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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

TRIAL CHAMBER II

Before Judges: Florence Rita Arrey, Presiding
Emile Francis Short
Robert Fremr

Registrar: Adama Dieng

Date Filed: 17 March 2011

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THE PROSECUTOR

v.

JEAN-BOSCO UWINKINDI

Case No: ICTR-2001-75-R11*bis*

***AMICUS CURIAE* BRIEF OF THE INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS (IADL), PURSUANT TO RULE 74 (RULES OF PROCEDURE AND EVIDENCE)**

Counsels for the International Association of Democratic Lawyers (IADL)
Jeanne Mirer, President, IADL
Lennox S. Hinds, IADL Permanent Representative to the U.N.
Beth S. Lyons, IADL Alternate Representative to the U.N.

Of Counsel
Peter Erlinder, Director, International Humanitarian Law Institute of Minnesota
Andrea M. Palumbo, Associate Director, International Humanitarian Law Institute

The Office of the Prosecutor
Hassan Bubacar Jallow
Bongani Majola
Richard Karegyesa
James Arguin
George Mugwanya
Inneke Onsea

Counsel for the Defence
Claver Sindayigaya
Iain Edwards
Bettina Spilker

A. Introduction

1. On 18 February 2011, the International Association of Democratic Lawyers (hereinafter, "IADL"), filed a Motion requesting leave to appear as an *amicus curiae* in the case of The Prosecutor v. Jean-Bosco Uwinkindi.

2. On 24 February 2011, this Trial Chamber granted leave to the IADL, and requested that the IADL address the following four points in its report:

(i) The fair trial rights of the Accused in Rwanda, in practice

(ii) The independence of the judiciary in Rwanda

(iii) The ability of Defence Counsel to adequately perform his/her functions in Rwanda

(iv) Detention conditions in Rwanda

(v) Any other issues relevant to the implementation of Article 20 of the Statute

3. The Trial Chamber directed that the IADL file its brief with the Registry within 21 days of the Decision, which is 17 March 2011.

4. The IADL recognizes that *Amicus Curiae* status has been granted to Human Rights Watch (hereinafter, "HRW"), the International Criminal Defence Attorneys Association (hereinafter, "ICDAA") and the Government of Rwanda (hereinafter, "GOR"). Human Rights Watch and the Government of Rwanda filed briefs on 18 February 2011. The ICDAA filed its brief 11 March 2011.

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5. The IADL refers in its submission to the previously filed *Amicus Curiae* briefs. IADL shares the conclusions of the Human Rights Watch and ICDAA briefs. Many of our points overlap, but we have endeavored to complement, and not repeat the specific arguments in these briefs. Some redundancy, however, is inevitable.

6. The International Association of Democratic Lawyers, is a non-governmental organization, which was founded in 1946 in Paris by lawyers who survived the war against fascism and participated in the Nuremberg Trials. Its first President, Me. Rene Cassin, is recognised as an author of the Universal Declaration of Human Rights (UDHR).

7. The IADL has been in Consultative II Status with ECOSOC for more than forty years, and is represented at the United Nations in New York, Vienna and Geneva. The IADL is also represented at UNICEF and UNESCO.

8. The IADL's aim is to promote the rule of law through the implementation of the UN Charter, and the subsequent international treaties and conventions which guarantee civil, political, social, cultural and economic rights. Since its founding, the IADL has participated in the UN Human Rights Commission and UN sub-commissions concerned with disarmament, development, the rights of women and against apartheid and colonialism, among others.

9. The IADL is composed of national associations of jurists from all continents. Our members are law professors, judges, and lawyers who engage in all areas of the law, and within academic, governmental, public and private sectors.

10. The IADL has sponsored, organized and coordinated many fact-finding missions, and trial observation and election-monitoring delegations of lawyers and jurists to Chile, El Salvador, Haiti, Israel, Japan, Namibia, Nicaragua, North Korea, Northern Ireland, the Occupied Palestinian Territories, the Philippines, South Africa, South Korea, the United States and Vietnam.

11. The IADL has published reports of its delegations and observations, and has distributed these through its IADL affiliates world-wide, and within its United Nations-connected activities.

12. The IADL collectively has decades of legal work and experience within both domestic and international fora. Its members have served as counsel in various positions in respect to national, regional and international courts and tribunals. Over the last decade, members of the IADL's Bureau and national associations have served as defence counsel at the ICTR, ICTY and the ICC. The IADL's First Vice-President, Me. Roland Weyl, conducted a fact-finding mission at the ICTR in February 2010.

13. Over the years, the IADL has reviewed the issue of fair trial raised in previous transfer requests by the Prosecution. Since 2004, the IADL's Bureau, Council and Congresses (Paris in 2005 and Hanoi in 2009) have adopted resolutions opposing transfer requests on the grounds that the Accused could not receive a fair trial in Rwanda. These Resolutions were communicated to the ICTR and to various UN bodies.

14. The IADL firmly believes that the protection of the fair trial rights of the Accused, guaranteed under the ICCPR and numerous international instruments, including the ICTR Statute Article 20 is a cornerstone of international justice and the Tribunal's legacy.

15. The IADL's interest lies in protecting and promoting the universally-recognized guarantees of fair trial. This is an issue of principle for the IADL in respect to all transfers to Rwanda, and our interest does not rest with this particular case.

B. Preliminary Points

1. The IADL submits that the implementation of any fair trial rights takes place within a broader context.

2. For these rights to be guaranteed, in practice, there must be an environment which respects human rights and the rule of law, and is conducive to the full implementation of fair trial rights.

3. Unfortunately, both of these elements do not currently exist in Rwanda, as based on the policies and practices of its Government.

4. For these reasons, the IADL has had to conclude that regardless of "nominal rights" found in Rwanda's Constitution or legislation, the full implementation of these rights in respect to any ICTR Accused person, and to his or her defence team is not ensured.

5. If any ICTR cases were to be transferred to Rwanda's jurisdiction, the IADL suggests that the rights of the Accused person under both international law and the ICTR Statute to present a defence would be grievously impaired and obstructed. These violations of fair trial rights would result in prejudice to the Accused.

6. This Tribunal recognizes that the implementation of fair trial rights is the key criterion in determining a referral request. This is reflected in its previous Appeals and Trial Chamber decisions rejecting the Prosecution's requests for transfer to Rwanda, under Rule 11*bis*,[1] as well as in this Trial Chamber's decisions to grant leave to *Amici Curiae.*

7. The Prosecution's argument is that the Government of Rwanda has addressed this absence of fair trial legislatively, and corrected the fair trial problems identified in previous Trial and Appeals Chamber decisions. The Prosecution claims that "All counsel, whether prosecution or defence, are afforded favourable working conditions including access to documents and witnesses." [2]

8. The Government of Rwanda has dismissed criticisms that these reforms are not sufficient or are, as yet, untested as "phantom criticisms" to which it cannot respond.[3]

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[1] See, Prosecutor v. Munyakazi, Decision on the Prosecutor's Appeal Against Decision on Referral Under Rule 11*bis*, 8 October 2008; Prosecutor v. Munyakazi, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 28 May 2008; Prosecutor v. Kanyarukiga, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008; Prosecutor v. Gatete, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 17 November 2008; Prosecutor v. Kayishema, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 16 December 2008.

[2] Prosecutor's Request for the Referral of the Case of Jean-Bosco Uwinkindi to Rwanda Pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence ("Prosecutor's Request"), 4 November 2010, Section 9(3).

[3] Government of Rwanda, *Amicus Curiae* Brief ("GOR" Brief), 18 February 2011, para. 5.

9. Legislative codification cannot be the determinant element in evaluating whether Rwanda's legal reforms - in practice - protect the rights of the Accused to present a defence, which includes the right and obligation of his or her counsel to exercise his or her duty to present a defence.

10. Especially where Rwanda's laws applicable to transfer have not yet been tested vis-à-vis the ICTR detainees and their lawyers, the past and current practices of the Government of Rwanda vis-à-vis the ICTR Accused and defence teams assume even more importance.

11. Whether, and how the difficulties encountered by ICTR defence counsel and defence teams have been handled in the past are the important indicators from which to conclude whether any legislative reforms will be carried out.

12. The IADL suggests that no matter what Rwanda has done to amend its laws, the situation "on the ground" in respect to human rights has worsened, and we believe that the existence of "genocide denial" laws has chilled the right of fair trial.

13. Finally, the IADL assumes that Rwandan jurists, as officers of the court, act in good faith. But we recognize that the parameters and context in which members of the judiciary function is determined by the Government's policies and practice. Our analysis and conclusions are directed toward the policies and practices.

C. Organization of Argument

1. In respect to the Trial Chamber's queries re (i) and (iii), the IADL focuses on whether two enumerated fair trial rights can be implemented in Rwanda:

> a) the right of the Accused to a fair and public hearing, and to be presumed innocent, as per ICTR Statute, Article 20 (2) and (3); and
>
> b) the right of an Accused person to defend him or herself by counsel of his or her choice; and the right to cross-examine Prosecution witnesses and present Defence witnesses, as per ICTR Statute, Article 20, 4(d) and 4(e).

2. These rights are intertwined in practice: whether an Accused can receive a fair trial in Rwanda, and whether his or her defence counsel can fully exercise the right and duty to present the client's defence.

3. In respect to (ii) whether the judiciary is independent, this point has been fully addressed by the HRW and ICDAA *Amicus Curiae* briefs. The IADL submits a brief observation here.

4. In respect to (iv) conditions of detention, the IADL is not making a submission at this

time. We may request leave, at a later time, to make a submission on this point.

5. The final issue of Monitoring Proposals is addressed in the last section of the brief, and falls with (v) of the Trial Chamber's decision.

D. Rwanda and the ICTR – a Context of Impunity

1. Rwanda's reaction to the implementation of Security Council Resolution 955 establishing the ICTR, and ICTR investigations into alleged RPF crimes during 1994 can be characterized as disregard for the rule of law.

2. Security Council Resolution 955 mandates the prosecution of all parties in Rwanda to the conflict.[4] But it is indisputable that no member of the RPF has been prosecuted by the ICTR.[5]

3. However, over the tenure of the ICTR, Rwanda has consistently and persistently rebuked any investigations into these allegations.

4. The former Chief Prosecutor Carla del Ponte lost her position at the ICTR because she initiated Special Investigations of the RPF, which were opposed by both the Rwanda and U.S. governments.

Rwanda's Opposition to ICTR Prosecution of the RPF

5. The Rwandan government's opposition to any investigations or proceedings in respect to the RPF has been reported in the annual U.S. Department of State Country Reports.

[4] Security Council Resolution 955 states that "the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace."

[5] The RPF's crimes in 1994 against Hutus have been well-documented. These include the judicial findings of French Investigating Magistrate Jean Louis Bruguiere and the indictment issued by Spanish Judge Fernando Abreu Merelles. In 1994, a UNHCR team, headed by Robert Gersony found convincing evidence of wide-spread, systematic killings by the RPF. Gersony himself reportedly estimated that between 20,000 and 45,000 Hutu civilians were killed by the RPF, in the five month period between April and August 1994. Unfortunately, this report was buried after strong pressure from Washington and Rwanda, and debate within the UN. See, *Leave None to Tell the Story: Genocide in Rwanda*, by Alison Des Forges. There is also the UNCHR "Mapping Report," revealed in October 2010, which concluded that crimes of the Rwandan RPF military forces, occurring between 1993 and 2003, with their allied militia groups, could constitute the crime of genocide against the Hutu refugees from Rwanda and Congolese Hutus. See, "Dispute over U.N. Report Evokes Rwandan Déjà vu: Echoes of 1994 Standoff in New Claims," by Howard W. French and Jeffrey Gettleman, *The New York Times*, 1 October 2010, p. A7; and Lars Waldorf, infra.

6. The U.S. Country Report for Rwanda for 2009 reports that

> The ICTR had tried no RPF members by year's end. The government continued to claim that calls by human rights groups or opposition figures for investigations of alleged RPF war crimes constituted attempts to equate the genocide with abuses committed by RPF soldiers who stopped the genocide.[6]

7. A year earlier, in 2008, the same U.S. government report states that

> The government continued to claim that calls by human rights groups or opposition figures for investigations of alleged RPF war crimes constituted attempts to equate the genocide with abuses committed by RPF soldiers who stopped the genocide. There were reports that some NGOs were pressured to cooperate with the government to provide information on the activities of other NGOs.[7]

Rwanda's Opposition to "Special Investigations"

8. This opposition is recounted in a recent book by Professor Nancy Amoury Combs, a law professor and former law clerk to Judge Diarmuid O'Scannlain on the 9th Circuit, Court of Appeals and to Justice Anthony Kennedy on the U.S. Supreme Court.[8]

9. To express its disapproval of Del Ponte's "Special Investigations" into war crimes and crimes against humanity allegedly committed by RPF soldiers, including members of the current Government, Rwanda stalled trials at the ICTR by preventing witnesses from traveling to Arusha.

10. Ms. Del Ponte's contract as ICTR Chief Prosecutor, which expired in mid-September 2003, was not renewed in August 2003 by the U.N. Security Council due to her refusal to stop the "Special Investigations" of the RPF and the pressure from President Kagame. Del Ponte "had no doubt Mr. Kagame's calls for her resignation were made as a result of her investigations into possible RPF atrocities." [9]

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[6] U.S. Country Report on Rwanda, 2009, Section 5.

[7] U.S. Country Report on Rwanda, 2008, Section 4.

[8] Fact-Finding Without Facts. The Uncertain Evidentiary Foundations of International Criminal Convictions (Cambridge University Press: 2010), p. 244.

[9] Global Policy Form, "Del Ponte Says UN caved to Rwandan Pressure," by Steven Edwards, 17 September 2003. See, Ms. Del Ponte's account of U.S./Rwanda-led pressures on her to drop the "Special Investigations" of the RPF, in her book, *Madame Prosecutor: Confrontation with Humanity's Worst Criminals and the Culture of Impunity*, Other Press, New York: 2009 (English edition), Chapter 9.

Rwanda and Domestic Prosecutions for Genocide

11. Professor Combs, in her book, examines whether transferring cases to national jurisdictions can remedy any of the fact-finding deficiencies of criminal convictions. She points out that with this option, "political considerations are particularly likely to prove distortive" to the fact-finding process.[10]

12. To illustrate this point, Professor Combs cites the problem of the RPF's refusal to effectively prosecute any Tutsis for crimes against Hutus. She states:

> Rwanda, for instance, has shown an admirable commitment to prosecuting international crimes, but that commitment extends only to prosecuting Hutu accused of perpetrating violence against Tutsi. Rwanda's Tutsi-led government has rendered the Tutsi RPF soldier who committed retaliation crimes against Hutu civilians functionally immune from prosecution.[11]

13. This conclusion supports Rwanda's failure to implement the rule of law in an equal manner.

14. In fact, in Rwanda's first, and only domestic prosecution of RPF soldiers for 1994 war crimes, the trial opened with guilty pleas from two low-ranking soldiers and ended with the acquittal of their commanding officers.[12]

15. The IADL concludes that the political considerations which control Rwanda's failture to effectively prosecute RPF crimes in its domestic courts bodes ill for the implementation of fairness within Rwanda for an Accused who is charged with crimes during 1994. This failure to prosecute nationally, as well as the obstruction in the past of the ICTR investigations, indicates a culture of impunity at the highest level.

16. These conditions create an environment which is one-sided and cannot result in effective implementation and protection of fair trial trials for any ICTR Accused who may be transferred to, or their defence teams who will have to operate in, Rwanda.

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[10] Combs, p. 369.

[11] Combs, pp. 269-370. See, "A Mere Pretense of Justice": Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal, by Lars Waldorf, *Fordham International Law Journal*, Vol. 33, Number 4, April 2010, pp. 1221-1277.

[12] Waldorf, supra., pp. 1222-1223.

E. There is a hostile environment for implementing fair trial guarantees, as demonstrated by the Rwandan Government's intimidation of its opponents.

1. In the last months leading up to Rwanda's August 2010 Presidential elections, the world witnessed the pre-election incarceration and killings of members of the press and opposition parties in Rwanda.

2. On 19 June 2010 Lt. Gen. Faustin Kayumba Nyamwasa, President Kagame's former army chief of staff, was shot in Johannesburg. Nyamwasa has stated that this was an attempted assassination.[13]

3. On 24 June 2010, the acting editor of *Umuvugizi*, Jean-Leonard Rugambage, was shot dead in front of his home in Kigali. Editor Jean Bosco Gasasira, who himself fled to Uganda after *Umuvugizi* was suspended, is reported as saying "I'm 100% sure it was the office of the national security services which shot him dead". The victim had recently written an article about the attempted assassination of Lt. Gen. Nyamwasa in South Africa.[14]

4. On the same day (24 June 2010), the Vice-President of the Green Party, Andre Kagwa Rwisereka, was murdered. His decapitated body was found near Butare. He was due to contest the Rwandan presidential elections against President Kagame less than one month later.[15]

5. All opposition parties were outlawed before the August Presidential elections. President Kagame received 93% of the vote.

6. The election was so marred by violence that the Obama Administration's National Security Council (NSC) issued a statement critical of the process.[16]

7. The NSC stated:

> "We remain concerned, however, about a series of disturbing events prior to the election, including the suspension of two newspapers, the expulsion of a human rights researcher, the barring of two opposition parties from taking part in the election, and the arrest of journalists" and

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[13] http://www.bbc.co.uk/news/10358171; Nyamwasa and three co-defendants were convicted *in absentia* by a Rwandan court in January 2011 of offenses stemming from their public statements and criticisms of the government. Two defendants were sentenced to 20 years each and two were sentenced to 24 years each. See, HRW *Amicus Curiae* Brief, para. 80.

[14] http://www.bbc.co.uk/news/10413793.

[15] http://www.digitaljournal.com/article/294629.

[16] http://www.reuters.com/article/idUSTRE67D0DX20100814 .

"expressed our concerns to the government of Rwanda, and we hope the leadership will take steps toward more democratic governance, increased respect for minority and opposition views, and continued peace."[17]

8. The significance of this statement is underscored by the fact that the U.S. government has been a long-time, strong proponent of President Kagame.

9. In August, after the elections, the international community warned the newly re-elected Paul Kagame: no more dictatorship and no more repression of the opposition in Rwanda.

10. The Western press warned of the negative effects of government repression on economic growth. In *The Economist* magazine, its report on Rwanda, entitled "Efficiency versus freedom," was headlined with "The West should not be silent when efficient leaders, such as Rwanda's squash the opposition."[18]

11. A *The New York Times* editorial[19] warned that Kagame's "refusal [to foster broad political debate and participation and to strengthen independent news media and civil society] will threaten the very stability and economic growth that he has nurtured."

12. Nevertheless, the Rwanda Government continues to move in the opposite direction – more repression, more intimidation, more lack of free press.

13. As of the filing of this Brief, Ms.Victoire Umohoza Ingabire, the Presidential candidate whose party was refused registration for the August Presidential elections, has been imprisoned for nearly 5 months on charges of funding terrorism.[20] Similar charges have been publicly lodged against Paul Rusesabagina, the main figure who inspired the film "Hotel Rwanda", and the 2005 Recipient of the U.S. Medal of Freedom from U.S. President George W. Bush.[21]

F. There is no presumption of innocence in Rwanda for those persons accused under the ICTR Statute of the crime of genocide, and related crimes.

1. It is an unequivocal principle of international criminal law that a defendant is entitled to the presumption of innocence, and to a fair and public trial. These principles are

[17] Ibid.

[18] *The Economist*, 7 August 2010.

[19] *The New York Times*, 12 August 2010.

[20] http://www.bbc.co.uk/news/world-africa-11623454.

[21] 'Hotel Rwanda' Hero Accused of Funding Terrorism, http://www.aolnews.com/world/article/hotel...of...terrorism/19692914

embodied in Article 20, ICTR Statute, as well as international instruments including, among others, the Universal Declaration of Human Rights (Articles 10 and 11), the International Covenant on Civil and Political Rights (Article 14), the African Charter of Human and Peoples' Rights (Article 7), the European Convention on Human Rights (Articles 6 and 7) and the Rome Statute of the International Criminal Court (Articles 66 and 67).

2. The IADL submits that in countries where the presumption of innocence is affirmatively implemented, State officials refer to the charges against a person, and do not to make statements pre-judging a person's guilt.

3. Despite Rwanda's accession to the ICCPR in 1975, and its inclusion of the ICCPR, Article 14 rights (which are also enumerated in Article 20, ICTR Statute) in the Rwandan Constitution (2003), Article 19 (presumption of innocence) and Transfer Law No. 11/2007, Article 13, the reality is that there is no presumption of innocence for the ICTR Accused according to the Rwanda's Government.

a) There can be no fair trial in Rwanda where government officials have publicly commented in the media on pending and on-going ICTR cases, thus destroying the presumption of innocence.

4. ICCPR, Article 14(2) states:

> "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

5. The U.N. Human Rights Committee ("HRC") has concluded that campaigns in the state media which portray a person as guilty before being tried violate ICCPR, Article 14 (2).[22] This is the situation in respect to the Uwinkindi case.

6. The HRC View was adopted 22 July 2009 in the case of Engo v. Cameroon, Case No. 1397/2005.[23]

7. Mr. Engo. a Cameroonian national, was being held in prison in Yaounde. He had been managing director of Cameroon's national social security fund until his arrest in September 1999 on misappropriation of funds and related charges. He claimed violations under articles 9, 10 and 14 (2), (3a), (3b), (3c) and (3d) and of the ICCPR.

8. Mr. Engo was the target of public accusations in the press, including in a French newspaper and in the State media. Despite his repeated requests to the Minister of

[22] Engo v. Cameroon, Case No. 1397/2005, View adopted 22 July 2009.

[23] Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Affairs, 96th Session, Communication Vol. 1397/2005, CCPR/C/96/D/1397/2005, 17 August 2009, para. 7.6 and Report of Human Rights Committee, A/64/40 (Vol. I), para. 175. (covering 94th, 95th and 96th sessions during 2008 and 2009).

Justice and managing director of Cameroon Radio Television to stop the campaign against him, the campaign against him continued.[24]

9. Mr. Engo believed that he was being used as a scapegoat in the Government's campaign against corruption. In 1994, he had founded a NGO to help the poorest people in Cameroon, and announced that the NGO would be opening up offices nation-wide. In the same time period, Transparency International criticized the Government of Cameroon for its failure to combat corruption.

10. In the case at bar, Rwandan State officials, in the State-dominated media,[25] publicly proclaimed Uwinkindi's guilt the moment he was arrested as a suspect, before any judicial proceedings took place.

11. In an interview entitled "Arrest of top genocide suspect is 'big catch.' Says Rwanda minister," given at the time of Uwinkindi's arrest, Rwanda's Justice Minister Tharcisse Karugarama stated:

> All the people that feature on the International Criminal Tribunal for Rwanda arrest warrant are important enough. They are high up in the hierarchy and were involved in the planning and executing genocide. So yes, that the arrest of Jean-Bosco Uwinkindi would be a big catch.[26]

12. Minister Karugarama pronounced Uwinkindi (like other ICTR suspects and Accused) as guilty, and determined that Uwinkindi was involved in planning and executing the genocide --- all before any trial.

13. Thus, Uwinkindi, the moment he was arrested as a suspect, was pre-judged as guilty by Rwandan government officials.

14. This proclamation in the Rwandan media has stripped Uwkinkindi of the presumption of innocence.

15. Therefore, we conclude that it is not possible for Uwinkindi's fair trial rights to be implemented in Rwanda.

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[24] CCPR/C/96/D/1397/2005, 17 August 2009, para. 3.6

[25] The 2010 Human Rights Watch submission on Universal Periodic Review concludes that Rwandan media is dominated by pro-government newspapers and radio stations. See, Human Rights Watch Report, July 2010.

[26] Interview with RFI's Billie O'Kadameri, published 2 July 2010. Available on the internet.

b) When the presumption of innocence is compromised and destroyed in national proceedings by State officials' statements to the media, the environment cannot be conducive to implementing these fair trial rights in ICTR transfer cases.

The Erlinder Case

16. In the Erlinder case, Rwanda's Prosecutor, Mr. Martin Ngoga, has already stated that Professor Peter Erlinder has distorted the history of Rwanda.[27]

17. In another article commenting on the arrest of Professor Erlinder on the charges of "Genocide ideology," Mr. Ngoga is quoted as saying that ". . .our country is very sensitive to issues or people that tend to downplay the seriousness of the situation in some sense of denial."[28]

18. Mr. Ngoga's public characterizations are findings of guilt, because they fall within the ambit of the characteristics of the crime of genocide ideology under Rwandan law. With these comments, he has destroyed the right of Professor Erlinder to be presumed innocent.

19. Mr. Ngoga has already told the media – in unequivocal terms - that Professor Erlinder is guilty, stating that

> "Erlinder came to Rwanda in the full knowledge that he had broken the law. He has, for many years, propagated his own, false theory about the genocide and worked hard to build an international network of genocide deniers to amplify its diffusion. Erlinder's theory is based on the selective use of conclusions of an ICTR ruling which acquitted four prominent senior military officers of one count of conspiracy to commit genocide. Out of court, Erlinder generalises this specific ruling to the whole genocide and argues that there was no conspiracy or planning in Rwanda, and therefore no genocide. He says it was a spontaneous and uncoordinated act of panic and anger following the shooting down of the president's plane."[29]

20. President Kagame has also already presumed Erlinder to be guilty. In a recent Press Conference, he described Erlinder as a "pretender" and "genocidaire."[30]

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[27] "Rwanda: We Will Not Drop Erlinder's Case – Prosecutor," by Edmund Kagire, *The New Times*, 28 October 2010.

[28] *Arusha Times*, 10 July 2010

[29] 3 July 2010, Rwanda News Agency, http://www.rnanews.com/politics/3722-why-were-prosecuting-peter-erlinder

[30] Available at http://www.paulkagame.com/2010/index.php?option=com_content&view=article&id=247%3Atranscript-of-president-paul-kagames-press-conference-of-18th-january-2011&catid=35%3Apress&Itemid=57&lang=en.

The Ingabire Case

21. In the case of Ms. Victoire Umuhoza Ingabire, who has been accused of negating the genocide and abetting terrorism, there has been no trial yet,[31] Ms. Ingabire is still incarcerated, and under investigation. The Government Spokesperson Louise Mushikiwabo, has already declared that Ms. Ingabire has disregarded the laws of Rwanda.

22. *The New Times* reported, "In an interview with *The New Times*, Government Spokesperson, Louise Mushikiwabo, who is also the Minister of Foreign Affairs, confirmed the attempted escape [referring to Ingabire's arrest in March 2010], adding that Ingabire has deliberately continued to disregard the laws of the country."[32]

23. The same article continued: "In November last year, Ingabire featured prominently in a UN report, as one of the key supporters and fundraisers for the FDLR terrorist organization. 'This confirms what has been said all along. This woman does not think that she should abide by the laws that govern this country.'" Mushikiwabo said.

24. Here, Ms. Mushikiwabo, a highly placed State official is concurring with the UN report charges, thus pronouncing Ms. Ingabire to be guilty.

25. In April 2010, the Prosecutor General, Mr. Ngoga accused Ingabire of meeting with two commanders of the FDLR to share plans to attack Rwanda.[33]

26. Ms. Ingabire has already been pronounced guilty in the press by President Kagame.

27. In a statement before the August 2010 elections, to justify the side-lining of Ms. Ingabire, President Kagame told Rwanda News Agency: "She associated herself with those who carried out the genocide."[34]

28. *The Economist,* in an article entitled "Who is out to kill the dissidents? As an election looms, the politics of Rwanda become a lot nastier," 24 June 2010, noted that

> "The government press has not been kind to him [referring to Professor Erlinder] or to Ms. Ingabire. 'Now they must scurry back through the

[31] As of the date of the drafting of this brief.

[32] *The New Times*, 23 March 2010, "FDU's Ingabire Attempts to Flee."

[33] "Ingabire met Mbiturende in Kinshasa where they shared plans to attack the country," said Ngoga. *The New Times*, available at http://allafrica.com/stories/201004230080.html.

[34] Available at http://www.rnanews.com/ele-2010/3812-kagame-vows-free-polls-but-confident-of-win.

grimy crevices. . .from where they had crept, ' says *The New Times*. Paranoia on all sides is rife."[35]

c) The Rwanda Government views the ICTR Accused as the enemy, because as a group, they remain the strongest potential witnesses against the current government for crimes committed by the RPF in 1994.

29. Whether Rwanda's national laws afford guarantees to those arrested in Rwanda is relevant and pertinent to assessing fair trial rights, but the specifics of the question of transfer need also to be considered.

30. The transfer issue concerns conducting trials in Rwanda for those who allegedly "planned, instigated, committed or otherwise aided and abetted the planning, preparation or execution of a crime referred to" in the ICTR Statute.[36]

31. These Accused include persons who held leadership positions at national and local levels of government, or in the military as well as persons in the media, religious sector, and intellectuals and a few "without portfolio."

32. A common denominator of these Accused is their Hutu ethnicity, and the fact they were forced to flee the country for their safety as it was being overtaken by the RPF in 1994.

33. Due to the former positions of many of these Accused, they are likely to have either direct knowledge of, or access to, information about crimes which were allegedly committed by the members of the current Government during 1994.

34. If there were to be trials for charges against the RPF, these Accused would be among the most damaging witnesses for the RPF, due to their intimate knowledge of the individuals and workings of those in the current leadership in Rwanda.

35. The IADL suggests that the potential danger of the ICTR Accused to the Rwandan government means that their actual safety and well-being, especially in a detention facility, are, in our view, practically non-existent.

d) The ICTR Accused have challenged the accusations against them

36. All of the ICTR Accused, in different ways, have challenged the Prosecution's version of events of 1994 in their trials.

[35] Available at http://www.economist.com/node/16439016.

[36] ICTR Statute, Article 6(1).

37. Based on specific factual allegations, ICTR Defence counsel have developed strategies for defending their clients.

38. In these strategies, the Accused in some cases have presented defences which directly call into question the veracity of Rwanda's official narrative of the 1994 events.

39. One example is the Ntabakuze defence in "Military I."[37] In this case, Professor Erlinder, Lead Counsel for Aloys Ntabakuze, presented evidence which contradicted the Rwandan government's narrative of the events of 1994.

40. In the Ntabakuze defence, Professor Erlinder constructed an alternative narrative, based on U.S. and U.N. documents, and including the testimony of former U.S. Ambassador to Rwanda Robert Flaten and other witnesses.

41. In this narrative, the shooting down of the Presidents' plane in April 1994 was the consequence of a planned military offensive by the RPF. The RPF campaign had begun in October 1, 1990, when it invaded Rwanda from Uganda. Based on its military superiority, the RPF was able to finally consolidate political power in July 1994.

42. Professor Erlinder's client, as well as the other three co-defendants, were acquitted of conspiracy to commit genocide. One of the co-defendants, General Gratien Kabiligi was acquitted of all charges at trial; the remaining three co-defendants were convicted of other charges which are now on appeal.

43. The Trial Chamber's acquittal on the conspiracy charge in the "Military I" judgment is objectively a challenge to the fundamental view of Rwanda, and of the ICTR Prosecution's theory: that the events of 1994 were the result of a planned conspiracy by "extremist" Hutus to commit genocide against Tutsis.

44. To the extent defences (and ICTR judgments) are perceived by Rwanda to interfere with its objective of the molding of a collective consciousness based on the events of 1994,[38] any challenges to the Rwandan government's view of history by the Accused and their counsel are viewed as dangerous.

45. The Erlinder case, discussed below, examines the Rwandan government's view of the danger of the Ntabakuze defence in the "Military I" case, and the steps it is willing to undertake to defend itself against the danger it perceives.

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[37] See, "The U.N. Security Council *Ad Hoc* Rwanda Tribunal: International Justice or Juridically-Constructed 'Victor's Impunity'?," by Professor Peter Erlinder, DePaul Journal for Social Justice, Vol. 4, Number 1, Fall 2010, pp. 131-214, Part III on "Military I" Trial Evidence.

[38] Rwanda's objective is well known, and illustrated by its "re-education camps" or *Ingando*. See, Thomson, Susan. "Re-education for Reconciliation: Participant Observations on *Ingando*." See also, Mgbako, Chi, "*Ingando* Solidarity Camps: Reconciliation and Political Indoctrination in Post-Genocide Rwanda," *Harvard Human Rights Journal* 18, (Spring, 2005), pp. 201-224.

Rwanda has already officially presumed the ICTR Accused to be guilty

46. In November 1999, the ICTR Appeals Chamber dismissed the indictment against Jean Bosco Barayagwiza and ordered his release, based on the Prosecution's egregious violations of his rights.[39]

47. The Rwandan government then pressured Chief Prosecutor Carla del Ponte to re-instate the indictment against Jean Bosco Barayagwiza by temporarily suspending cooperation with the ICTR and denying a visa to Del Ponte.[40]

48. The prospect of a freed ICTR Accused was beyond Rwanda's countenance.

49. Rwanda, which voted against the establishment of the ICTR in 1994, has consistently voiced its disapproval of ICTR acquittal decisions.

50. In the first decision of acquittal by the ICTR in Bagilishema, the BBC reported that "The Rwandan Government said it is shocked by the acquittal of Mr. Bagilishema, who it described as one of the most 'notorious' criminals from the genocide."[41]

51. In the case of the ICTR acquittals of Ntagerura and Bagambiki, Rwanda's Minister of Justice described the acquittals as a "miscarriage of international justice." Mr. Martin Ngoga, former Special Representative of the Rwandan government to the ICTR and currently the Prosecutor General, described the acquittals as a "joke."[42]

52. A recent example is the demonstration held by IBUKA in Kigali, in November 2009, after the Appeals Chamber's acquittal in the Zigiranyirazo case. IBUKA equates acquittal with denial of Tutsi genocide.[43]

53. The Rwanda government may respond that IBUKA is not a state-controlled organization, and that the demonstration reflected only the sentiments of members of the public.

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[39] Decision, Appeals Chamber, 3 November 1999, paras. 106-108.

[40] Country Reports on Human Rights Practices: Rwanda, U.S. Department of State, 1999. See also, *International Justice in Rwanda and the Balkans, Virtual Trials and the Struggle for State Cooperation*, by Victor Peskin (Cambridge University Press: 2008). Chapter 7.4.

[41] BBC News, June 1, 2001.

[42] See, ICDAA *Amicus Curiae* Brief, 11 March 2011, fn. 12 for citations.

[43] Combs, p. 230.

54. However, there is evidence to the contrary: IBUKA, an organization of genocide survivors formed in 1995, has played a leading role in propagating the Rwandan government's view of the genocide. This includes its fundamental view that anyone who believes that there was a genocide against both Tutsis and Hutus, is guilty of the crime of genocide denial, or negationism.[44]

55. In addition, IBUKA's highest leadership included members of the RPF Central Committee. As Lars Waldorf points out, " a member of the RPF's central committee was appointed as president of IBUKA in 2000, "the same year that several Tutsi survivors critical of the RPF's policies were effectively neutralized." [45]

G. Defence counsel and teams cannot freely function and carry out their work in Rwanda, free from intimidation or threat in Rwanda

a) There is a history of interference with, and danger to defence teams working in Rwanda.

1. In September 2006, ICTR defence counsel Callixte Gakwaya was arrested at the ICTR in Tanzania, as a request of the Rwandan Government. He was released with the assistance of the ICTR Registrar, after a boycott of ICTR lawyers, but died in Mozambique, where he lived in asylum.[46]

2. In June 2007, ICTR Defence investigator Leonidas Nshogoza was arrested in Rwanda and charged with minimization of genocide, based on false allegations related to his work activities for the Rukondo defence team at the ICTR.

3. In 2007, one of the investigators on the Ntabakuze Defence Team, Emilien Dusabe, was threatened by the *Auditor Militaire* in Kigali because of his success in locating defence witnesses and was recently granted asylum in a European country after spending three years in a refugee camp. The second investigator for the Ntabakuze Defence Team, Juvenal Baragahoranye, is also in asylum in an African country and cannot return to Rwanda. [47]

4. Ntabakuze's Lead Counsel, Peter Erlinder, also has represented examples of defence witness harassment and intimidation to the Trial Chamber. In a recent pleading, he states

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[44] See, for example, IBUKA's "Open Letter to United States Congress Regarding HR#1426," 17 June 2010, stating that Professor Peter Erlinder is a genocide denier, at www.businesswire.com.

[45] Waldorf, supra., pp. 1231-1232.

[46] See http://www.hirondellenews.com/content/view/5162/459/.

[47] Prosecutor v. Ntabakuze, ICTR-98-41-A, Defence Exceptional Public Motion for Permanent Stay, to Uphold the Rule of Law and the Appearance of Justice, in Proceedings Before this Chamber, 17 December 2010.

that none of the Rwandan witnesses testifying for the Ntabakuze Defence in the Military-1 trial were willing to testify in open session; all required a pseudonym; and native Rwandans did not travel with UN assistance directly from Kigali for fear their identity would be reported to RPF immigration authorities.[48]

5. Yet, despite these precautions, some Ntabakuze defence witnesses were interrogated and beaten by RPF Government agents after speaking with defence investigators in Rwanda. Other defence witnesses refused to come to Arusha, and even European Catholic priests-defence witnesses were threatened by RPF Government agents after returning to Rwanda.[49]

6. On May 28, 2010, Professor Erlinder was incarcerated on charges of negationism and genocide-denial, and denied bail.[50] He was finally released by the Rwandan court, three weeks later, on humanitarian grounds and after an intensive international campaign.

7. At the time of his arrest in May, Professor Erlinder was in Rwanda to meet with his client, the prospective Presidential candidate, Victoire Umuhoza Ingabire, who had been briefly detained earlier in the year as a "genocide-denier."

8. Although Professor Erlinder was released on 17 June 2010, and still has never been formally charged, he continues to be a target of harassment and threats of the Rwandan government.[51]

9. On 14 July 2010 ICTR defence counsel Professor Jwani Mwaikusi, Lead Counsel for Yusuf Munyakazi was shot dead outside his house in Dar Es Salaam. In the Munyakazi case, the Appeals Chamber affirmed the Trial Chamber's denial of the Prosecution's Referral Request, under Rule 11*bis*, on fair trial grounds. Although the killing was reported in the media as a robbery, only Professor Mwaikusa's briefcase and some

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[48] Ibid.

[49] Ibid.

[50] Based on Judge's decision 7 June 2010 denying bail, Professor Erlinder was charged with a) denying and downplaying/minimizing genocide through his publications and conferences. The charge is prescribed and punishable by Article 4, Law No. 33bis/2003 (September 6, 2003) which punishes crime of genocide, crimes against humanity and war crimes; and b) spreading rumors that are capable of threatening the security of the Rwandan people. The charge is prescribed and punishable by Article 166, Law No 21/77 (August 18, 1977) establishing criminal laws. The High Court of Gasabo Decision, 7 June 2010 (RDP0312/10/TGJI/GSBO) is available at http://jurist.org/doc/erlinderbail.doc.

[51] Ntabakuze Defence Motion, 17 December 2010, para. 2 states: At the end of October 2010, Professor Erlinder received credible information from a former RPF leader, now in asylum, that President Kagame stated in a high level meeting in Kigali in mid-October that Lead Counsel's release from Rwandan detention on bail in June 2010 was a "mistake," and ordered high level RPF figures present at the meeting, one of whom reported what occurred, that Lead Counsel should be brought back to Rwanda "dead or alive."

documents were taken.[52] There were no reports that any items of monetary value were taken.

10. The timing and circumstances (as well as a history of Rwandan political assassinations throughout East Africa) give rise to reasonable fears as to the physical safety of ICTR defence counsel in East Africa, including Rwanda.

b) There is no security for ICTR defence counsel and defence teams because Rwanda has publicly targeted ICTR counsel

11. The Government of Rwanda has publicly conducted a campaign against ICTR counsel whom it views as "denying genocide."

12. In 19 May 2010, an up-coming ICTR Defence Conference held in Brussels was attacked in Kigali's *New Times*. Attorney General Martin Ngoga stated, "For a few years now, some defence lawyers at the ICTR have so badly deviated from their professional duties and turned into activists and advocates of Genocide denial." The reporting continued that "a programme of the meeting. . .shows several lawyers known for their efforts to negate or trivialize the 1994 Genocide against the Tutsi." Professor Erlinder was named in this article.

13. A similar article appeared in the Rwanda *Sunday Times* front-page editorial, on 30 May 2010.

14. At the 18 June 2010 Security Council meeting, the Representative from Rwanda, Mr. Gasana, focused on what he referred to as "a cohort of members of the legal profession, academia and others associated with the perpetration of this most heinous of crimes," who "misrepresent, misinterpret and openly deny the 1994 genocide against the Tutsis." He assured the Security Council that any person who trivializes or denies the genocide will be brought to justice in accordance with Rwanda's laws.[53]

15. Six months later, on 6 December 2010, at the Security Council meeting, Mr. Gasana re-iterated his previous statement: ". . Unfortunately, the denial and trivialization of the genocide are phenomena that tend to grow and be trivialized even in the community of defence lawyers in Arusha." [54]

16. On 20 July 2010, Rwanda's Minister and Foreign Affairs and Cooperation, Ms. Louise Mushikiwabo stated, ". . .[G]enocide denial is there. We've seen it. We see it in

[52] http://www.bbc.co.uk/news/world-africa-10649739.

[53] Provisional minutes of U.N. Security Council meeting, 18 June 2010, S/PV.6342.

[54] Provisional minutes of U.N. Security Council meeting, 6 December 2010, S/PV.6434.

writings, in meetings, in conferences, in academic papers. We see it with defense lawyers for genocide suspects. . .:[55]

17. The IADL submits that these public statements target all ICTR defence counsel.

18. It is anticipated that the Rwanda government will claim its statements about "genocide-deniers" only apply to those defence counsel who present, as part of their defence of their client, evidence that contradicts the official Rwandan Government narrative of 1994.

19. But the Rwandan government's tactic to try to divide defence counsel is fallacious.

20. The reality is that all ICTR counsel, based on Rwanda's threats, are at risk if they were to represent a client in Rwanda, or to travel to Rwanda while they represent a client at the ICTR in Arusha.

21. The reason is that all criminal defence counsel contradict the "official story" in their strategies – to one degree or another.

22. Generally in criminal cases, there are two strategic approaches to reasonable doubt: a) to offer an alternative theory which demonstrates that someone, other than the defendant, committed the crimes alleged; or b) to offer an alternative narrative of the facts, to show that the events did not take place exactly as the Prosecution is suggesting.

23. Which approach is taken, or whether there is a blending of the two is determined by the defence investigations and evidence.

24. But there is one unifying principle: A criminal defence attorney – regardless of the jurisdiction - has the obligation to put forward a defence and zealously represent the interests of the client.

25. The IADL suggests that if a defence counsel representing an ICTR defendant in Rwanda puts forward a defence which, similar to the Ntabakuze evidence, contradicts in whole or in part the Rwandan government's narrative of the 1994 events, he or she could be subject to running afoul of the "genocide-denial laws."

26. Rwanda's public threats, in combination with the "genocide-denial laws," produce a chilling effect on all Defence counsel, denying the fair trial right of the Accused, through legal representation, to present a Defence.

[55] Presentation to the Atlantic Council of the United States, 20 July 2010, Washington, D.C. Transcript by Federal News Service, Washington, D.C.

The Legal Concept of "Chilling Effect"

27. The legal concept of "chilling effect," is found in the landmark U.S. Supreme Court case, Dombrowski v. Pfister, 380 U.S. 479 (1965).[56]

28. At issue in this case was the statutory definition of a "subversive organization."[57] Specifically, whether a Louisiana State statute, the Subversive Activities and Communist Control Law was overly broad and violated due process and whether its existence as a State law – independent of its implementation - chilled protected speech.

29. The U.S. Supreme Court, reversing the lower Federal court, answered both issues in the affirmative. It held that the provision of the Louisiana's Subversive Activities and Communist Control Law and Communist Propaganda Control law defining "subversive organization" violates due process is that its language is unduly vague and uncertain and broad, and "so long as the statute remains available to the State the threat of prosecutions for protected speech is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected speech."[58]

30. This case, therefore, stands for the proposition that the very existence of an overly broad statute results in a "chilling effect" because it creates the possibility that the law can be used against a person who is defined as a violator.

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[56] The concept of a statute chilling the rights safeguarded by the Bill of Rights is first found in the U.S. Supreme Court case, Wieman v. Updegraff, 344 U.S. 183 (1952), 221. In this case, the Supreme Court held that the requirement that state officers and employees take "loyalty oaths" that they have not been affiliated with, or are not members of organizations which have been deemed as communist fronts or subversive by Federal agencies offends due process (Fourteenth Amendment).

[57] This case grew out of, and was litigated during the civil rights movement the 1960's in the south of the U.S. In this case, each of the appellants was indicted on charges of violating the Subversive Activities and Communist Control Law. Two of the indictees were members of the National Lawyers Guild (an organization of U.S. lawyers which still exists today, and is an IADL affiliate in the U.S.), and the third was a leading member of the Southern Conference Educational Fund (SCEF), one of the leading organizations of in the civil rights movement. During the McCarthy era in the U.S. in the early 1950's, the National Lawyers Guild was falsely accused of being a Communist front organization. These allegations were never substantiated by the U.S. government.

As described by one of the lawyers in the case, the former Arthur Kinoy, a well-known constitutional law expert and litigator, "The Cold War McCarthy red-baiting attack was being resurrected in the middle of the southern movement." (Rights on Trial, The Odyssey of a People's Lawyer, by Arthur Kinoy (Harvard University Press: 1983), p. 216). Those who had been indicted brought an action, under the Civil Rights Act, in the District Court (lower federal court) in the State of Louisiana, requesting declaratory relief and an injunction restraining defendants from prosecuting or threatening to prosecute the plaintiffs for alleged violations of the statute. The District Court dismissed the complaint, and the plaintiffs appealed directly to the U.S. Supreme Court which reversed the judgment and cause was remanded with directions.

[58] Dombrowski v. Pfister, 380 U.S. 479 (1965), 494.

30a. The chilling effect results in an act not being undertaken, and this obviously presents difficulty in quantifying the effect since one cannot point to affirmative actions which can be counted.

30b. However, the chilling effect can be measured by examining the existing laws and practices.

31. Article 13 of the Rwandan Constitution criminalizes "revisionism, negationism and trivialization of genocide" and states that the crime of genocide, crimes against humanity and war crimes have no statute of limitations.

32. There are also a series of Rwandan laws related to genocide denial, negationism and divisionism.[59]

33. The IADL maintains that the very existence of the genocide-denial and related laws, based on the constitutional provision, present the possibility of prosecution for an indefinite period of time, chilling the defence for any case transferred from the ICTR to Rwanda.

c) Prosecution and Government of Rwanda (GOR) position

34. Both the Prosecution and the GOR conclude that the security of the defence has been ensured in Rwanda.[60] But, the GOR brief specifically addresses the chilling effect argument, where it discusses the security of defence teams.[61]

35. The GOR anticipates the criticism of defence teams and witnesses who would argue that Rwanda could broadly construe and apply Article 13, thus instilling the fear of arrest and prosecution for statements made, or for actions undertaken in connection with the defence of an Accused. These fears would, allegedly have a chilling effect on the defence, and thus interfere with the rights of the accused.[62]

36. The GOR argues that a) immunities to the defence under the Transfer Law provide protections; b) no reported cases against defence team members or witnesses have been prosecuted under Article 13; and c) the Minister of Justice has commissioned a study of

[59] Law No. 18/2008 of 23/07/2008 Relating to the Punishment of the Crime of Genocide Denial; Law No. 33 Bis/2003 of 6/09/2003 on Repressing the Crime of Genocide, Crimes against Humanities and War Crimes; Law No. 47/2001 of 18/12/2001 on Prevention, Suppression and Punishment of the Crime of Discrimination and Sectarianism

[60] Prosecutor's Request, para. 64 and GOR *Amicus Curiae* Brief, para. 63.

[61] GOR *Amicus Curiae* Brief, Section iv., paras. 46-63.

[62] GOR *Amicus Curiae* Brief, paras. 46, 48.

potential problems, with a commitment from both the Minister and President to consider amendments to clarify Article 13 and limit its scope.

37. The Prosecution asserts that "The prospect of the application of the genocide ideology/genocide negation law has been removed through the immunity granted in the transfer law. Any witness testifying in Rwanda enjoys immunity for whatever he or she does in court, with the exception of perjury or contempt."[63]

No reported cases under Article 13

38. Rwanda's Constitution, Chapter 1. Fundamental Human Rights, Article 13 states:

> The crime of genocide, crimes against humanity and war crimes do not have a period of limitation.
>
> Revisionism, negationism and trivialization of genocide are punishable by the law.[64]

39. Assuming arguendo that the GOR's facts are correct, and that there are no reported cases of Article 13 prosecutions against the defence, this point does not lead to the conclusion that Article 13 has no chilling effect on the defence.

40. As held in Dombrowski, the chilling effect of a statute or law does not mean that it must be used against someone in a prosecution. It is the possiblity that it may be used at some future date that creates the chilling effect.

41. Therefore, the fact that, according to the Government of Rwanda, there are no reported cases under Article 13 of defence team members or witnesses being prosecuted does not remove the possibility that this would never happen.

42. Moreover, as the provision is written, there is no statute of limitations. Thus, the provision's lifetime potentially is forever.

43. More importantly, the issue of the chilling effect is not limited only to prosecutions based on Article 13. A number of laws[65] related to genocide denial exist in Rwanda. These laws are derived from the Article 13 constitutional provision, thus also chilling the rights of the Accused to a fair trial.

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[63] Prosecutor's Request, 4 November 2010, p. 8.

[64] 04 June 2003 – Constitution of the Republic of Rwanda (O.G. No. Special of 4 June 2003, p. 119).

[65] Law No. 18/2008 of 23/07/2008 Relating to the Punishment of the Crime of Genocide Denial; Law No. 33 Bis/2003 of 6/09/2003 on Repressing the Crime of Genocide, Crimes against Humanity and War Crimes; Law No. 47/2001 of 18/12/2001 on Prevention, Suppression and Punishment of the Crime of Discrimination and Sectarianism.

44. A more relevant and telling survey would be the number of persons under investigation for, and prosecuted for alleged violation of laws stemming from Article 13.[66] The Government of Rwanda, however, does not provide this information.

45. The chilling effect of Article 13 and its related laws on potential defence witnesses has already been addressed by HRW and ICDAA.[67]

The Immunity Issue

46. In support of its argument that there has been no single Prosecution for crimes under Article 13, the GOR states that "the arrest of ICTR defence attorney Peter Erlinder on charges of genocide denial is no exception." It argues that his case "aptly illustrates that the immunity afforded to defence team members in connection with referral cases will have practical force and effect. Additionally, it provides affirmative proof that Rwanda will honor those immunity protections by not prosecuting defence team members for word or acts related to the defence of a referred case." [68] The "affirmative proof" is that Rwanda ceased all legal action based on the one document the ICTR Appeals Chamber identified as relate to his work as a defence counsel, and for which immunity attached.[69]

47. The IADL submits that the Erlinder case illustrates Rwanda's use of its genocide ideology law to violate the rights of an attorney guaranteed under international instruments, and the protections for the defence of his client. Rwanda's continuing investigation of Professor Erlinder, under the rubric of this law, demonstrates the chilling effect of the laws on ICTR lawyers and ICTR defence teams.

Professor Erlinder's immunity under international instruments

48. The IADL recognizes that Professor Erlinder was in Rwanda to consult with his client, Ms. Victoire Umuhoza Ingabire, who was not an ICTR Accused. We submit that in this situation, Professor Erlinder and his client were protected by the Basic Principles on the Role of Lawyers. These Principles were established to protect the rights of accused persons and the rights of lawyers to defend them.

49. These Basic Principles on the Role of Lawyers, promulgated by the U.N. and adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 7 September 1990, state:

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[66] See, ICDAA *Amicus Curiae Brief*, para. 52, pointing out that persons accused of genocide or genocide ideology are normally prosecuted under Law No. 33 bis/2003 of 6/09/2003 Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes, and not under the Constitution, Article 13.

[67] See, HRW *Amicus Curiae* Brief, pp. 9-12 and ICDAA *Amicus Curiae* Brief, section D, p. 18.

[68] GOR *Amicus Curiae* Brief, para. 56.

[69] Ibid., para. 55.

a) "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, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."[70]

b) "Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities."[71]

50. The Principles further prohibit identification of lawyers with their clients' causes.

"Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions."[72]

51. The Principles also provide immunity to lawyers while engaging in professional activities.

"Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority."[73]

The 6 October 2010 ICTR Appeals Chamber Decision[74]

52. While welcoming the assertion of immunity for ICTR defence counsel in the Appeals Chamber decision of 6 October 2010, the IADL suggests that the Appeals Chamber interpretation of a defence counsel's activities, in the context of defending one's client, appears to be somewhat restrictive.

53. The Decision makes an artificial distinction between words or statements spoken in court by a defence counsel, and words or statements, about the defence by counsel, which are made in other fora, such as in academic conferences, or in written papers.

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70 Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990), Art. 16.

71 Ibid., Art. 17.

72 Ibid., Art. 18.

73 Ibid., Art. 20.

74 Appeals Chamber, Decision on Aloys Ntabakaze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 6 October 2010

54. The IADL submits that the rights and duties, as well as the protections, of a defence counsel do not end when he or she walks out of the courtroom.

55. The IADL suggests the content of any statements or writings which emanate from the pleadings and litigation in the case are related to the work as defence counsel. Hence, there is no "private" commentary on a defence case when one is a defence counsel and talking or writing about that case.[75]

56. The statements or writings by the defence which emanate from the defence of an ICTR case, moreover, are protected speech.

57. The IADL notes that the application of the 6 October decision, approximately four months after the arrest and incarceration of Professor Erlinder was injurious and prejudicial to both Professor Erlinder and to his client, Ms. Ingabire.

58. In addition, the existing "genocide ideology" and related laws had already caused injury, and prejudice to the rights of an ICTR Accused (Ntabakuze) to a fair trial.

Immunities under the Transfer Law

59. The Transfer Law states that

> "Without prejudice to the provisions of other laws of Rwanda, Defence Counsel and their support staff shall have the right to enter into Rwanda and move freely within Rwanda to perform their duties. They shall not be subject to search, seizure, arrest or detention in the performance of their legal duties. The Defence Counsel and their support staff shall, at their request, be provided with appropriate security and protection."[76]

60. The Government of Rwanda ("GOR") argues that its immunity provisions are "co-extensive" with ICTR's immunity, and even broader, because they extend to all defence team members, not just counsel.

61. The IADL suggests the GOR's analysis of the immunity protection is factually incorrect.

62. In light of the Erlinder case, the IADL believes that any immunities in the Transfer Law would not be implemented to protect the fair trial rights of the Defence.

63 As illustrated in the Erlinder case, the Rwandan government, has the power to implement any provisions of its laws, based on its own subjective assessments.

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[75] Appeals Chamber Decision, 6 October 2010, para. 28.

[76] Transfer Law of 2007, Article 15.

64. The Rwandan government publicly disagreed with Professor Erlinder's defence of his client, and with his analysis of the ICTR judgment in the "Military I" case. According to Prosecutor-General Ngoga, this is the reason that Professor Erlinder was prosecuted:

> "Erlinder came to Rwanda in the full knowledge that he had broken the law. He has, for many years, propagated his own, false theory about the genocide and worked hard to build an international network of genocide deniers to amplify its diffusion. Erlinder's theory is based on the selective use of conclusions of an ICTR ruling which acquitted four prominent senior military officers of one count of conspiracy to commit genocide. Out of court, Erlinder generalises this specific ruling to the whole genocide and argues that there was no conspiracy or planning in Rwanda, and therefore no genocide. He says it was a spontaneous and uncoordinated act of panic and anger following the shooting down of the president's plane."[77]

65. Based on this admission from Rwanda's Prosecutor-General, any Defence counsel who may have made any statement which the Rwandan government perceives as contrary to its laws, in any venue, is potentially vulnerable to the same judicial treatment as Professor Peter Erlinder.

66. Professor Erlinder did not violate any Rwandan laws in May 2010 when he was there to represent Ms. Ingabire. He did not make any statements, nor was he involved in any activities in reference to the Ntabakuze judgment or the defence he presented at the ICTR.

67. Yet, Professor Erlinder was placed under investigation and incarcerated for alleged violations of Rwandan laws.

68. As the Gasabo judgment which denied bail in Erlinder's illustrates, the vast majority of the writings and statements, on which the decision was based, emanated directly from Lead Counsel Erlinder's presentation of the defence of his ICTR client in the case, and from evidence which was tendered by the Defence in the case.[78]

69. For any defence counsel who may be involved in a case transferred to Rwanda, the Erlinder case demonstrates potential vulnerability to investigation, incarceration and possible prosecution, based on statements or activities outside Rwanda which may be viewed as threatening to the Rwandan government.

70. This situation chills all the defence counsel and destroys the fair trial rights of clients.

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[77] Rwanda News Agency, http://www.rnanews.com/politics/3722-why-were-prosecuting-peter-erlinder.

[78] The High Court of Gasabo Decision, 7 June 2010 (RDP0312/10/TGJI/GSBO), denying bail to Professor Peter Erlinder, is available at http://jurist.org/doc/erlinderbail.doc.