

The Arrest of ICTR Defense Counsel Peter Erlinder in Rwanda

By [Kate Gibson](#)

I. Background



On August 9, 2010, Rwandans voted in national presidential elections. At the time of writing, the incumbent President Paul Kagame is an almost certain victor. International news coverage of the election has been consistent in its reference to a string of violent incidents and arrests, which many observers have sought to qualify as acts of intimidation directed

against political opponents in the lead-up to the elections.^[1]

Perhaps the most publicized of these incidents was the arrest of Professor Peter Erlinder, an American lawyer serving as defense counsel at the International Criminal Tribunal for Rwanda (ICTR).^[2] Erlinder was arrested by the Rwandan authorities on May 28, 2010, and detained without charge in Kigali Central Prison for three weeks. At the time of his arrest, Erlinder was in Rwanda acting on behalf of Victoire Ingabire, chairperson of the United Democratic Forces political party, who had been seeking to run against President Kagame in the elections before her arrest and detention.

Erlinder's initial request for provisional release was denied. He was, however, released on health grounds on June 17, 2010.^[3] Although no indictment or formal charges have been issued, the decision denying provisional release rendered by the High Court of Gasabo on June 7, 2010 indicates that he will face charges of "denying and minimising genocide in his various writings and speeches" and "spreading rumours likely to disrupt the security of Rwandans."^[4]

This Insight explores the immunity afforded defense counsel at the ICTR, the reaction of the ICTR to Erlinder's arrest, and the implications of the arrest for future defense work in Rwanda.

II. The Immunity of Defense Counsel

Professor Erlinder is currently the lead counsel of Major Aloys Ntabakuze, an accused in the *Military I* case^[5] at the ICTR. Erlinder's arrest has given rise to a range of legal questions concerning the extent and effect of privileges and immunities afforded to defense counsel at the ICTR; questions which remained without clear answers despite the ICTR's operation for over a decade.

The first question to arise was whether the Rwandan authorities were in fact precluded from arresting Erlinder on the basis of the immunity afforded to him as an ICTR defense counsel. Defense counsel, not being ICTR staff, are regarded by the ICTR as "experts on mission."^[6] In 1999, the ICTR entered into a Memorandum of Understanding with the Government of Rwanda (MoU). Section 2 of the MoU provides that the Government of Rwanda shall extend "[t]o other persons assigned to the Office . . . the privileges and immunities accorded to experts on mission for the United Nations, in accordance with Article VI of the [Convention on the Privileges and Immunities of the United Nations]." Section 22 of Article IV of the Convention on the Privileges and Immunities provides that

[e]xperts . . . performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their

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missions, including the time spent in connection with their missions. In particular they shall be accorded: (a) immunity from personal arrest.

For this reason, widespread condemnation of Erlinder's arrest was swift. National and international bar associations called for his immediate release. In addition to the issue of immunity, numerous public letters of opposition cited to the United Nations Basic Principles on the Role of Lawyers, which state that "governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment, or improper interference."^[7]

III. The Reaction of the ICTR

The response from the ICTR was neither as swift nor as clear. Despite filings from defense teams requesting varied forms of relief, such as the suspension of proceedings and the withdrawal of a defense counsel, the ICTR took the following steps. On May 31, 2010, the ICTR sent a *Note Verbale* to the Rwandan authorities seeking clarification of whether Erlinder's arrest was related to his mandate as an ICTR defense counsel.^[8] Secondly, the ICTR spokesman announced that because Erlinder was not on an official mission in Rwanda as lead counsel for Major Ntabakuze, the ICTR did not have the "power or the vocation for giving lawyers any immunity in cases that are not related to the ICTR's mandate."^[9] Following this announcement, the Rwandan Prosecutor-General responded to the ICTR *Note Verbale*, predictably stating that Erlinder's arrest was in no way connected to his assignment at the ICTR^[10], thus clearing the way for his prosecution.

The ICTR's hands-off approach became more difficult when, contrary to earlier public statements, the Rwandan authorities continued to link Erlinder's arrest to his work as a defense counsel at the ICTR. On June 7, 2010, the High Court of Gasabo rendered a decision denying Erlinder's request for provisional release. This decision focused on Erlinder's academic writing, parts of which are critical of and impute criminal responsibility to members of the current regime in Rwanda for crimes committed in 1994. However, in summarizing the Prosecution's submissions, the High Court referred on three occasions to statements made by the Rwandan prosecutors regarding the link between the alleged genocide denial and Erlinder's pleadings as a defense counsel in the *Military I* case. For example, according to one statement, "during the Military I Trial at the ICTR, Carl Peter Erlinder denied and downplayed genocide. He managed to prove that genocide had not been planned nor executed by the military officials he was representing."^[11] The Court itself concluded that Erlinder should "answer for his acts at the ICTR."^[12]

This was the critical link. And one which was reinforced by public statements made by officials in Rwanda. On June 11, 2010, the Rwandan Minister of Foreign Affairs and Cooperation was reported as stating, "[i]t is important to alert the public on [sic] this deliberate confusion by defence lawyers. Rwandans will not sit back and watch as the history of Genocide is being distorted. We will prosecute them aggressively."^[13]

Despite the establishment of this link, the ICTR remained without a consistent position. On June 9, 2010, defense teams were presented with two irreconcilable statements from the Registrar and Chambers on the ICTR's stance. For his part, the Registrar, in response to a request for withdrawal from another defense counsel, ruled 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 in any way to his mandate at the ICTR."^[14] In a decision rendered on the same day in *Niyezimana*, Trial Chamber III held that "it appears from the available information that the charges against Peter Erlinder are partly related to his submissions before the Tribunal during the Military I case."^[15]

As such, the situation remained unclear. It was at this point that the United Nations Office of Legal Affairs in New York "advised the ICTR to formally assert immunity for Professor Erlinder without delay and request his immediate release."^[16] Consequently, on June 15, 2010, after Erlinder had already been imprisoned for nineteen days and hospitalized twice, the ICTR Registrar reversed his position and sent a *Note Verbale* to the Rwandan Ministry of Foreign Affairs and Cooperation, notifying Rwandan authorities that Erlinder enjoys immunity and requesting his immediate release.^[17] The assertion of immunity was not qualified to extend only to acts directly related

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to the defense of Major Ntabakuze; it was framed in blanket terms: "Professor Erlinder enjoys immunity." Significantly, the *Note Verbale* stated:^[18]

Although no formal copy of the charges brought against Professor Erlinder has been received yet, the ICTR takes the view that the decision of the High Court of Gasabo constitutes a sufficient basis to identify a link between the nature of the accusations against Professor Erlinder and his mandate with the Tribunal.

Two days later, on June 17, 2010, an appeal against the decision of the High Court of Gasabo denying provisional release was successful, and Erlinder was released. However, the Judge clearly stated that the release was ordered "on health grounds."^[19] The decision made no reference to the immunity asserted by the ICTR, and there was no response to the Registrar's *Note Verbale* of June 15, 2010.^[20] On the same day, the Rwandan Ministry of Foreign Affairs and Cooperation issued a press release, quoting Rwanda's Prosecutor-General Martin Ngoga:

[t]he Decision to grant bail to Peter Erlinder was made out of concern for his physical and mental health and in no way diminishes the seriousness of the charges against him . . . [t]his will not deter the prosecution as we finalise the case against Mr. Erlinder. He will soon be called to defend his record of genocide denial that insults the people of Rwanda and inflames those that seek to harm us.^[21]

IV. The Implications for ICTR Defense Teams

Even though the ICTR had expressly stated that Erlinder enjoyed immunity, the Rwandan authorities continued to investigate the case which appeared to be based, at least in part, on Erlinder's pleadings before the ICTR.^[22] The ICTR's affirmation that defense counsel enjoy immunity is useless absent cooperation from the Rwandan authorities. As such, concern continued among members of ICTR defense teams as to whether they could continue to work in Rwanda, or elsewhere, without the threat of arrest or interference. On this last point, Rwandan Prosecutor-General Ngoga declared that it did not matter where Erlinder had made the statements at issue, as the Rwandan authorities "have jurisdictional links for statements and publications done outside Rwanda."^[23]

Accordingly, on June 29, 2010, another defense team raised the lack of acknowledgement of the *Note Verbale* by the Rwandan Government, and asked an ICTR Trial Chamber to secure a statement of immunity from the Rwandan Government before a scheduled site visit to Rwanda.^[24] The next day, on June 30, 2010, the Rwandan Prosecutor-General Ngoga and the ICTR Spokesperson held a joint press conference where they "reaffirmed their cooperation," and Ngoga "assured the current ICTR Defence lawyers that they can continue their work in Rwanda without fear" and stated "the case against Mr. Erlinder is not based on his work before the Tribunal and is a specific case that does not have implications for the work of other Defence counsel."^[25] This statement cannot be reconciled with the link made between Erlinder's work and his prosecution by the High Court of Gasabo; a link recognized previously by the ICTR. Nor does it sit easily with the subsequent public statement by the Rwandan Minister of Foreign Affairs and Cooperation on July 20, 2010 at a public forum in Washington D.C. that "[g]enocide denial is there. We've seen it We see it with defense lawyers for genocide suspects."^[26]

Of further concern is the apparent attempt to limit the scope and extent of the immunity afforded to defense counsel on the part of the ICTR itself. In *Niyezimana*, the Chamber qualified this immunity. It held that "defence counsel and their investigators [are] experts on UN missions; thus, they are covered by the Immunity Clause and the Memorandum *when they conduct investigations in Rwanda that are related to the preparation of their Defence case.*"

Affording immunity to defense counsel and investigators only "when they conduct investigations in Rwanda" is not uncontroversial and raises several questions. Would defense counsel be subject to arrest if they remain in Rwanda after the expiry of an official mission? What is the status, for example, of a defense investigator who may live in Rwanda, but who is not at

the time of his arrest conducting investigations in that capacity? The limitation in *Niyezimana* also appears incompatible with the ICTR's assertion of blanket immunity in the case of Erlinder, whose immunity was not explicitly limited to acts related to his defense of Major Ntabakuze.

On this point, the language of Article VI of the Convention on the Privileges and Immunities, referred to in the 1999 MoU between the ICTR and the Government of Rwanda, is worth considering. Section 22(b) of Article IV affords immunity

in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. *This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.*

It could therefore be argued that, as long as the mandate of a member of a defense team continues, or even after its expiry, he or she is afforded the protections of the Convention on the Privileges and Immunities in any country which is a signatory.

V. Conclusion

The effective standoff between the ICTR and the Government of Rwanda over the question of Erlinder's immunity was certainly of most immediate concern to Erlinder himself, and at a broader level to all members of defense teams working at the ICTR. The fact that the recent affirmation by Prosecutor-General Ngoga is inconsistent with judicial statements in Rwanda has done little to allay these concerns. The situation of Erlinder's arrest also has wider implications for defense counsel in other international fora attempting to investigate *in situ* and build cases which run counter to the history of a conflict presented by the regime in power, particularly where no legal basis for immunity exists.

About the Author

Kate Gibson is the Co-Counsel of Mr. Jean-Baptiste Gatete at the ICTR, and a member of the defense legal team of Dr. Radovan Karadžić at the ICTY. She has previously worked at the ICTR on the *Military I* case, as part of the defense team of General Gratién Kabiligi, who was acquitted of all charges in December 2008. She was an Associate Legal Officer at the ICTY Appeals Chamber in The Hague, and also worked on the 'Duch' trial at the ECCC in Phnom Penh as a lawyer for Civil Parties. She holds an LL.M. in International Law from Cambridge University, and is admitted as a solicitor of the Supreme Court of Queensland, Australia.

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