

ICTR-98-44-T
07-06-2010
(51386-51379)

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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: 7 June 2010

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS/ARCHIVES
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REPLY BRIEF: JOSEPH NZIRORERA'S MOTION FOR
CONTINUANCE: ARREST OF PETER ERLINDER

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. On 31 May 2010, Joseph Nzirorera moved the Trial Chamber to cancel the three day trial sitting during the week of 7 June 2010 due to the arrest of Peter Erlinder. He supplemented the motion on 3 June 2010. On 4 June 2010, there was filed the *Prosecutor's Consolidated Response to Joseph Nzirorera's Motion for Continuance: Arrest of Peter Erlinder and Requete Pour M. Ngirumpatse en Ajournement du Proces.*

2. Mr. Nzirorera now replies.

Nexus Between ICTR and Erlinder Arrest

3. The prosecution contends that the arrest of Peter Erlinder has nothing to do with his work at the ICTR and that therefore there are no ramifications from his arrest on Mr. Nzirorera's case. That appears to be factually incorrect.

4. 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."¹ A broadcast on Radio Rwanda on 5 June 2010 at 6 am explicitly reported that Mr. Erlinder is being prosecuted for statements made in connection with the ICTR in Arusha. This is consistent with previous statements made by the Rwandan police spokesperson and Prosecutor General that has linked his prosecution to his representation of Major Ntabakuze at the ICTR.²

5. The articles written by Mr. Erlinder, such as the one attached to the prosecution's response, all relate to his work for Major Ntabakuze, and not to his representation of Presidential challenger Victoire Ingabire. Therefore, it appears that he

¹ A copy of the Associated Press article is attached as Annex "C" to this reply brief.

² See Annexes "A" and "B" filed with earlier submissions.

is being prosecuted for matters within the scope of his work in defending Major Ntabakuze before the ICTR.

Nexus Between Erlinder Arrest and Nzirorera Case

6. It is Joseph Nzirorera's 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.

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

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

9. Mr. Nzirorera himself has testified to those facts, as has Edouard Karemera, and he expects Matthieu Ngirumpatse to do the same. He has also obtained the testimony of Interahamwe Vice President George Rutaganda and hopes 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.

10. Mr. Nzirorera has 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 consists 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*.

11. If Peter Erlinder's publications on behalf of Aloys Ntabakuze can be the basis of criminal charges, then members of Mr. Nzirorera's defence team are at risk for prosecution in Rwanda for genocide negationism if their work on behalf of Mr. Nzirorera is so interpreted by the Rwandan government. That is simply an unacceptable risk—for the members of the defence team and their families.

Kalimanzira Distinguished

12. The prosecution relies on the one-paragraph decision of the Appeals Chamber in the *Kalimanzira* case in which an adjournment of the appeals hearing was denied.³ But that case involved allegations of individual acts by the accused in Butare prefecture and did not include a defence of no state-sponsored genocide. The defence team did not even attempt to demonstrate how they might be at risk from arguing the discrete assignments of error which are the subject of the pending appeal.

13. In contrast, Mr. Nzirorera is charged with being part of a nationwide joint criminal enterprise involving the highest officials in Rwanda. He has demonstrated above that his defence involves contesting the fact that a state-sponsored genocide occurred. The witnesses he is yet to call, including one scheduled for this week, will testify on that issue. His closing submissions must include arguments in support of that defence. Therefore, unlike in *Kalimanzira*, his defence team faces a real risk if the

³ *Kalimanzira v Prosecutor*, No. ICTR-2005-88-A, *Decision on Kalimanzira's Request to Postpone the Appeal Hearing* (2 June 2010)

Rwandan government interprets their work on behalf of Mr. Nzirorera as a violation of their laws.

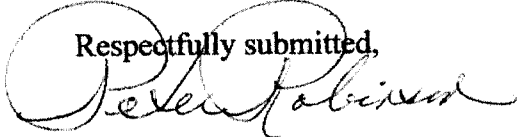
Where do we go from here?

14. Mr. Nzirorera implores the Trial Chamber to be his ally, not his adversary, in this matter. He seeks cooperation and not confrontation.

15. A postponement of this week's session is the most practical solution to diffuse what may otherwise lead to a breakdown in these proceedings. It would signal the Tribunal's concern for its ability to provide a fair trial to an accused whose lawyers fear prosecution for what they say and do on his behalf. It will allow the Rwandan government to reflect upon how its proceedings against Mr. Erlinder may impact on the ICTR's mandate and its obligations as a UN member State. And it will take Mr. Nzirorera's defence team out of harm's way until the situation can be clarified and resolved.

Conclusion

16. The arrest of Peter Erlinder in Rwanda is a real threat to the fair trial rights of Joseph Nzirorera and the safety of his defence team. Mr. Nzirorera, and his defence team, hope that the Trial Chamber will act courageously to protect their interests and the interests of justice.

Respectfully submitted,

PETER ROBINSON
Lead Counsel for Joseph Nzirorera

ANNEX "C"

US law professor charged in Rwandan court

By EDMUND KAGIRE (AP) – 1 hour ago

KIGALI, Rwanda — A Rwandan judge has charged a U.S. lawyer with denying Rwanda's 1994 genocide and publishing articles that threaten the country's security.

Peter Erlinder pleaded not guilty to the charges during a five-hour court hearing late Friday in the Rwandan capital, Kigali.

"It is the first time I have come to know that my obscure publications back in America were that bad and could amount to genocide denial," Erlinder told the court. He suggested it may be a case of misinterpretation or misunderstanding.

If convicted, he faces up to 25 years in prison. Erlinder was upset when the judge said he will decide on Monday whether to grant bail.

Erlinder — a professor at William Mitchell College of Law in St. Paul, Minnesota — has a reputation for taking on difficult, often unpopular defendants and causes. A past president of the progressive National Lawyers Guild, Erlinder leads a group of defense lawyers at the U.N.'s International Criminal Tribunal for Rwanda, which is trying the alleged leaders of the 1994 genocide.

The genocide claimed the lives of more than 500,000 people, mostly Tutsis and moderate Hutus. The massacres ended when mostly Tutsi rebels led by President Paul Kagame defeated the mostly Hutu extremist perpetrators.

Erlinder said Kagame's party might dispute his writings, but "not all Rwandans."

He said he had ignored warnings from his tribunal colleagues not to travel to Rwanda, where he had spent several days helping opposition leader Victoire Ingabire in her presidential election challenge before his May 28 arrest.

"I believed the country has grown democratically, but if I am detained and prosecuted, my case will be confirm what is being said out there," Erlinder said.

Appearing weak in court, Erlinder asked to be granted bail so he could return home for treatment, and promised to comply with any conditions the court sets.

He said he hadn't been mistreated, but also had not had contact with anyone while in Rwandan custody.

"I haven't talked to anyone in my family, I haven't listened to the radio or watched TV since I was arrested. I haven't talked to my doctor," he said.

Judge Maurice Mbishibishi said he would decide Monday whether to grant bail.

Prosecutor Richard Muhumuza argued against it while investigation was ongoing, but agreed not to object if a medical examination determined Erlinder needed treatment in the United States.

Authorities are considering a joint medical evaluation involving a doctor of Erlinder's choice, Foreign Affairs Minister Louise Mushikiwabo said, while rejecting a U.S. request made Thursday for the lawyer's release on compassionate and humanitarian grounds.

"We are sensitive to medical and health conditions, whether it's for American citizens or others, but we cannot short circuit the legal process, so we stand advised by mental health professions on what needs to happen," Mushikiwabo said.

Erlinder was hospitalized Tuesday after police said he took dozens of pills in an attempted suicide. Erlinder's family said it did not believe that.

Meanwhile, the Hutu opposition leader Ingabire was in court Friday to attend Erlinder's hearing.

She plans to challenge Kagame for the presidency in Aug. 9 elections, and had asked Erlinder for legal advice in defending herself against charges of promoting genocidal ideology.

After returning to Rwanda in January from the Netherlands, Ingabire had visited a memorial to Tutsis killed in the 1994 genocide and asked why Hutus who died weren't also remembered.

She was arrested and freed on bail, but her passport was seized and she cannot leave Kigali. If convicted, Ingabire, 41, could be sentenced to more than two decades in prison.

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