp. 29-30

<sup>25</sup> Transcript of 7 June 2010 at p. 29

again requested that the Trial Chamber not proceed until his request to withdraw was decided.<sup>26</sup>

26. The Chamber refused to reconsider its decision to proceed and ordered Lead Counsel to proceed with the witness, Janvier Busugi.<sup>27</sup> Lead Counsel asked the witness if he was willing to return to give his testimony at another time. The witness agreed.<sup>28</sup>

When Lead Counsel indicated he had no further questions at that time, the Trial Chamber stated:

Mr. Robinson, we consider that this step is obstructing the justice of this—our—trial and in direct disobedience of a court order. At the moment we have decided that what we will do is give you a warning under Rule 46 and direct the Registrar that this be communicated to your bar association. We adjourn until 2 o'clock when we expect you to examine the witness.<sup>29</sup>

27. The proceedings reconvened in the afternoon. Lead Counsel for Mr. Nzirorera advised the Trial Chamber that he had tried once again to meet the Registrar without success. He repeated his view that the arrest of Mr. Erlinder on charges related to his work at the ICTR made it impossible for him to represent Mr. Nzirorera under those conditions.

28. Lead Counsel pointed out that to do so would violate Article 5 of the ICTR's *Code of Professional Conduct for Defence Counsel* which provides that "in providing representation to a client, counsel must never permit their independence, integrity, and standards to be compromised by external pressures."

29. Lead Counsel further pointed out that his continued representation of Mr. Nzirorera would also violate Article 9 of the *Code of Conduct* which provides that

---

<sup>26</sup> Transcript of 8 June 2010 at pp. 1-2

<sup>27</sup> Transcript of 8 June 2010 at p. 2

<sup>28</sup> Transcript of 8 June 2010 at pp. 2-3

<sup>29</sup> Transcript of 8 June 2010 at p. 3

“counsel must not represent a client with respect to a matter if the counsel’s professional judgement on behalf of his client will be, or may reasonably expected to be, adversely affected by the counsel’s own financial, business, property, or personal interests.”

30. Lead Counsel indicated that he was fully prepared to accept the outcome of the decision on his request to withdraw and that he would be prepared to proceed if the decision was that he would not be allowed to withdraw. He requested an opportunity to consult with his bar association and to retain and consult with his own counsel before proceeding.<sup>30</sup>

31. The Presiding Judge thereupon said:

“Mr. Robinson, it’s quite clear that you are not obeying our directives. And I think the Chamber does have a reason to believe that you may be in contempt of the Tribunal under Rule 77 for directly disobeying a court order and refusing to conduct the examination of Witness Janvier Busugi, who has traveled from the United States to testify in Arusha after the Tribunal overcame many expensive logistical and administrative obstacles. Mr. Busugi is an important witness for the defence of Joseph Nzirorera and the Chamber notes that your failure to conduct his examination has created a direct and negative impact on Nzirorera’s ability to present an effective defence.

Therefore, under Rule 77(c)(iii), the Chamber will initiate contempt proceedings against you.

Accordingly, the Chamber orders that Mr. Robinson procure legal representation and submit an affidavit showing cause why he should not be held in contempt of court no later than the close of business on Friday, 18<sup>th</sup> June. The affidavit should also mention why Mr. Nimy has not been present in court this week which has effectively left Mr. Nzirorera without counsel as this matter unfolds.

The Chamber orders that Mr. Robinson and Mr. Nimy appear in court on Monday, 21st June.”<sup>31</sup>

---

<sup>30</sup> Transcript of 8 June 2010 at p. 4

<sup>31</sup> Transcript of 8 June 2010 at p. 4