

ICTR-98-44-T
15-06-2010
(51515-51486)

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-T

Before: Mr. Adama Dieng, Registrar

Date Filed: 15 June 2010

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS ARCHIVES
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Joseph Nzirorera

MOTION FOR RECONSIDERATION OF DECISION ON
REQUEST FOR WITHDRAWAL OF THE
ASSIGNMENT OF COUNSEL

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

1. Peter Robinson, Lead Counsel for Joseph Nzirorera, hereby moves for reconsideration of the *Registrar's Decision on Peter Robinson's Motion for Withdrawal as Counsel for Joseph Nzirorera* (9 June 2010). He respectfully contends that new facts not available to the Registrar at the time of the decision provide reason to believe that the decision may have been erroneous.

2. It is well established that a Chamber may reconsider a previous decision if a new fact is discovered that was not known to the Chamber at the time, if there is a material change in circumstances, or where there is reason to believe that a previous decision was erroneous and therefore prejudicial to either party.¹ The same standard can be applied to decisions of the Registrar.

3. In his decision, the Registrar first indicated that he was not persuaded that Mr. Erlinder's arrest has anything to do with his work in ICTR, as his travel to Kigali was not in any way connected with his mandate with ICTR.² He relied upon the letter from Prosecutor General Martin Ngoga dated 2 June 2010 in which Mr. Ngoga pointed out that Mr. Erlinder's arrest was in no way connected with his assignments at ICTR.³

¹ *Prosecutor v Ndindliyiimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials* (3 November 2004) at para. 21; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion to Harmonize and Amend Witness Protection Orders* (1 June 2005) at para. 3; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosecutor's Consolidated Corrigendum to Prosecutor's Response to Defence Motions for Protection of Defence Witnesses and Request for Reconsideration of Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses* (7 July 2005) at para. 7; *Prosecutor v Ndindliyiimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Motion for Reconsideration of the Chamber's Oral Decision of 14 September 2005 on Admissibility of Witness XXO's Testimony in the Military I Case in Evidence* (10 October 2005) at para. 11; *Prosecutor v Ndindliyiimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu's Motion in Opposition to the Admissibility of the Testimonies of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL and GFO and for Reconsideration of the Chamber's Decision of 13 May 2005* (24 November 2005) at para. 18; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Urgent and Confidential Defence Motion Requesting Reconsideration of the 1 March 2007 Ruling Refusing a Subpoena for the Witness JPF3* (20 March 2007) at para. 2

² Impugned Decision at para. 3

³ Impugned Decision at para. 5

4. However, the transcript of Peter Erlinder's bail hearing reveals a clear connection between his work as defence counsel at the ICTR and the charges against him.⁴

5. Paragraph 7 provides:

Even though the genocide was planned by the Interahamwe during the MRND regime by putting up a list of Tutsis and Hutus to be killed, **during the Military I Trial at the ICTR**, Carl Peter Erlinder denied and downplayed genocide. He managed to prove that the genocide has not been planned nor executed by the military officials he was representing and showed that his clients were mostly preoccupied by the country's sovereignty. The prosecutor stressed that Carl Peter Erlinder had no reason to deny or downplay genocide adding that he continued to do so through out many other trials; (emphasis added)

6. Paragraph 8 provides, in part:

Carl Peter Erlinder attested that what happened in Rwanda in 1994 were civilians-on-civilians killings even **though he is the lead defense counsel** for several of the accused at the ICTR in Arusha (emphasis added)

7. Paragraph 10 provides, in part:

During the Military I trial at the ICTR he wrote that the killings of Tutsis that took place in Rwanda in 1994 are not genocide and that this is a tool Rwandan officials use to silence people who would like to challenge Kagame in presidential elections of 2010;

8. Paragraph 11 makes specific reference to Mr. Nzirorera's case:

In his press release of May 6, 2010, Carl Peter Erlinder said that among the UN classified documents there are documents that prove that Kagame is the key trigger of the genocide and war crimes in Eastern DRC. Carl Peter Erlinder denies history by trying to deny genocide, a word he usually put in quotation marks even though this word has been accepted at the International level. **During Karemera Edouard trial at the ICTR**, people were reminded that genocide against the Tutsis is not disputable. However, Carl Peter Erlinder seems to not listen and continues to allege that the Rwandan President committed genocide. (emphasis added)

9. Therefore, it appears that the Registrar's conclusion that the charges against Peter Erlinder had nothing to do with his work at ICTR was incorrect.

⁴ A translation of the report of those proceedings is attached as Annex "A" to this motion.

10. The Registrar also did not consider the conflict of interest created by the initiation of contempt proceedings against Lead Counsel whose personal interests now are potentially in even greater conflict with those of his client, who is entitled to a vigorous defence unencumbered by his lawyer's fear of prosecution in Rwanda and now, being found guilty of contempt at this very Tribunal.

11. It is also respectfully submitted that the Registrar also considered an irrelevant matter when referring to the total compensation paid to Lead Counsel since his appointment in 2002.⁵ If a conflict of interest develops where a lawyer can no longer properly represent the interests of his client, his assignment must be withdrawn regardless of the stage of the proceedings or the amount of money expended on the lawyer's representation.

12. Finally, Lead Counsel reiterates his request that the Registrar provide him with procedural fairness by allowing him to meet the Registrar in person.⁶

13. Lead Counsel has represented to his Trial Chamber that he is prepared to abide by the final decision on his *Application for Withdrawal of Assignment of Counsel*.⁷ He stands by that representation. However, it is important that the Decision of the Registrar be based upon accurate, relevant information, and be rendered with procedural fairness. He respectfully requests that the Registrar reconsider his decision of 9 June and replace it with one which comports with these standards.

⁵ See Decision at para. 7

⁶ A copy of a written request for such a meeting sent on 10 June 2010 is attached as Annex "B".

⁷ Transcript of 8 June 2010 at p. 4

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Respectfully submitted,

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

PETER ROBINSON

Lead Counsel for Joseph Nzirorera

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ANNEX "A"

ICTR-98-04-1
11-06-2010
(51428-91402)

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51509

THE HIGH COURT OF GASABO, SITTING IN KABUGA AND AT FIRST INSTANCE
IN A CRIMINAL MATTER RELATING TO DETENTION AND PROVISIONAL
RELEASE IN CASE No. RONPJ0678/Kg/NM, RENDERED ON THIS 7TH DAY OF
JUNE 2010 THE FOLLOWING DECISION:

CASE

THE PUBLIC PROSECUTOR of the High Court of Gasabo

Versus

ACCUSED: Carl Peter Erlinder, son of Atwood Erlinder and Jane Lois Bihl, born on 14 April
1948 in Chicago, Illinois, married to Masako Isui, Professor of Law in Minnesota, USA.

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Erlinder
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COUNTS

1. Denying and minimizing genocide in his various writings and speeches. This offence is provided for and punishable under Article 4 of Law No. 33bis/2003 of 6 September 2003 punishing the crime of genocide, crimes against humanity and war crimes.

Translation certified by LSS, ICTR

2. Spreading rumours likely to disrupt the security of Rwandans. This offence is provided for and punishable under Article 166 of Legislative Decree No. 21/77 of 18 August 1977 establishing the Penal Code.

I. FACTS

1. After the questioning of Carl Peter Erlinder by the judicial police and the Public Prosecutor, the Legal Officer at the High Court of Gasabo established an arrest warrant against the Accused.
2. In his letter to the President of the High Court of Gasabo, the Chief of Prosecutions at the High Court of Gasabo requested the appearance of Carl Peter Erlinder, charged with the offences mentioned of above, before the judge's chambers.
3. By Order of 4 June 2010, the President scheduled the hearing for 4 June 2010.

II. PROCEDURE

4. On 4 June 2010, the Public Prosecutor, represented by Richard Muhumuza, and Carl Peter Erlinder, assisted by Messrs Gershom Otachi Bw'Omanwa, Kenned (*sic*) Ogeto, Kurt P. Kerns, Jean-Bosco Kazungu, Gatera Gashabana, Donatien Mucyo, Shoshi

Bizimana, Ms Amida Furaha and Mr Pierre-Célestin Buhuru, entered an appearance.

Interpretation was done by Elisée Byukusenge.

4. [sic] The Accused, Carl Peter Erlinder, confirmed his identity which was read to him. Prosecution Counsel requested to make his submissions in English to enable the Accused to better understand the charges against him. A copy of the submissions was handed over to the Accused. He stated that his submissions were pursuant to Articles 93 and of Law No. 13/2004 of 17 May 2004 establishing the Criminal Procedure Code, as modified and complemented by Law No. 20/2006 of 22 April 2006, because he [Carl Peter Erlinder] was charged with denying and minimizing genocide in his statements, and of spreading rumours likely to disrupt the security of Rwandans.
5. At the request of Mr Kazungu, Carl Peter Erlinder, was authorized to sit down as he was not feeling well.
6. Prosecution Counsel submitted that there was prima facie evidence of guilt against Carl Peter Erlinder in his writings and speeches. He mentioned, for example, Carl Peter Erlinder's written work of 2 February 2009. He further stated that recently in 2008, the Accused stated that 40 dignitaries of the Kagame administration were the subject of investigations after that conducted by France in 2006, which resulted in the indictment of the authorities who killed the Rwandan President. Prosecution Counsel affirmed that the Accused stated that what happened in 1994 was a civil war. He stated that the Accused

denied the genocide while insisting that the death of the Presidents of Rwanda and Burundi triggered the killings, whereas it has been established that the genocide had been planned by the Habyarimana regime and executed by Sindikubwabo and Kambanda. He stated that the Accused, without providing any evidence in support thereof, also spread rumours that Rwandan authorities were responsible for the murder of the Presidents of Rwanda and Burundi. He submitted that, pursuant to Article 166 of the Penal Code, Book II, this statement disrupted the peace of Rwandans and was likely to stir up the citizens and rouse them against the current regime.

7. Whereas the genocide was planned, under the MRND regime, by the *Interahamwe* who drew up lists of Tutsi and Hutu who had to be killed, Carl Peter Erlinder denied and minimized the genocide in *Military I*, in which he was ICTR Defence Counsel. Carl Peter Erlinder denied and minimized the genocide by stating that the soldiers he was defending neither planned nor carried out the genocide. The Accused affirmed that his clients were rather defending national integrity. Prosecution Counsel submitted that the Accused did not end there, as he denied and minimized the genocide in other cases.
8. Prosecution Counsel showed that in his piece of writing entitled, "*no genocide planning, no genocide*", Carl Peter Erlinder stated that, had it not been for the policy of impunity practised in the United States of America, Kagame would already have been tried and punished instead of looting the riches of the Congo and spilling the blood of Rwandans. While he was Defence Counsel at the International Criminal Tribunal for Rwanda, Carl

Peter Erlinder submitted that that what happened was a massacre of members of the population.

9. Prosecution Counsel submitted that in his submissions before an Oklahoma court, Carl Peter Erlinder stated that he was not denying the killings that were committed by RPF soldiers targeting the Hutu or the Tutsi. He stated that the Accused submitted that the killings were not committed by the then regime prior to the genocide, that they were rather comparable to those committed in Burundi, and that the killings in Rwanda were triggered by the murder of the second and third Hutu presidents. The Accused also minimized the genocide of the Tutsi by affirming that some people described the genocide as the Rwandan tragedy. However, the ICTR has evidence which shows that the genocide was planned and executed by the regime of President Habyarimana.

10. Prosecution Counsel further submitted that Carl Peter Erlinder has stated in his writings that some people describe the genocide as the Rwandan tragedy. He submitted that The Accused also minimized the genocide of the Tutsi by affirming that this concept is used as pretext by the Rwandan State. Elsewhere in his writings, the Accused considers the genocide as a war and, even in the *Military I* case, he submitted that the killings committed against the Tutsi in 1994 did not constitute genocide. He further states that in Rwanda, this issue is being used as a hurdle against those who want to challenge Kagame during the 2010 elections.

11. In his written piece of 6 May 2010 which he described as “public”, Carl Peter Erlinder stated that some UN documents show that it was Kagame who triggered the Rwandan genocide and the killings in the east of the Democratic Republic of Congo. In so doing, he expressed his negation of history in attempting to deny the genocide, a word he writes in quotation marks, whereas the international community uses it and has accepted that there was genocide. In the *Edouard Karemera* case before the ICTR, the Chamber stated that the genocide of the Tutsi no longer raises doubt. However, Carl Peter Erlinder ignores this decision and wants to make Rwandans believe that the Head of State committed genocide. Moreover, in his letter of 6 April 2006 to the Prime Minister of Canada relating to the visit she was going to make to the current President of Rwanda, Carl Peter Erlinder sought to stir up members of the Rwandan population against each other, referring to the Kagame regime as the most dictatorial in Africa, in violation of Article 166 of Legislative Decree No. 21/77 of 18 August 1977 establishing the Penal Code.
12. Considering his various writings and pursuant to Articles 93 and 94 of Law No. 13/2004 of 17 May 2004 relating to the Code of Criminal Procedure as modified and complemented by Law No. 20/2006 of 22 April 2006, the Public Prosecutor prayed the Court to take into account the prima facie evidence resulting from the writings of Carl Peter Erlinder and to order his provisional detention, especially as that was the only guarantee that the Accused would appear before the Court whenever necessary and that he would not escape from justice.