

Rwanda: Peter Erlinder Summary

Overview

On 28 May 2010, Professor C. Peter Erlinder was arrested in Rwanda on charges of under the 2008 *Law Relating to the Punishment of the Crime of Genocide Ideology* (Genocide Ideology Law). C. Peter Erlinder is a faculty member at William Mitchell College of Law in St. Paul, Minnesota, former president of the National Lawyers Guild, and defence counsel for the United Nations International Criminal Tribunal for Rwanda (ICTR). On June 7, 2010, the High Court of Gasabo denied bail and ordered Erlinder provisionally detained for 30 days. On 17 June 2010, bail was granted on medical grounds and Erlinder was allowed to return to the U.S. on condition that he provide the court with his address at all times and cooperate with the Rwandan court proceedings against him. If convicted of the charges, Mr. Erlinder could be sentenced to 20 years in jail.

LRWC and other organizations have expressed concern that Mr. Erlinder was charged to punish him for questioning the official explanation of the cause of 1994 Rwanda massacre during the course of defending clients on trial before the International Criminal Tribunal on Rwanda (ICTR) and to prevent him continuing to do so. Professor Erlinder has, in submissions made in defence of clients on trial before the ICTR, suggested a causal theory that implicates President Paul Kagame.

Background

Peter Erlinder arrived in Rwanda to defend Ms. Victoire Ingabire Umuhiza—who is running for president in the August 2010 elections—on charges under the Genocide Ideology Law. It is alleged that, while visiting a memorial site for murdered Tutsis, she questioned whether there was a memorial for murdered Hutus.

On May 28, 2010, Professor Peter Erlinder was arrested in Kigali, Rwanda, on charges of denying and downplaying genocide and spreading rumours capable of threatening the security of the Rwandan people. On June 7, 2010, the High Court of Gasabo denied him bail and ordered him provisionally detained for 30 days. Martin Ngoga, Rwanda's prosecutor general, referred to Mr. Erlinder as a "denier" and "revisionist" of the 1994 genocide or at least, the official government-sanctioned account of the tragedy.

During his arrest, Professor Erlinder was held under harsh prison conditions and was subjected to police interrogations regarding his work as a lawyer. Although he was visited by his lawyer, Mr. Kennedy Ogeto, a colleague of his at the ICTR, attempts to have him released on bail were initially unsuccessful. Professor Erlinder has a history of high blood pressure and was scheduled to undergo a medical procedure upon his return to the United States and had to make a visit to the hospital during his time under arrest.

Further concerns for Erlinder were raised by the report that he had been found semi-conscious in his cell. The claim by Rwandan police officials that Erlinder has attempted suicide by overdosing on prescription medication pills was rejected by Erlinder's family.

The charges of denying and downplaying genocide against Erlinder appear to be based on statements allegedly made by him:

- (a) in the course of defending clients on trial before the ICTR;
- (b) in a civil law suit in the U.S. District Court of Western Oklahoma;
- (c) in academic articles and presentations discussing his legal submissions on behalf of clients tried before the ICTR.

Rwanda alleges that Mr. Erlinder violated the Genocide Ideology Law by using the words "two genocides" and "civilian killings" and by making the following statements:

- On 2 February 2009: "In early 2008, Spain indicted leading members of Kagame government which followed a late 2006 French indictment charging Kagame and his followers with assassinating former Rwandan and Burundian Presidents, the crime that triggered 1994 Civilians-on-Civilians killings in Rwanda."¹
- Written submissions filed by Erlinder in defence of his client Major Ntabakuze,² that questioned the government-sanctioned history and asserted an alternative explanation for the 1994 massacre:

"It is now quite apparent that the invasion from Uganda [by the eventually victorious RPA/F, or Rwanda Patriotic Army and Rwanda Patriotic Front] was driven more by internal Ugandan politics . . . rather than a legitimate effort to democratize Rwanda, or to protect Rwandan "tutsi" from the interior. . . .
[T]he Kagame-led RPA/F engaged in a planned strategy of "guerrilla" warfare with the purpose of . . . destabilizing [then-President] Habyarimana[']s government [and] seizing power by military force in a final assault initiated by the assassination of President Habyarimana.

. . .
[Acts of sabotage by the RPA/F for the purpose of destabilizing and discrediting the Habyarimana government] included the killing of opposition political leaders and "tutsi" civilians to blame on the Habyarimana government and to demonstrate that the government could no longer ensure security of the population

. . .
"[T]he final plans to assassinate President Habyarimana had been converted into specific orders from Paul Kagame The assassination certainly was an act of war, as well as a violation of the

¹ The High Court Of Gasabo Located In Kabuga That Tries Criminal Cases Regarding Provisional Incarceration And Release In The First Instance In The Case Rprgr0678/10/Kgl/Nm, Rdpo312/10Tgui/Gsbo, 06/07/2010, p. 2.

² The Prosecutor v. Theoneste Bagosora, Gratien Kabiligi, Anatole Nsengiyumva, Aloys Ntabakuze, case no. ICTR-98-41-T (2007).

cease-fire These acts were undertaken with *full knowledge on the part of Gen. Kagame that resumption of the war would cause massive civilian casualties* Gen. Kagame admitted . . . [that] the predicted civilian massacres were an integral part of his war plan . . . [and that] the RPA/F was not using its troops to save the predicted “tutsi” victims of the renewed combat . . . [because they were] part of the sacrifice for his war plan.³

- a 2006 letter a letter to Canadian Prime Minister Stephen Harper, on the occasion of a state visit to Canada by Rwandan President Paul Kagame, claiming the, “Kagame Regime is the most repressive military dictatorship in Africa”.⁴

The Illegitimacy of the Genocide Ideology Law

Under Rwanda’s Genocide Ideology Law, it is a crime to “create[] confusion aim[ed] at negating the genocide which occurred [and] stiring [sic] up ill feelings” Because this law criminalizes internationally protected free speech and is overly broad and vague, it may be illegitimate under recognized legal standards. Free expression is protected by the *International Covenant on Civil and Political Rights*, the *Universal Declaration of Human Rights*, and the *African Charter on Human and People’s Right*.

Under internationally-accepted principles governing criminal law, a law that is overly vague will be considered void as failing to give adequate notice that the sanctioned conduct is illegal. Similarly a criminal sanction that is so broad that it provides the state with the power to arbitrarily target individuals for prosecution will also be void. For example, the U.S. Supreme Court struck down a vagrancy statute because it “fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.”⁵ The Court further voiced concern for laws that gave “unfettered discretion”⁶ in the hands of the state:

“Where . . . there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages the arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.”⁷

The Supreme Court of Canada has rejected as void a criminal sanction that “permits a ‘standardless sweep’ that allows law enforcement officials to pursue their personal

³ Defence Brief, paras. 442-57 (internal citations omitted).

⁴ *Infra* p. 8.

⁵ *Papachristou v. City of Jacksonville*. 45 U.S. 156, 170, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972), at 163.

⁶ *Id.* at 168.

⁷ *Id.* at 170 (internal citations omitted).

predilections.”⁸ The test for vagueness encompasses a requirement of fair notice,⁹ an intelligible standard for the judiciary,¹⁰ and a prohibition on uncontrolled discretion.¹¹

The Genocide Ideology Law does not give adequate notice, precise definition, or a clear standard as to what constitutes an offence, leaving it to those in charge of the prosecution to fit innocent acts to the words of the law. Furthermore, the statute makes a criminal act out of merely making a comment or asking a question. Therefore, the law appears to create a tool to suppress legitimate free expression.

Furthermore, Rwanda’s courts probably lack the jurisdiction to prosecute Professor Erlinder for criminal remarks made outside Rwanda. Prosecutor general, Mr. Ngoga claims, “we have jurisdictional links for statements and publications done outside Rwanda.” Thus, Rwanda is asserting either a type of “universal jurisdiction”—where a state claims the right to adjudicate a violation of universally-accepted norms that are *erga omnes* or owed to all—or a jurisdiction for purported violation of Rwandan criminal law even though the locus of the alleged crime was outside Rwanda.

By arresting and threatening prosecution of Professor Erlinder, Rwanda violated a number of internationally protected rights, namely

1. The right of persons accused of a crime to be represented by a lawyer empowered to effectively protect rights and achieve justice¹²;
2. The right of lawyers to perform their professional functions without intimidation, harassment, or improper interference¹³;
3. The prohibition against identifying lawyers with their clients’ causes.¹⁴

The duties of Rwanda and other states to ensure that lawyers can perform their professional duties—particularly when representing unpopular clients and causes—free from political pressure, prosecution and other interference are set out in the *Basic Principles on the Role of Lawyers*. Article 16 provides,

Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative,

⁸ Reference re ss. 193 and 195.1(1)(C) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123.

⁹ *Irwin Toy Ltd. v. Quebec (Att’y General)*, [1989] 1 S.C.R. 927, 983.

¹⁰ *Id.*

¹¹ *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 636.

¹² The *Basic Principles on the Role of Lawyers* U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990); Articles 5, 6, 7, 8. The International Covenant on Civil and Political Rights, Article 14; The Declaration of Human Rights Defenders, Article 9.

¹³ *The Basic Principles on the Role of Lawyers*, Article 16.

¹⁴ *The Basic Principles on the Role of Lawyers*, Article 18.

economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.¹⁵

Article 18 ensures that “[l]awyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.”¹⁶

Furthermore, statements made by a lawyer in the course of oral or written defence are immune from criminal liability.¹⁷ The acts that form the basis for charges against Mr. Erlinder are statements that he made while acting as a defence attorney while within the territory of Tanzania, as part of the defence team at the International Criminal Tribunal for Rwanda (which is being conducted in Tanzania).¹⁸ Therefore, even if his submissions made in defence of clients contradict government-sanctioned historical “fact,” his statements should be immune because they were made in the course of the legal defence of his client.

Without lawyers who are free from fear of adverse consequences for representing people before the courts, the courts cannot count on hearing full argument on the facts and law of particular cases.

LRWC Action

LRWC sent a letter (John Cotter, Brian Y.K. Cheng and Gail Davidson) to the government of Rwanda on May 31st 2010 outlining the breach of Mr. Erlinder’s internationally protected right to represent his client free from interference including being criminally charged for statements made in the course of his representation and the illegitimacy of the charges against him. LRWC’s letter was forwarded to Rwanda’s National Commission for Human Rights, the Canadian government, the American Bar Association, and the William Mitchell College of Law.

LRWC also signed a joint letter with the National Association of Criminal Defense Lawyers, the International Criminal Defense Attorneys Association, the International Bar Association and the Paris Bar Association. LRWC was planning on participating in a rally of lawyers in The Hague being organized for June 26.

Actions by Other Organizations

Because Rwandan government’s allegations were apparently based on Professor Erlinder’s defence work, the ICTR sought clarification about the charges and, after bail had been refused, requested that Rwandan authorities provide a formal copy of the charges against him.¹⁹ Although the ICTR never received a copy of the charges, it believed that the accusations against Professor Erlinder were based on his work with the ICTR and, thus, he should enjoy immunity from prosecution for words spoken in the course of his work as per the Convention on the Privileges

¹⁵ *Id.* at Article 16.

¹⁶ *Id.* at Article 18.

¹⁷ Cite source?

¹⁸ *See supra* at “Background.”

¹⁹ ICTR/RO/06/10/175/1984/A.

and Immunities of the United Nations. Consequently, the ICTR requested Professor Erlinder's release, even though this request came as a surprise for the Rwandan government, which insisted that the charges were not related to Professor Erlinder's work at the ICTR.²⁰

Furthermore, U.S. Secretary of State Hillary Clinton, at a foreign policy round-table on Africa urged Rwanda to release Professor Erlinder.²¹

Other organizations likewise demanded the release of Professor Erlinder. Notably, the National Lawyers Guild, which had Professor Erlinder as its former president, published a statement in late-May that emphasized the importance of advocacy without fear of prosecution and called for his release.²²

Additionally, the American Bar Association urged Rwandan officials to release Professor Erlinder and called on them to observe the U.N. Basic Principles on the Role of Lawyers, which discourage governmental interference and intimidation from lawyerly work.²³ Similarly, the International Criminal Defence Attorneys Association denounced Professor Erlinder's arrest,²⁴ and the Barreau de Paris (Paris Bar) condemned the Rwandan government's actions.²⁵

Professor Erlinder's Release

On 17 June 2010, Professor Erlinder was released on medical grounds.²⁶ Although the charges against him remain, he was free to leave Rwanda and has since returned to his home in the United States. Upon his return, Professor Erlinder credited U.S. Secretary of State Hillary Clinton with his release but criticized the U.S. Embassy for not providing assistance to him by securing food or medicine for him while he was in prison.²⁷

²⁰ African Great Lakes News Repository. "Gov't Surprised by ICTR U-Turn." 17 June 2010.

<http://newsrepository.wordpress.com/2010/06/17/gov't-surprised-by-ictr-u-turn/>

²¹ African Great Lakes News Repository. "Hillary Clinton publicly pleads for Peter Erlinder." 15 June 2010.

<http://newsrepository.wordpress.com/2010/06/16/hillary-clinton-publicly-pleads-for-peter-erlinder/>.

²² National Lawyers Guild. "NLG Demands Immediate Release of Attorney Peter Erlinder." 1 June 2010.

<http://www.nlg.org/news/press-releases/nlg-demands-immediate-release-of-attorney-peter-erlinder/>

²³ American Bar Association. "ABA President Urges Rwanda to Observe UN Principles on Role of Lawyers." 2 June 2010. <http://www.abanow.org/2010/06/aba-president-urges-rwanda-to-observe-un-principles-on-role-of-lawyers/>.

²⁴ International Criminal Defence Attorneys Association. "The ICDA Denounces the Extention [sic] of Peter Erlinder's Provisional Detention for Another 30 Days." 9 June 2010. <http://www.aiad-icdaa.org/index.php?section=1>.

²⁵ Barreau de Paris. "Le Barreau Paris condamne l'arrestation de Peter Erlinder." 1 June 2010.

<http://www.avocatparis.org/Actualite/Communiqués/Communiqué.aspx?p=20100603134309>.

²⁶ Edmund Kagire. Associated Press. "Rwandan court grants medical release to US lawyer." 17 June 2010.

<http://www.google.com/hostednews/ap/article/ALeqM5glFcY-e8EGur7UNMelrapReMrELgD9GD9DK00>.

²⁷ Jason Straziuso. Associated Press. 20 June 2010. <http://www.google.com/hostednews/ap/article/ALeqM5glFcY-e8EGur7UNMelrapReMrELgD9GF6CTG0>.

Further Reading

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