ICTR-98-41-A
21-03-2011
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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodore Meron

Registrar: Adama Dieng

Date: 18 March 2011

THE PROSECUTOR
v.
Aloys NTABAKUZE
Case No: ICTR-98-11-A

REQUEST FOR LEAVE TO APPEAR AS *AMICUS CURIAE*
PURSUANT TO RULE 74 OF THE ICTR RULES
OF PROCEDURE AND EVIDENCE

Office of the Prosecutor
Hassan Bubacar Jallow
George W. Mugwanya
Inneke Onsea
Renifa Madenga
Abubacarr Tambadou
Evelyn Kamau
William Mubiru
Christians Fomenky
Aisha Kagabo
Ndeye Marie Ka

Defence Counsel for Ntabakuze
Peter Erlinder
André Tremblay

1. Pursuant to Rule 74 of the Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda, the Bar Human Rights Committee ('BHRC') respectfully requests leave to make written submissions as *amicus curiae* in the case of Prosecutor v. Aloys Ntabakuze on the joint issues of the independence of defence advocates as an integral component of fair trial rights and the scope of functional immunity of defence counsel.

2. The BHRC is the international human rights arm of the Bar of England & Wales. Established in 1991, it is an independent committee of the Bar Council of England & Wales, the regulatory and representative body for barristers in that jurisdiction. The BHRC is primarily concerned with defending the rule of law and internationally recognised legal standards relating to the right to a fair trial. The remit of the BHRC extends to all countries of the world, apart from its own jurisdiction of England & Wales. This reflects the Committee's need to maintain its role as an independent but legally qualified observer, critic and advisor, with internationally accepted rule of law principles at the heart of its agenda.

3. In addition to its association with the Bar Council of England & Wales, and bar associations around the world, the BHRC is aligned with other notable organisations, including amongst others the Coalition for the International Criminal Court and Euro-Mediterranean Human Rights Network. Over the years, the BHRC has worked in partnership with international bodies, including the Organisation for Security and Co-operation in Europe, UNICEF, national governments, members of the judiciary, legal profession and courts, including the Special Court for Sierra Leone, on a wide variety of projects which have secured a reputation for legal expertise in the protection of human rights, and notably the right to a fair trial.

4. The BHRC has previously submitted amicus briefs to, *inter alia*, the European Court of Human Rights, the Inter-American Court of Human Rights, the US Supreme Court and the Supreme Court of Pakistan on matters including the independence of the judiciary and the writ of *habeas corpus*. Its objectives include upholding the rule of law and international recognised human rights norms and standards, and to support practising lawyers, judges and human rights defenders. To achieve these objectives, the BHRC conducts trial observations, capacity building training, fact-finding

investigations, monitors human rights abuses, provides legal resources and conducts in strategic litigation. The BHRC's reports provide valuable tools to legal practitioners around the world and are read widely by policy makers within national and international bodies, thereby assisting in the development of the law. The BHRC's reputation for its work in fair trial is further secured by the expertise of its membership. Numerous BHRC members actively work as defence counsel practicing before international and domestic jurisdictions in cases involving international crimes.

5. Rule 74 of the Rules of Procedure and Evidence provides: 'A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to appear before it and make submissions on any issue specified by the Chamber.'

6. The amicus brief is appended to this application by way of demonstrating the application of these issues in the case at hand. The BHRC believes that this brief will assist the Appeals Chamber to ensure a proper determination of the issue by:

   i. Expanding on the independence of an advocate as an integral component of fair trial rights, with particular reference to the relevant binding principles articulated in the International Covenant on Civil and Political Rights 1966;[1] the substantial persuasive jurisprudence of the European Court of Human Rights and other international instruments, and the relevant professional conduct rules applicable before the international criminal tribunals and in selected national jurisdictions.

   ii. Elaborating on the scope of functional immunity of defence counsel with particular regard to the jurisprudence of the international criminal tribunals and the International Court of Justice. While the BHRC notes the Decisions of the Appeals Chamber on 6 October 2010[2] and 15 March 2011[3] in which the

[1] *Prosecutor v. Barayagwiza*, Decision of 3 November 1999, para. 40.
[2] *Bagosora et al. v. The Prosecutor,* Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 6 October 2010.
[3] *Bagosora et al. v. The Prosecutor,* Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motions for Video-Conference Participation of Lead Counsel in the Appeal Hearing and for the Withdrawal of the Registrar's Public Decision, 15 March 2011.

functional immunity of counsel appearing before the Chamber was recognised, the proposed brief will expand upon the implementation of the scope of that immunity and how this interacts with the broader context of conflict resolution and the maintenance of peace and security in which international criminal justice plays a critical role for the international community.

7. The BHRC is not affiliated with any party into this case. This amicus brief is submitted in support of the appeal by counsel for the appellant in the matter of *P v Ntabakuze*. However, whilst the brief is submitted in support of counsel for the appellant, it is the BHRC's position that the issues addressed in the brief are far reaching across the spectrum of issues raised by both the Prosecution and Defence and will therefore assisted the Appeals Chamber in determination of those issues.

8. In the *Bagosora* case the Trial Chamber stated: 'As a preliminary matter, we note that the general definition of *amicus curiae* does not call for impartiality on the part of the filing party. Rather it takes into consideration that such briefs are filed by a party, not a part of the action, but one with strong interests in or views on the subject matter before the court.'[4] Such interests are set out in paragraphs 2 - 4 above.

9. The brief deals with live issues that are relevant to the case at hand.[5] Furthermore, the brief deals with legal arguments and will assist the Appeals Chamber in the determination of procedural guarantees in international criminal law.

10. For the reasons quoted, the BHRC respectfully requests permission to file an amicus curiae brief in relation to the above matters. Given the short time available between this filing and the oral hearings currently listed for 30 March 2011, the BHRC respectfully requests that the Appeals Chamber impose an expedited timetable for the filings of any parties' responses.

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[4] *Prosecutor v. Bagasora*, ICTR-96-7, p 3.

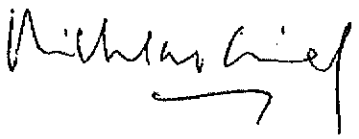
[5] In *Prosecutor v. Musema*, ICTR-96-13-A, the Trial Chamber stated at para. 13: 'were an *Amicus Curiae* granted leave to make submissions on the procedural elements and substantive background of Rules 88 and 105 of the Rules, the submissions must be relevant to the case, and such as to be of assistance for the proper determination thereof', Decision on an Application by African Concern for Leave to Appear as *Amicus Curiae*, 17 March 1999, para. 13. See also the *Ntagerura* case, ICTR-96-46T, Decision on the Application to File an *Amicus Curiae* Brief According to Rule 74 of the Rules of Procedure and Evidence Filed on Behalf of the NGO Coalition for Women's Human Rights in Conflict Situations', 24 May 2001, para. 20.

11. Should the Appeals Chamber consent to the BHRC's filing of *amicus* brief, the BHRC requests permission for the brief to be filed with a word count exceeding that set in the Practice Direction on the Length of Briefs and Motions on Appeal. First the issues on which the BHRC is making its observations – fair trial rights, the scope of functional immunity and abuse of process – are of central importance to the instant case. Secondly and equally significantly, the BHRC has determined that the Appeals Chamber will most benefit from observations drawn from a broad range of international and national sources which has necessitated, exceptionally, an expanded brief. It is the submission of the BHRC that in removing material to meet the word count in the Practice Direction, the usefulness of the *amicus* brief to the Appeals Chamber will be vastly undercut and accordingly, leave is requested.

12. The BHRC further requests that Professor Nicholas Grief and/or Sareta Ashraph be granted leave to appear before the Chamber at the hearings on 30 March, 31 March and 1 April 2011 to make oral submissions in relation to issues outlined in the *amicus* brief, if it is felt that such a right of audience will be of assistance to the Chamber to clarify the submissions made and to answer any questions which may arise.

Dated: 18 March 2011

Respectfully submitted,



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Professor Nicholas Grief,
Sareta Ashraph and
Sally Longworth

Bar Human Rights Committee
Garden Court Chambers
57-60 Lincoln's Inn Fields
London WC2A 3LS
United Kingdom
Tel: +44 (0)20 7993 7755
Fax: +44 (0)20 7993 7700
Website: www.barhumanrights.org.uk
E-mail: bhrc@compuserve.com

3548/A

International Criminal Tribunal for Rwanda
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THE PROSECUTOR
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ANNEX A: *AMICUS CURIAE* OBSERVATIONS OF THE BAR HUMAN RIGHTS COMMITTEE SUBMITTED PURSUANT TO RULE 74 OF THE RULES OF PROCEDURE AND EVIDENCE

Office of the Prosecutor
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Aisha Kagabo
Ndeye Marie Ka

Defence Counsel for

Peter Erlinder
André Tremblay

1. The Bar Human Rights Committee hereby submits its observations on issues related to (i) the independence of the advocate as a cornerstone of fair trial rights, (ii) the scope of defence counsels' functional immunity and (iii) abuse of process. The *Amicus* respectfully offers the Appeals Chamber its observations in order to assist in "the proper determination of the case", pursuant to Rule 74.

The independence of the advocate as a cornerstone of fair trial rights

2. In its unanimous 1982 judgment in *Canada (Attorney General) v. Law Society (British Columbia)*, the Supreme Court of Canada held:

> The independence of the bar from the State in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the State must, so far as by human ingenuity it can be so designed, be free from State interference, in the political sense, with the delivery of services to the individual citizens in the State, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the bar and through those members, legal advice and services generally.[1]

3. An advocate's independence is the founding principle of the legal profession: without it, an advocate cannot exercise the independent judgment which enables him or her to act in the best interests of the client. As noted by the Canadian Bar Association's Code of Professional Conduct: "It is the responsibility of lawyers to protect clients' rights, and in order that they may continue to do so there can be no compromise in the principle of freedom of the profession from interference, let alone control, by government."[2]

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[1] [1982] 2 S.C.R. 307
[2] Canadian Bar Association, Code of Professional Conduct, Section V, paragraph 3.

4. The Office of the UN High Commissioner for Human Rights has emphasised that the just and efficient administration of justice requires that advocates be allowed to work without being subjected to physical attacks, harassment, corruption and other kinds of intimidation.[3]

5. All Special Rapporteurs of the UN Commission on Human Rights have emphasised the close relationship that exists between the greater or lesser respect for the due process guarantees of Article 10 of the Universal Declaration of Human Rights and the greater or lesser gravity of the violations established.[4] Human rights and fundamental freedoms are "all the better safeguarded to the extent that the judiciary and the legal professions are protected from interference and pressure".[5]

6. Principle 16 of the United Nations Basic Principles on the Role of Lawyers[6] 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, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

7. The importance of this principle in the administration of justice was summarised by the European Court of Human Rights in *Kyprianou v Cyprus.*[7] The Court observed:

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[3] OHCHR, Chapter 4, 'Independence and Impartiality of Judges, Prosecutors and Lawyers', p. 151, http://www.ohchr.org/Documents/Publications/training9chapter4en.pdf.
[4] *Ibid*, p 116 with a reference to UN Doc E/CN.4/Sub.2/1993/25, Report on the independence of the judiciary and the protection of practising lawyers, para. 1.
[5] *Ibid.*
[6] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990: http://www2.ohchr.org/english/law/lawyers.htm.
[7] Application No. 73797/07, 15 December 2005.

> For the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation.[8]

8. The paramount importance of an advocate's independence is underscored by its inclusion in the Codes of Conduct for Counsel of the international criminal tribunals. In addition, this principle has been recognised in international human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), the jurisprudence of the regional human rights courts and in various national Bar Associations' Codes of Conduct.

International Criminal Tribunals: Codes of Conduct for Counsel

9. The Code of Professional Conduct for Counsel before the International Criminal Court (ICC) applies to defence counsel, counsel acting for States, *amici curiae* and counsel or legal representatives for victims and witnesses practising at the ICC.

10. In accordance with Article 5 of the Code, counsel are required to give the following "solemn undertaking" before the Court: "I solemnly declare that I will perform my duties and exercise my mission before the International Criminal Court with integrity and diligence, honourably, freely, independently, expeditiously and conscientiously, and that I will scrupulously respect professional secrecy and the other duties imposed by the Code of Professional Conduct for Counsel before the International Criminal Court".

11. Article 6 of the ICC's Code of Professional Conduct for Counsel, sub-headed "Independence of Counsel", reads:

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[8] *Ibid,* para. 175.

1. Counsel shall act honourably, independently and freely.
2. Counsel shall not:

(a) Permit his or her independence, integrity or freedom to be compromised by external pressure; or

(b) Do anything which may lead to any reasonable inference that his or her independence has been compromised.

12. The International Criminal Tribunal for Rwanda (ICTR)'s Code of Professional Conduct for Defence Counsel applies, as its title suggests, only to Defence advocates before the ICTR. Article 5 of this Code reads:

> In providing representation to a client, Counsel must:
>
> (a) Act with competence, dignity, skill, care, honesty and loyalty;
>
> (b) Exercise independent professional judgment and render open and honest advice;
>
> (c) Never be influenced by improper or patently dishonest behaviour on the part of a client;
>
> (d) Preserve their own integrity and that of the legal profession as a whole;
>
> (e) *Never permit their independence, integrity and standards to be compromised by external pressures.*[9]

13. Article 5 of the ICTR's Code is identical to Article 10 of the Code of Professional Conduct for Defence Counsel at the International Criminal Tribunal for the former Yugoslavia (ICTY).

14. These standards are also reflected in the General Principles for the Legal Profession, adopted by the International Bar Association on 20 September 2006, which state:

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[9] Emphasis added.

> A lawyer shall maintain and be afforded protection of independence to allow him or her to give his or her client unbiased advice or representation...[10]

15. Similarly, Article 1 of the Convention between Lawyers of the World 2008 (Convention des Avocats du Monde),[11] provides:

> A lawyer is guided by five fundamental principles:
> - Independence and freedom in defending and advising his/her client;
> ...
> - A duty to exercise his/her profession while acting according to the dictates of his/her conscience, under his/her own responsibility, in accordance with the law, and while respecting his/her professional code of ethics and conduct.

International Human Rights Instruments

International Covenant on Civil and Political Rights (ICCPR)

16. Article 14(1) ICCPR guarantees all persons the right to equality before courts and tribunals and to a fair trial. In General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial,[12] the Human Rights Committee stated:

> The notion of fair trial includes the guarantee of a fair and public hearing. Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. A hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the

[10] http://www.ibanet.org/.
[11] Paris, 6 December 2008.
[12] UN Doc CCPR/C/GC/32 (2007).

> courtroom that is tolerated by the court, thereby impinging on the right to defence, or is exposed to other manifestations of hostility with similar effects.[13]

17. Noting that Article 14(3)(b) ICCPR provides that accused persons shall be entitled to adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing, and that this provision is an important element of the guarantee of a fair trial and application of the principle of equality of arms,[14] the Human Rights Committee further declared:

> lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter.[15]

18. The right of the accused to have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing is further guaranteed by Article 20(4)(b) of the Statute of the ICTR.

European Convention on Human Rights (ECHR)

19. Article 6 ECHR is the equivalent of Article 14 ICCPR.

20. In *Elci and Others v Turkey*,[16] the European Court of Human Rights emphasised the central role of the legal profession in the administration of justice and the maintenance of the rule of law. It continued:

> The freedom of lawyers to practise their profession without undue hindrance is an essential component of a democratic society and a necessary prerequisite for the effective enforcement of the provisions of the Convention, in particular the guarantees of fair trial and the right to personal security. Persecution or harassment of members of the legal profession thus strikes at the very heart of the Convention system. For

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[13] *Ibid*, para 25 (footnote omitted).
[14] *Ibid*, para 32.
[15] *Ibid*, para 34.
[16] Applications No. 23145/93 & 25091/94, 13 November 2003.

> this reason, allegations of such persecution in whatever form, but particularly large scale arrests and detention of lawyers and searching of lawyers' offices, will be subject to especially strict scrutiny by the Court.[17]

21. The applicants, all Turkish lawyers, alleged that in November and December 1993 they had been taken into detention by law enforcement officers on the pretext of involvement in criminal activities, but that their arrests were actually as a result of their representation of clients before the State Security Court and their involvement in human rights work. The European Court found violations of Articles 3, 5(1) and 8 ECHR and expressed its concern as to 'the inevitable chilling effect that this case must have had on all persons involved in criminal defence work or human rights protection in Turkey'.[18]

22. In *Janatuinen v Finland*,[19] the European Court noted that Article 6(3)(b) ECHR guarantees the accused "adequate time and facilities for the preparation of his defence" and therefore implies that the substantive defence activity on his behalf may comprise everything which is "necessary" to prepare the main trial. It continued:

> The accused must have the opportunity to organise his defence in an appropriate way and without restriction of the possibility to put *all* relevant defence arguments before the trial court and thus to influence the outcome of the proceedings (see *Can v. Austria*, No. 9300/81, § 53, Commission's report of 12 July 1984, Series A no. 96, and *Moiseyev v. Russia*, No. 62936/00, § 220, 9 October 2008)...[20]

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[17] *Ibid*, para 669.
[18] *Ibid*, para 714. See also *Nikula v Finland* Application No. 31611/96, 21 March 2002 in which the European Court observed that it "would not exclude the possibility that, in certain circumstances, an interference with counsel's freedom of expression in the course of a trial could raise an issue under Article 6 of the Convention with regard to the right of an accused client to receive a fair trial."
[19] Application No. 28552/85, 8 December 2009.
[20] *Ibid*, para 44. Emphasis added.

23. The vital significance of these principles is highlighted by the case of *Finucane v United Kingdom*,[21] concerning death threats received by a defence solicitor because of his professional activities.

24. On 12 February 1989 the applicant's husband, solicitor Patrick Finucane, was killed in front of her and their three children by two masked men who broke into their home. Patrick Finucane represented clients from both sides of the conflict in Northern Ireland and was involved in a number of high-profile cases arising from that conflict. The applicant believed that it was because of his work on these cases that prior to his murder he had received death threats, via his clients, from officers of the Royal Ulster Constabulary (RUC) and was targeted for murder.[22]

25. Patrick Finucane had been threatened occasionally since the late 1970s. After acting in a case concerning maltreatment in RUC custody, the threats apparently escalated, and clients reported that police officers often abused and threatened to kill him during interrogations at holding centres such as Castlereagh. On 5 January 1989, one of Patrick Finucane's clients reported that an RUC officer had said that the solicitor would "meet his end". On 7 January 1989 another client claimed that he was told that Patrick Finucane was "getting took out" (murdered). His death came less than four weeks after Douglas Hogg MP, then Parliamentary Under-Secretary of State for the Home Department, had said in a committee stage debate on the Prevention of Terrorism (Temporary Provisions) Bill on 17 January 1989:

> I have to state as a fact, but with great regret, that there are in Northern Ireland a number of solicitors who are unduly sympathetic to the cause of the IRA.[23]

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[21] Application No. 29178/95, 1 July 2003.
[22] *Finucane v United Kingdom*, paras. 10-11.
[23] *Finucane v United Kingdom*, para 11. For the original, see *Hansard*, House of Commons, Standing Committee B., January 17, 1989, at col. 508.

26. It is widely believed that that official statement by a British Government minister significantly increased Patrick Finucane's vulnerability.[24] In February 1989 Patrick Finucane was murdered.

27. In April 1998, Param Cumaraswamy, the UN Special Rapporteur on the Independence of Judges and Lawyers, set out a special review of Patrick Finucane's murder in his report on Northern Ireland.[25] Before citing Principle 17 of the United Nations Basic Principles on the Role of Lawyers, which provides: "where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities", Cumaraswamy stated:

> Although some pointed out that this was only one of hundreds of unresolved murders, the murder of Patrick Finucane is of a different nature. As a high profile lawyer who had tremendous success representing his clients, both before domestic courts and the European Court of Human Rights, his murder had a chilling effect on the profession and further undermined public confidence in the judicial system. Solicitors informed the Special Rapporteur that the murder led them either to give up criminal practice entirely or to alter the manner in which they handled terrorist related cases. Thus, the defendant's right to counsel was compromised.[26]

Inter-American Court of Human Rights

28. In its Advisory Opinion on indigence and fear as bars to obtaining counsel, the Inter-American Court of Human Rights expressly recognised that the exhaustion requirement in determining admissibility is relaxed for those affected by either of those local conditions:

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[24] Lawyers Committee for Human Rights, Beyond Collusion: The UK Security Forces and the Murder of Patrick Finucane, 2003, p 9.
[25] UN Doc E/CN.4/1998/39/Add. 4, 5 March 1998.
[26] The European Court of Human Rights subsequently found that the proceedings following the death of Patrick Finucane had failed to provide a prompt and effective investigation into the allegations of collusion by UK security personnel. There had been a failure to comply with the procedural obligation imposed by Article 2 of the Convention and, consequently, a violation of that provision.

> where an individual requires legal representation and a generalized fear in the legal community prevents him from obtaining such representation, the ... individual is exempted from the requirement to exhaust domestic remedies.'[27]

29. This Advisory Opinion recognised that where counsel are subject to such external pressure that their independence is compromised (whether because counsel's personal interests are brought into conflict with the interests of his client, or otherwise), it is not possible to have a fair trial within the domestic jurisdiction.

African Commission on Human and Peoples' Rights

30. The African Commission on Human and Peoples' Rights found that the right to defence as guaranteed by Article 7.1(c) of the African Charter on Human and Peoples' Rights was violated where two defence teams in the case of the *Federal Republic of Nigeria v. Ken Saro-Wiwa and Others* were 'harassed into quitting the defence of the accused persons'.[28]

31. Article 7.1 of the African Charter provides: 'Every individual shall have the right to have his cause heard. This comprises: .... (c) the right to defense, including the right to be defended by counsel of his choice'.

32. The relevant paragraphs of the African Commission's decision are as follows:

> [97]. Initially the accused were defended by a team of lawyers of their own choice. According to Communication 154/96 and Communication 139/94, this team withdrew from the case

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[27] Advisory Opinion OC/11-90, August 10, 1990, Inter-Am.Ct.H.R. (Ser.A) No 11 (1990), para 35. See also *Akdivar v Turkey* (Application No. 21893/93, 16 September 1996), para 74, where the European Court of Human Rights held that in applying the exhaustion rule in Article 26 ECHR it 'could not exclude from [its] considerations the risk of reprisals against the applicants or their lawyers if they had sought to introduce legal proceedings alleging that the security forces had been responsible for burning down their houses as part of a deliberate State policy of village clearance'.

[28] International Pen, Constitutional Rights Project, *Interights (on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation) v Nigeria*, Communications Nos. 137/94, 139/94, 154/96 and 161/97, Decision adopted on 31 October 1998.

because of harassment, both in the conduct of the trial and in their professional and private lives outside. Communication 154/96 alleges that two of the lawyers were seriously assaulted by soldiers claiming to be acting on the instruction of the military officer responsible for the trial. On three occasions defence lawyers were arrested and detained and two of the lawyers had their offices searched. When these lawyers withdrew from the case, the harassment subsided.

[98]. After the withdrawal of their chosen counsel, the accused were defended by a team assigned by the Tribunal. However, this team also resigned, complaining of harassment. After that, the accused declined to accept a new team appointed by the Tribunal, and the court proceedings were closed without the accused having legal representation for the duration.

[99]. Communication 154/96 also claims that the defence was denied access to the evidence on which the prosecution was based and that files and documents which were required by the accused for their defence were removed from their residences and offices when they were searched by security forces on different occasions during the trial.

[100]. The government claims that: "Their [the accused] defence team which comprised sly human rights activists such as Femi Falana and Gani Fawehinmi, known to be more disposed towards melodrama than the actual defence of their clients, inexplicably withdrew from the Special Tribunal at a crucial stage of the trial in order to either play to the gallery or delay and frustrate the process".

[101]. This statement does not contradict the allegations of Communication 154/96, that two different defence teams were harassed into quitting the defence of the accused persons; it merely attributed malicious motives to the defence. The government has not responded to the allegations of withholding evidence from the defence. The Commission therefore finds itself with no alternative but to conclude that a violation of Article 7.1(c) has occurred.

National jurisdictions

33. Paragraph 303 of the Code of Conduct of the Bar of England and Wales states:

> A barrister: (a) must promote and protect fearlessly and by all proper and lawful means the lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person.[29]

34. The duty to "promote and protect fearlessly…the lay client's best interests" is mirrored in the guiding principles of the Canadian Bar Association's Code of Professional Conduct, paragraph 1, Chapter IX of which states:

> The advocate's duty to the client is "fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case" and to endeavour "to obtain for his client the benefit of any and every remedy and defence which is authorized by law" [30] must always be discharged by fair and honourable means, without illegality and in a manner consistent with the lawyer's duty to treat the court with candour, fairness, courtesy and respect.[31]

35. Under the Canadian Bar Association's Code of Professional Conduct, "[t]he lawyer shall not act or continue to act in a matter when there is a conflicting interest".[32] A conflict of interest is defined as "an interest which gives rise to substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person."[33] Such conflict of interest "may arise in the context of: (a) Conflicts of duty and interest: When a lawyer's own interest conflicts with the duty of performance owed to a client".[34]

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[29] See Code of Conduct of the Bar of England and Wales and Written Standards for the Conduct of Professional Work, adopted on 18 September 2004, available at http://www.barstandardsboard.rroom.net/assets/documents/Code%2016%20feb.pdf.
[30] The sources of the quotations are comments of Lord Reid in *Rondel v. Worsley* (1969) 1 A.C. 191 at 227 and Canon 3(5) of the *Canons of Legal Ethics* of the Canadian Bar Association, adopted in 1920.
[31] ABA-MC EC 7-1, 7-19; N.B. 8-R(b); N.S. R-9 Guiding Principle; Ont. 4.01(1) Commentary.
[32] *Ibid,* para. 1, Section V.
[33] *Ibid.*
[34] *Ibid*, para. 2, Section V.

36. The Canadian Bar Association's Code of Professional Conduct sets out the reasoning underlying this conflict:

> the reason for the Rule is the protection of client representation. Client representation may be materially and adversely affected unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from compromising influences and the relationship between the lawyer and the client is not materially impaired by the lawyer acting against the client in any other matter."

37. Rule 37 of the Rules of Professional Conduct and Etiquette of the Tanganyika Law Society notes the advocate's "[d]uty to fearlessly defend his client's interests subject to never allowing his personal feelings or those of his client to affect his duty to treat the Court, the lawyer on the other side and the witnesses with courtesy and respect". Rule 37 also requires that the advocate act "free from malice or bias".

38. Canon IV(j) of the Legal Profession (Canons of Professional Ethics) Rules and Legal Profession Act 1978, governing the conduct of lawyers in the Republic of Jamaica, states: "Except for the specific approval of his client given after full disclosure, an Attorney shall not act in any manner in which his professional duties and his personal interest conflict or are likely to conflict".

39. Whilst not an unfiltered mouthpiece of the client, "within proper bounds, however, counsel must be fearless and independent in the defence of his client's rights.... He must be completely selfless in standing up courageously for his client's rights, and he should never expose himself to the reproach that he has sacrificed his client's interests on the altar of expediency..."[35]

Functional Immunity

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[35] *per* Schroeder J. A., "Some Ethical Problems in Criminal Law" in Law Soc. U.C. Special Lectures (1963) 87 at 102.

40. The enjoyment of functional immunity is a vital means of protecting the independence of the advocate and thus of safeguarding fair trial rights. Members of the defence, including defence investigators, enjoy functional immunity under Article 29(4) of the ICTR Statute with regard to acts that fall within their official functions before the Tribunal.[36]

41. Article 29(4) provides, inter alia:

> '[o]ther persons, including the accused, required at the seat of the Tribunal shall be accorded such treatment as is necessary for the proper functioning of the... Tribunal'.

42. The ICTY Appeals Chamber in *Prosecutor v. Ante Gotovina et al* has held that Article 30(4) - the equivalent of the ICTR's Article 29(4) - vests in defence counsel both functional inviolability and functional immunity.[37] In so ruling, the Appeals Chamber noted:

> Although a State may not intend or foresee that its actions will interfere with a defence investigation, such actions may nonetheless have this effect if the State arrests a member of the defence who is acting in her or her official capacity. Prioritising the State's exercise of its domestic jurisdiction over a defence investigation does not accord with providing defence members protection "necessary for the proper functioning of the .....[T]ribunal" under Article 30(4) of the Statute.[38]

43. The principal concern, therefore, is the scope of this functional immunity; that is to say, the proper delineation of a counsel's performance of their duties as defence counsel. In the 6 October 2010 Erlinder Decision, the Appeals

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[36] *Theoneste Bagosora et al. v. The Prosecutor,* Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 6 October 2010 (the '6 October 2010 Erlinder Decision'); *Prosecutor v. Ante Gotovina et al.*, Case No. IT -06-90-AR73.5, Decision on Gotovina Defence Appeal against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia,14 February 2011 (the 'Gotovinda Decision').

[37] This is implied by the Gotovinda Decision concerning Article 30(4) of the Statute of the ICTY in Gotovina, where an investigator for the Defence team was arrested and a member and a former member of the Defence team were detained. See paras. 33 and 36.

[38] Gotovinda Decision, para. 32.

Chamber defined the scope of functional immunity as being the immunity from personal arrest or detention enjoyed by defence counsel "while performing their duties assigned by the Tribunal and also with respect to words spoken or written and acts done by them in the course of the performance of their duties as Defence Counsel before the Tribunal, in order to allow for the proper functioning of the Tribunal in accordance with Article 29 of the Statute"[39].

44. It is submitted that there is support for a broader construction of "the performance of [...] duties as Defence Counsel before the Tribunal" and thus of functional immunity. While the duties of defence counsel invariably include making oral and written representations before the Court and acts done in the course of defence investigations, duties as defence counsel may also include making oral and written representations aimed at encouraging public debate on the substance or thesis of the defence case and at emboldening potential witnesses to come forward and make themselves known.[40]

45. It is noted that the Chief Prosecutors in international criminal tribunals often make out-of-court statements in an effort to inform the public and the media about the thrust of the prosecution case and/or investigations. Between 23 February and 3 March 2011 alone, for example, the ICC Prosecutor released three separate press releases about the situation in Libya. In making these public statements, the Prosecution are afforded the opportunity of publicising their case theory and reaching potential witnesses and encouraging their assistance before on-the–ground investigations commence.

46. It is submitted that only defence counsel can play an equivalent role for a defence team. The ICTR's Defence Counsel & Detention Management Section's mandate does not include making public representations about the defence case. Even so, it is submitted that the making of such statements is a

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[39] 6 October 2010 Erlinder Decision, para. 26.
[40] See further Principle 23 of the UN Basic Principles on the Role of Lawyers, above note 6.

more appropriate role for counsel, who are better attuned to their cases' intricacies. That the Prosecution should enjoy immunity for out-of-court statements which have the effect of publicising the thrust of the prosecution case[41] while the defence do not would be an inequality that ought not to be sustained. This is particularly so given its effect on potential defence witnesses who will be exposed to public statements from the Prosecution but will have to wait for members of the defence team to appear in person to speak to them before being encouraged to participate.

47. In the case of countries where the justice system is not free from political interference, the ability of a State to arrest and detain defence counsel for acts that do not fall within the narrower definition of functional immunity set out in the 6 October 2010 Erlinder Decision is a concern that ought to be considered. Much of the International Criminal Tribunals' activities take place in post-conflict countries, many of which are not supportive of the work of various actors in the tribunals. To permit the arrest and detention of defence counsel as a consequence of the narrower scope of the functional immunity that they enjoy would open the door to the politically-motivated arrest/detention of counsel under the guise that the grounds for arrest/detention do not engage their functional immunity. This is particularly so where the government of a relevant state renders illegal the discussion of what is likely to be a significant aspect of a prosecution or defence case.

48. It is submitted that the functional immunity enjoyed by the defence, as currently defined, ought to reflect the broader immunity provided to the Chief Prosecutor. That is to say that there should be an equal recognition that "words spoken or

[41] For example, were Colonel Ghaddafi to remain in power and make it illegal to promulgate the view that his forces had deliberately attacked civilians, the ICC Prosecutor would enjoy functional immunity for relevant statements made in any subsequent press releases and press conferences, as the making of such public out-of-court (and non-investigation related) statements would be seen as part of his duties as Chief Prosecutor. Defence Counsel do not, under the current definition, enjoy functional immunity for similar public statements.

written and acts done by them in the course of the performance of their duties as Defence Counsel before the Tribunal" encompasses public statements intended to introduce aspects of the defence case theory into the public domain to encourage debate and to embolden potential defence witnesses to come forward. It ought not to be that the scope of the functional immunity of defence counsel is narrower than that of the Chief Prosecutor, particularly as it is only defence counsel who can perform the same role as the Prosecutor as regards the making out-of-court statements.

49. At the moment the narrowness of the scope of functional immunity for defence counsel exposes them to arrest/detention by countries hostile to the defence for public statements (written or oral) which have the effect of promoting the issues being raised in any particular accused's defence case.

Abuse of Process

50. In addition to the fundamental rights set out in their Statutes and derived from Article 14 ICCPR, the International Criminal Tribunals have recognised a doctrine of 'abuse of process'.[42]

51. As Schabas has observed, the practice of the ICTY and the ICTR in this regard is codified in the Rules of Procedure and Evidence (RPE) of the Special Court for Sierra Leone (SCSL). SCSL Rule 73(b)(v) authorises preliminary motions to be raised by the accused 'based on abuse of process'. The rationale for the addition to the Rules is 'primarily to enhance and further protect the rights of the accused'. According to the SCSL Appeals Chamber, "[a]t the root of the doctrine of abuse of process is fairness. The fairness that is involved is not

[42] William A Schabas, 'The UN International Criminal Tribunals' (CUP, 2006), p 539.

fairness in the process of adjudication itself but fairness in the use of the machinery of justice".[43]

52. The doctrine of abuse of process was applied by the ICTR Appeals Chamber in *Barayagwiza v Prosecutor*,[44] which cited the UK House of Lords: "[P]roceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place".[45]

53. Emphasising that it is a discretionary doctrine, the Appeals Chamber described "a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity".[46]

54. As Schabas says, the doctrine is not to be invoked lightly and will only be applied in clear cases where it can be shown that the rights of the accused have been "egregiously violated".[47]

55. In cases where a violation of the accused's rights is grave and manifest, for example, where it must have been abundantly clear that those rights were being

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[43] *Ibid*, p 540.
[44] ICTR-97-19-AR72, Decision, 3 November 1999.
[45] *Ibid*, para 74. *C.f. DPP v O'C* [2006] IESC 54, where the Supreme Court of Ireland recognised the inherent and constitutional duty of the trial court to ensure that there is a fair trial and to stop a trial if matters arise which render it unfair. See also the New Zealand case of *Mason v R* [2010] NZSC 129, citing *R v Accused* [1993] 1 NZLR 385 which notes cases affirming 'the Court's inherent jurisdiction to prevent unfair trials'.
[46] *Barayagwiza*, para. 74.
[47] *Loc cit*, p 540, citing *Dragan Nikolić* (IT-94-2-PT), Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para 111.

violated, it is submitted that the violation can be described as serious and egregious.[48]

Conclusion

56. Functional immunity is a vital means of the protecting the independence of the advocate, and thus of safe-guarding fair trial rights. It is the respectful submission of the Bar Human Rights Committee that the definition of the functional immunity, given by the ICTR in its 6 October 2010 Erlinder Decision and based on Article 29(4) of the ICTR Statute, should be construed broadly to reflect the functional immunity enjoyed by the Prosecution, and specifically the Chief Prosecutor. Both defence counsel and Chief Prosecution may make out-of-court statements for the purpose of introducing their case theories into the public domain to influence discussion and to encourage witness participation and both parties should enjoy the same level of functional immunity in this regard.

57. This wider functional immunity is particularly important as the work of both parties may involves interacting with (and/or being present in the territory of) the governments of countries which may be hostile to their work and their public statements about their case theories. The decision of the African Commission on Human and Peoples' Rights concerning Article 7.1(c) of the African Charter[49] is particularly significant in the context of recent events in the present case.[50]

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[48] *Cf* the judgment of the Court of Justice of the European Union in Case C-446/04 *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue* [2006] ECR I-11753 at para 214: 'on any view, a breach of [EU] law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement'.

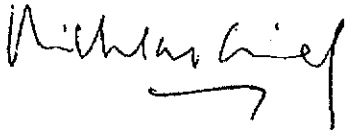
[49] See above, note 28.

[50] See further *Theoneste Bagosora et al. v. The Prosecutor,* Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 6 October 2010.

58. It is the submission of the Bar Human Rights Committee that the narrower functional immunity enjoyed by defence counsel, relative to that enjoyed by the Chief Prosecutor, puts defence counsel at risk of being subjected to external pressures such as arrest or detention or threats thereof. This is particularly where a government renders illegal the public discussion of what is likely to be a significant aspect of a defence case. As set out above, this may result in a violation of an accused's right to effective legal assistance.

Dated: 18 March 2011

Respectfully submitted,



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Professor Nicholas Grief,
Sareta Ashraph and
Sally Longworth

Bar Human Rights Committee
Garden Court Chambers
57-60 Lincoln's Inn Fields
London WC2A 3LS
United Kingdom
Tel: +44 (0)20 7993 7755
Fax: +44 (0)20 7993 7700
Website: www.barhumanrights.org.uk
E-mail: bhrc@compuserve.com

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COURT MANAGEMENT SECTION
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To:	☐ Trial Chamber I N. M. Diallo	☐ Trial Chamber II R. N. Kouambo	☐ Trial Chamber III C. K. Hometowu	☒ Appeals Chamber / Arusha F. A. Talon
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From:	☐ Chamber (names)	☐ Defence (names)	☐ Prosecutor's Office (names)	☒ Other: **Bar Human Rights Committee of England and Wales** **Sareta Ashraph / Professor Nicholas Grief / Sally Longworth** (names)
Case Name:	The Prosecutor vs. **Aloys Ntabakuze**			**Case Number:** ICTR-98-41- A
Dates:	Transmitted: **17 March 2011**			Document's date: **17 March 2011**
No. of Pages:	**26 (incl 21 pgs of Annex)**	**Original Language:**	☒ English	☐ French ☐ Kinyarwanda
Title of Document:	**PUBLIC WITH ANNEX** **REQUEST FOR LEAVE TO APPEAR AS AMICUS CURIAE PURSUANT TO RULE 74 OF THE ICTR RULES OF PROCEDURE AND EVIDENCE**			

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