

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

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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: 14 June 2010

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS/ARCHIVES  
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APPLICATION FOR CERTIFICATION TO APPEAL  
RE: ARREST OF PETER ERLINDER AND FOR  
STAY PENDING APPEAL

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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.

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<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**.

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<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*.

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<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

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<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

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<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

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<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

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<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>

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

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

32. The Chamber thereafter warned counsel of the maximum penalties for contempt, including loss of the right of audience.<sup>32</sup>

33. On 9 June 2010, Mr. Ngirumpatse filed a motion for reconsideration, attaching the transcript of the 7 June 2010 proceedings against Mr. Erlinder in Rwanda. Those proceedings leave no doubt that Mr. Erlinder was arrested for matters related to his representation of Major Ntabakuze at the ICTR.<sup>33</sup>

34. 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)

35. 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)

36. 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;

37. Paragraph 11 makes specific reference to our 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

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<sup>32</sup> Transcript of 8 June 2010 at p. 4

<sup>33</sup> An English translation is attached as Annex "D".

Tutsis is not disputable. However, Carl Peter Erlinder seems to not listen and continues to allege that the Rwandan President committed genocide. (emphasis added)

38. Unfortunately, the Trial Chamber insisted on proceeding with Mr. Nzirorera's case before learning these facts.

39. On 11 June 2010, an interview with the Rwandan Minister of Foreign Affairs was published in Rwanda wherein she reiterated that:

"It is nonsense. It is important to alert the public on this deliberate confusion by the defence lawyers. Rwandans will not sit back and watch as the history of Genocide is being distorted. **We will prosecute them aggressively,**" (emphasis added)<sup>34</sup>

### **Certification to Appeal**

40. Rule 73(B) provides:

"Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings."

41. The test for certification has two parts. First, it must be shown that the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

42. Mr. Nzirorera contends that this part of the test is satisfied. The right to counsel is fundamental to the fairness of the trial. Because of the impact on the Trial Chamber decisions taken on 7 and 8 June 2010 on Mr. Nzirorera's right to continue to receive effective assistance of counsel, the fairness of his trial is in jeopardy.

43. Ironically, the leading case on this issue at the ICTR arises out of Peter Erlinder's entry as counsel for Major Ntabakuze in the ongoing *Military I* trial. Major

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<sup>34</sup> A copy of this article is attached as Annex "E" to this application.

Ntabakuze moved for additional time or a severance so that he could receive effective assistance of his new counsel who needed time to prepare. The Trial Chamber granted certification to appeal finding that the issue of effective assistance of counsel for the accused and adequate time to prepare significantly affected fairness of the trial.<sup>35</sup>

44. In another decision at the ICTR, the Trial Chamber in the *Government II* case granted certification to appeal an issue of whether a legal officer working for the Trial Chamber had a conflict of interest as a result of his access to confidential defence information as Deputy Registrar<sup>36</sup> If an issue of conflict of interest by a person working for Chambers meets the certification standard, so too must an issue of conflict of interest by the accused's own Lead Counsel.

45. At the ICTY, similar issues have also been found to meet the test for certification to appeal.

46. In the *Blagojevic* case, the accused sought the withdrawal of his lead counsel after a disagreement arose over trial strategy. The Trial Chamber granted certification to appeal, finding that "the issue of assignment of counsel is an issue which affects the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings."<sup>37</sup>

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<sup>35</sup> *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Certification of Interlocutory Appeal from Decisions on Severance and Scheduling of Witnesses* (11 September 2003) at para. 9

<sup>36</sup> *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Mugiraneza Request for Certification to Appeal and Mugenzi's and Bizimungu's Requests for Reconsideration of the Decision on the Objections of Mugiraneza and Bicamumpaka to the Engagement of Mr. Everard O'Donnell as a Chamber's Consultant Dated 28 August 2009* (23 September 2009) at para. 16

<sup>37</sup> *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Decision on Vidoje Blagojevic's Request for Certification* (25 July 2003)

47. In the *Gotovina* case, the Trial Chamber has twice granted certification to appeal where it was alleged that defence counsel had a conflict of interest with that of their clients.

48. In the first decision, where the Chamber had granted the withdrawal of counsel for the accused Markac, the Chamber held that “the Impugned Decisions involve the issue of assistance of counsel of choice which would significantly affect the fair and expeditious conduct of the proceedings in this case, and for which the Chamber finds that an immediate resolution by the Appeals Chamber may materially advance the proceedings”.<sup>38</sup>

49. In the second decision, issued one month later and concerning withdrawal of counsel for the accused Cermak, the Chamber granted certification using the identical language.<sup>39</sup>

50. A third decision in the *Gotovina* case is also of relevance to Mr. Nzirorera’s application. In that decision, the Trial Chamber granted certification to appeal its decision denying an injunction against prosecution of a defence investigator by national authorities in Croatia. The Chamber found that “such proceedings relating to acts which are closely connected to the performance of the defence members’ functions can impede or hinder the fulfillment of those functions. That could in turn, in certain circumstances, result in the infringement of an accused’s right to a fair trial. For these reasons, the

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<sup>38</sup> *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Decision on Request to File Certification of Interlocutory Appeal Against Trial Chamber’s Decision on Conflict of Interest...* (13 March 2007)

<sup>39</sup> *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Decision on Request to File Interlocutory Appeal Against Trial Chamber’s Decision on Conflict of Interest of Attorneys Cedo Prodanovic and Jadranka Slokovic* (27 April 2007)

Chamber finds that the Decision involves issues that could significantly affect the fair and expeditious conduct of the proceedings.”<sup>40</sup>

51. In the *Prlic* case at the ICTY, the Trial Chamber has also granted certification to appeal counsel-related issues on two occasions.

52. In the first decision, the Trial Chamber found that its decision refusing the assignment of counsel for the accused Stojic due to a conflict of interest met the test for certification as it related to a fundamental right bearing on the fairness of the trial and that an immediate decision by the Appeals Chamber may materially advance the proceedings.<sup>41</sup>

53. In the second decision, the Trial Chamber granted certification to the Prosecution to appeal its decision that a former OTP lawyer did not have a conflict of interest such that would disqualify him from representing the accused Petkovic. The Chamber held that the issue of conflict of interest is of crucial importance to the fairness of the trial and its outcome and that an immediate decision by the Appeals Chamber would materially advance the proceedings.<sup>42</sup>

54. At the Special Court of Sierra Leone, where the test for certification to appeal is more stringent, requiring exceptional circumstances, the Trial Chamber in the *Brima* case found that the issue of withdrawal and/or reinstatement of the lead counsel involved

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<sup>40</sup> *Prosecution v Gotovina et al*, No. IT-06-90-T, *Decision on Defence Request for Certification to Appeal the Trial Chamber's Decision of 12 March 2010* (21 April 2010). The Chamber also found that the second prong of Rule 73(B) was also met.

<sup>41</sup> *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Certification for Appeal of Decision on Conflict of Interest Revoking Counsel of Accused Stojic* (1 September 2004)

<sup>42</sup> *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prosecution Request for Certification for Appeal of Decision of 25 May 2006 on Lead Counsel's Assignment of Mr. Orsat Miljenic as Pro Bono Co-Counsel for the Accused Petkovic* (23 June 2006)

the fundamental right to counsel enshrined in the Statute and warranted certification to appeal.<sup>43</sup>

55. In the *Sesay* case, the Trial Chamber also granted certification to appeal a decision refusing the withdrawal of lead counsel, finding that it met the stringent test for certification to appeal.<sup>44</sup>

56. In Mr. Nzirorera's case, the Trial Chamber's decisions which led to the initiation of contempt proceedings against his lead counsel significantly affect the availability, conflict of interest, and effective assistance of counsel to Mr. Nzirorera and go directly to the fairness of the trial and its outcome.

57. Likewise, an immediate resolution of these issues by the Appeals Chamber will materially advance the proceedings. If the Chamber is found to have erred in one or more of the decisions which led to the initiation of contempt proceedings, the remainder of the trial will be tainted by the prejudice to Mr. Nzirorera's interests by proceeding with a counsel having to simultaneously defend himself from contempt charges.

58. It will be impossible for Lead Counsel to defend Mr. Nzirorera's interests before a Chamber which is deciding on matters affecting Lead Counsel's professional future. It will be also impossible for Mr. Nzirorera's interests to be effectively defended in front of a Chamber by a lawyer against which contempt proceedings have been initiated by the same Judges. If Lead Counsel is the spokesperson for the client, and the link between the client and the Chamber, Mr. Nzirorera's interests are manifestly affected

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<sup>43</sup> *Prosecutor v Brima et al*, No. SCSL-2004-16-T, *Decision on Brima-Kamara Application for Leave to Appeal Decision on the Reappointment of Kevin Metzger and Wilbert Harris as Lead Counsel* (5 August 2005)

<sup>44</sup> *Prosecutor v Sesay et al*, No. SCSL-04-15-T, *Decision on Application for Leave to Appeal Gbao—Decision on Application to Withdraw Counsel* (7 August 2004)



by this same Chamber's finding that Lead Counsel should be prosecuted for contempt.

These genuine issues must be resolved before the trial can continue.

59. Therefore, the criteria for certification to appeal by Mr. Nzirorera are met.

60. Likewise, with respect to certification to appeal the decision by Lead Counsel, the standard for certification to appeal is also met. Requiring Lead Counsel to swear out an affidavit before the very Chamber that is prosecuting him for contempt would significantly affect the fairness of those contempt proceedings. In addition, if it is found that requiring lead counsel to simultaneously defend himself and his client before the same Trial Chamber is error, the prejudice to both Mr. Nzirorera's case and the contempt case may be curable only by new trials. Therefore, an immediate resolution of these issues by the Appeals Chamber would materially advance both proceedings.

61. The jurisprudence of all three *ad hoc* Tribunals demonstrate that certification to appeal should be granted.

### **The Merits**

62. Although it has often been said that an application for certification to appeal is not concerned with the merits of the issues sought to be appealed, this Trial Chamber has, in the past, denied certification to appeal on the grounds that there is no serious doubt regarding the correctness of the legal principles at issue."<sup>45</sup>

63. Ironically, the Appeals Chamber later reversed the Trial Chamber on the very issue the Trial Chamber claimed was free from serious doubt.<sup>46</sup>

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<sup>45</sup> *Decision on Joseph Nzirorera's Application for Certification to Appeal Disclosure Decision on Witness ALG* (29 April 2009 at para. 5

<sup>46</sup> *Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation* (17 May 2010)

64. Therefore, to avoid a repeat of such an error, Mr. Nzirorera will touch upon the merits of the issues sought to be appealed so that certification cannot be denied on the grounds that there are serious doubts as to the correctness of the legal principles at issue.

65. If granted certification to appeal, Mr. Nzirorera would raise the following grounds of appeal: (1) the Trial Chamber erred in refusing to wait for accurate information as to the nature of the charges against Peter Erlinder; (2) the Trial Chamber erred in proceeding while the issue of withdrawal of counsel was before the Registrar; (3) the Trial Chamber erred initiating contempt proceedings before giving counsel an opportunity to consult with his bar and obtain legal advice; (4) the Trial Chamber erred in directing the Registrar to report the matter to the counsel's bar; (5) the Trial Chamber erred in concluding the grounds for initiating contempt proceedings existed; and (6) the Trial Chamber erred in requiring counsel to submit an affidavit showing cause why he should not be held in contempt.

#### **Charges Against Peter Erlinder**

66. It is now clear that the Trial Chamber's finding that the charges against Mr. Erlinder in Rwanda were not related to his work at the ICTR was erroneous. The transcript of the 7 June 2010 hearing in the Gasabo court makes explicit reference to his work in the Military I case.

67. The Trial Chamber's reliance on the letter of Prosecutor General Ngoga, in light of the conflicting information, was error. The Appeals Chamber<sup>47</sup> and this Trial

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<sup>47</sup> *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Order in Relation to Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder* (9 June 2010)

Chamber itself<sup>48</sup> have subsequently recognized that the Ngoga letter is at odds with the facts.

68. Lead Counsel for Mr. Nzirorera had advised the Chamber on 7 June that the charges that had been read out to Mr. Erlinder encompassed his work at the ICTR.<sup>49</sup> He said:

But don't you think you ought to get the information from Rwanda as to what the charges are against Mr. Erlinder? They were read out in court on Friday. They are contained in a newspaper article attached to my reply brief. And you're asking us to take a risk. But don't you think that you ought to have sufficient information before you ask us to do that? It's simple to do.<sup>50</sup>

69. On appeal, it will be contended that the Trial Chamber was wrong on the facts and wrong not to wait until it had the facts before making its decision to deny the motion to postpone the trial and to initiate contempt proceedings.

#### **Request to Withdraw Assignment of Counsel**

70. Article 19 of the *Directive on Assignment of Defence Counsel* provides that the procedure for withdrawal of the assignment of counsel is for an application to be filed with the Registrar, with a right of appeal to the President. Lead Counsel filed a timely application to withdraw immediately after the Trial Chamber denied the motion to postpone the trial. He made numerous efforts to obtain a decision on the application by appearing at the Registrar's office at every adjournment in the proceedings seeking an appointment to meet the Registrar.

71. On appeal it will be contended that the Trial Chamber erred in proceeding while Lead Counsel's application to withdraw was *sub judice* before the Registrar and in

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<sup>48</sup> *Prosecutor v Nizeyimana*, No. ICTR-00-55C-PT, *Decision on Ildephonse Nizeyimana's Motion to Suspend Trial Proceedings* (9 June 2010) at para. 7

<sup>49</sup> Transcript of 7 June 2010 at p. 11,17

<sup>50</sup> Transcript of 7 June 2010 at p. 18

initiating contempt proceedings in the wake of Lead Counsel's good faith efforts to obtain a decision on his application and his pledge to abide by that decision.

**Rule 46**

72. On the morning of 8 June, the Trial Chamber issued a warning to Lead Counsel that he was obstructing the proceedings and "direct the Registrar that this be communicated to your bar association."<sup>51</sup>

73. The Trial Chamber's error in refusing to wait for accurate information about the charges against Peter Erlinder, and thus have the basis for a realistic assessment of the validity of the concerns in proceeding maintained by the Lead Counsel, led to the issuance of the warning under Rule 46.

74. Likewise, the Trial Chamber's erroneous insistence in proceeding while Lead Counsel's application to withdraw was pending before the Registrar also led to the issuance of the warning.

75. In addition, the Trial Chamber did not have the authority to direct the Registrar to communicate the matter to Lead Counsel's bar association. Rule 46(B) provides that:

A Judge or a Chamber may also, **with the approval of the President**, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in his State of admission... (emphasis added)

76. The approval of the President, or, in this case, the Vice-President,<sup>52</sup> is required before a report can be made to Lead Counsel's bar association.

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<sup>51</sup> Transcript of 8 June 2010 at p. 3

<sup>52</sup> The President has earlier recused himself when the report emanated from the Trial Chamber where he served as Presiding Judge. *Decisions on Joseph Nzirorera's Motions for Reconsideration of 24 October 2008 Order...* (2 December 2008) at para. 24