'Genocide Denial' and the ICTR: Reflections of a Former Defense Counsel

JURIST Guest Columnist **Peter Erlinder** of William Mitchell College of Law was defense counsel in the International Criminal Tribunal for Rwanda (ICTR) until last month when he was **removed** for "misconduct," an action that he argues was part of a wider history of institutional bias that has helped the Rwandan government label him and other defense counsel "genocide deniers" subject to official threats of arrest and even death...

A four-hour ICTR Appeal Chamber hearing on March 31 in Arusha, Tanzania was all that remained to complete the case against Major Aloys Ntabakuze, one of the four highest ranking officers of the Rwandan army to face charges of genocide and related crimes in the Military-I case that began in 2002. The highest-ranking officer, General Gratien Kabiligi, was acquitted of all charges in the December 2008 Trial Judgment. Ntabakuze and other defendants (even the notorious Bagosora) were also acquitted of conspiracy or planning to commit genocide. The Prosecutor did not appeal the acquittals.

In the interest of full disclosure, as reported in the *New York Times* April 28, 2011, I was Ntabakuze's lead counsel until the ICTR Appeal Chamber informed me on April 21 that my request to appear by video for the four-hour hearing was "unprofessional conduct." This decision came after threats on my life by Rwandan President Paul Kagame and unbidden PTSD symptoms following my release from imprisonment for medical reasons by Kagame's government last summer. My release came only after appeals by US Secretary of State Hillary Clinton and an international campaign. On April 30, the Appeal Chamber appointed co-counsel Andre Tremblay, who had been unable to appear on March 31 for medical reasons, as my replacement to argue the appeal in Arusha as we suggested before I was removed.

On January 27, the Appeal Chamber first announced the date for the hearing. This was the same day the Chamber denied Ntabakuze's Motion for the Permanent Stay of the Proceedings filed on December 17, 2010. Tremblay and I informed the Chamber of the conflict of interest situation, created when the Rwandan government arrested me last summer and threatened me with life in prison for the "crime" of writing articles in my office in the US describing Military-1 Trial evidence that challenged the one-sided story of the war.

The motion informed the Appeal Chamber that, after I was released, the threats to my life and safety did not stop, the Appeal Chamber was provided with:

An email from a former Rwandan Patriotic Front (RPF) leader reporting a high level meeting in October 2010 during which Kagame told senior leaders that my release was a "mistake" and I should be returned to Kigali "dead or alive";

Notice that, by failing to extend UN immunity to writings about the Military-1 case beyond proceedings in court, the Appeal Chamber exposed all lawyers to prosecution because of Rwanda's universal jurisdiction claims over words written or spoken anywhere in the world;
RPF officials continued to insist that I would be prosecuted, and if I did not return to Kigali, INTERPOL warrants would be issued for my arrest;
Rwanda claimed all defense lawyers were "genocide deniers" engaged in a vast conspiracy, evidenced by conferences organized by defense counsel in Europe;
UN "functional immunity" was not meaningful protection from RPF extrajudicial assassinations and disappearances, as confirmed by asylum claims of opponents and former supporters of the Kagame regime as well as mass violence in the Kibeho massacre, invasions of the Congo, etc.;
Fear of extrajudicial violence was not abstract as evidenced by the murder of Professor Jwani Mwaikusa, ICTR defense counsel, in Dar es Salaam in July 2010; the attempted assassination of Kagame's former chief of staff in South Africa in June 2010; the beheading of the Green Party vice president in Rwanda in July 2010; the assassination of an opposition journalist in Kigali in July 2010;
Evidence that the stated reason for my arrest, "genocide denial," was discredited by the UN "Mapping Report" on October 1, 2010, documenting RPF genocide, crimes against humanity and war crimes in the Congo from 1993-2003;
Evidence of a cover-up at the ICTR trial level, confirmed in the 2009 memoirs of former ICTR Chief Prosecutor Carla Del Ponte;
ICTR prosecutors' affidavits that confirm the ICTR knew of Kagame's responsibility for the assassinations of presidents Habyarimana and Ntaryarmira, touching off the genocide in 1997, and the Spanish indictment of Judge Abreu Merelles, which describes 325,000 people killed by the RPF in 1994;
The Military-1 Judgment in December 2008, acquitting the top military officers of conspiracy to commit genocide, contains UN files that show UN General Dallaire concluded that the RPF refused to use its military superiority to stop mass killings as part of its war plan.

The motion alleged that this evidence, and more, made normal representation in Arusha impossible because RPF supporters and agents work at the ICTR and are present throughout east Africa. None of this evidence had ever been put before the Appeal Chamber before, although the Chamber must have known that the ICTR, with a mandate to prosecute all crimes, has only prosecuted only the vanquished.

The *New York Times* article was too short to review the litigation leading up to the April 21 Order, but the following is reflected in the Military-1 litigation record. As early as December 17, 2010, the Appeal Chamber was on notice that threats to my life and safety made normal professional focus on my client's interests in Arusha illusory, at best:

December 17, 2010 — Motion for Stay of Proceedings/Conflict of Interest because of threats to defense counsel;
January 27, 2011 — Motion for State of Proceedings denied, first notice of oral argument 60 days hence — March 31/April 1 (4 hours total);
February 1, 2011 — Co-counsel Tremblay requested ICTR Registrar for withdrawal for conflict of interest reasons. Waiver of conflict by client permits lead counsel to continue;
February 7, 2011 — Formal Request for Substitution of Co-counsel;
February 13, 2011 — Tremblay suffered injuries in a road accident. A British barrister, qualified to practice at both the International Criminal Tribunal for the former Yugoslavia

(ICTY) and ICTR, engaged to replace Tremblay pending response from Registrar;
February 22, 2011 — No response from Registrar, Motion for Video Appearance by Counsel filed;
February 24, 2011 — Registrar Decision Denies Substitution of Co-counsel, rejected conflict of interest, ignored medical unavailability of co-counsel;
March 4, 2011 — Addendum to Request of Video re: medical condition of co-counsel;
March 15, 2011 — Motion for Video Appearance denied by Appeal Chamber;
March 25, 2011 — Confidential Medical Report Notice of Waiver of Appearance of Counsel by Defendant: Notification of onset of increasingly acute symptoms of PTSD as travel/hearing date of draws closer, Defendant waives presence of counsel;
March 31, 2011 — Waiver of Presence of Counsel by Ntabakuze: Public record of PTSD diagnosis resulting from Rwandan imprisonment and intense reactions brought on by impending life threatening situation;
April 15, 2011 — Counsel and co-counsel inform Chamber that counsel, pending medical approval, can complete 4-hour hearing by video or at The Hague after May 1 and co-counsel in Arusha, after June 1;
April 21, 2011 — Chamber Order removing counsel;
April 30, 2011 — Registrar Order replacing counsel with co-counsel Tremblay.

The Chamber was also informed that ambassadors and agents of the Rwandan government had attempted to disrupt my academic speaking engagements at US law schools in New York, D.C., Philadelphia and Pittsburgh. The Chamber was provided with copies of the propaganda churned out by the Rwanda media calling for my arrest and worse. Ntabakuze's concern for my life and safety was embodied in the March 31 Waiver of the Presence of Counsel that also explained PTSD symptoms but failed to convince the Appeal Chamber.

Now that I have been replaced, the final four-hour argument will be scheduled for some time after June 1 in Arusha as originally suggested. Ntabakuze will still benefit from the extraordinary efforts of Tremblay and Legal Assistants Me. Sandrine Gaillot and Joseph Holmes, Esq., who were prepared to assist during the March 31 hearing had the Appeal Chamber permitted him to proceed with the argument as requested.

Perhaps the most important evidence in the many documents now before the Appeals Chamber for the first time is the evidence of RPF crimes that the ICTR failed to prosecute which was provided by former ICTR prosecutors Carla Del Ponte, Florence Hartmann, and Michael Hourigan, FBI Agent James Lyons, and UNAMIR's Amadou Deme. All of whom were fired or resigned when they insisted on prosecuting Kagame or the RPF for crimes committed during the Rwandan genocide. The first defense attorney has now been added to their ranks and the evidence of the ICTR cover-up they could not put before the Chamber is now in the record and is a bell that cannot be "unrung."

It is important that my colleagues have a clear understanding of what will be required of them, should they accept the mandate to defend a case in the international system. Apparently, the "highest level of professional standards" permits participating in the cover-up of genocide, war crimes and crimes against humanity whether as a prosecutor or a defense attorney. At its "highest levels" professional standards require counsel to risk arrest by a criminal dictatorship for thought crimes, or assassination, to assist the court in perpetuating a cover-up, should the court so decree. Unfortunately for me, ethical rules in the US prohibit knowingly participating in a fraud. I wonder how others do it?

In addition to all this, on May 2 Rwanda Prosecutor Martin Ngoga announced he would insist on my return to Rwanda to answer false "genocide denial" charges. So, permit me to make clear: (1) I have never disputed the evidence that tens of thousands of Rwandan Tutsis were killed in Rwanda in 1994, under conditions that meet the definition of the Genocide Convention; (2) I have never disputed the UN characterization of the "Rwandan genocide" as having both Hutu and Tutsi victims; (3) I have never disputed the findings of October 2010 UN "Mapping Report," that between 1993-2003 the RPF, and others, committed mass violence against both Hutu and Tutsi victims.

Agreeing with the UN apparently makes anyone a criminal in the eyes of Ngoga and Kagame. The Rwanda Constitution was amended two years ago to officially rename the "Rwanda genocide," the "Rwanda Genocide of Tutsis." In Kagame's Rwanda, no victims other than Tutsis need apply, no matter what the facts might be.

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