

2840/H



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-98-41-A
06th October 2010
{2840/H – 2829/H}

IN THE APPEALS CHAMBER

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

Registrar: Mr. Adama Dieng

Decision of: 6 October 2010

ICTR Appeals Chamber
Date: 26th October 2010
Action: R. Juvon
Copied To: Concerned Judges,
SLOs, LOs, ALOs, CMS.

Parties, LSS.

**Théoneste BAGOSORA
Aloys NTABAKUZE
Anatole NSENGIYUMVA**

v.

THE PROSECUTOR

Case No. ICTR-98-41-A

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: *KEITH KUMUZIRO Y. AFANGA*
SIGNATURE: DATE: *26 Oct. 2010*

**DECISION ON ALOYS NTABAKUZE'S MOTION FOR INJUNCTIONS
AGAINST THE GOVERNMENT OF RWANDA REGARDING THE ARREST
AND INVESTIGATION OF LEAD COUNSEL PETER ERLINDER**

The Republic of Rwanda

Ministry of Foreign Affairs and Cooperation

Office of the Prosecutor

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of a motion filed on 3 June 2010 by Aloys Ntabakuze ("Ntabakuze") requesting the Appeals Chamber to order the Registrar to take immediate action to secure the release of his Lead Counsel, Peter Erlinder ("Erlinder"), arrested in Rwanda on 28 May 2010, and order the Government of Rwanda to stop all proceedings against his Lead Counsel.¹

A. Background

2. On 28 May 2010, Erlinder was arrested in Kigali by Rwandan authorities on allegations of "genocide denial".² At the time of his arrest, Erlinder was in Rwanda for reasons unrelated to his work at the Tribunal.³

3. On 31 May 2010, the Registrar of the Tribunal ("Registrar") addressed a *note verbale* to the Rwandan Ministry of Foreign Affairs and Cooperation requesting clarification of the motives of Erlinder's arrest and, in particular, inquiring whether the arrest was related to Erlinder's mandate as Defence Counsel at the Tribunal.⁴ On 2 June 2010, the Prosecutor General of Rwanda responded to the *note verbale* indicating that the arrest of Erlinder was "not at all related to his assignments at the ICTR".⁵

4. On 3 June 2010, Ntabakuze filed the present Motion.

5. On 7 June 2010, the High Court of Gasabo (Rwanda), sitting in Kabuga and at first instance, found that "the Prosecution's grounds establishing that there is *prima facie* evidence of guilt against Carl Peter Erlinder, charged with the crime of denying and minimizing the genocide and that of spreading rumours likely to disrupt the security of Rwandans, have merit" and ordered that Erlinder

¹ Aloys Ntabakuze's Extremely Urgent Request for Injunctions Against the Government of Rwanda for the Illegal Arrest of and Investigation Against Lead Counsel, P. Erlinder, for Statements Made in the Course of Appellant's Defence – Articles 19, 20, 28 & 29 of the Statute and Rule 54 of the RPE, 3 June 2010 ("Motion"), para. 25.

² See Registrar's Submissions Under Rule 33 (B) of the Rules of Procedure and Evidence in Respect of the Appeals Chamber Order to the Registrar Dated 9 June 2010, dated 10 June 2010, filed 11 June 2010 ("Registrar's Submissions of 11 June 2010"), para. 4. See also Motion, paras. 1, 2.

³ See Motion, para. 1.

⁴ Registrar's Submissions of 11 June 2010, para. 5. See also *ibid.*, Annex 1: *Note Verbale* from the Registrar to the Minister of Foreign Affairs and Cooperation dated 31 May 2010.

⁵ Registrar's Submissions of 11 June 2010, para. 6. See also *ibid.*, Annex 2: Correspondence from Mr. Martin Ngoga, Prosecutor General of Rwanda, to the Registrar dated 2 June 2010.

be provisionally detained for 30 days.⁶ In the course of the provisional release hearing, the Rwandan Prosecutor's allegations against Erlinder focused on his writings but also made specific references to Erlinder's statements as Defence Counsel before the Tribunal.⁷ Upon review of the Decision of the High Court of Gasabo, the Registrar sent a second *note verbale* to the Rwandan Ministry of Foreign Affairs and Cooperation requesting a formal copy of the charges against Erlinder.⁸

6. On 9 June 2010, the Appeals Chamber instructed the Registrar to request the assistance of the Rwandan authorities in obtaining information regarding the nature and basis of the charges against Erlinder.⁹ The Registrar immediately transmitted the Appeals Chamber's Order of 9 June 2010 to the Rwandan Ministry of Foreign Affairs and Cooperation *via* a third *note verbale*.¹⁰ On 11 June 2010, the Registrar filed submissions pursuant to Rule 33(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules") setting out the steps taken thus far.¹¹

7. On 11 June 2010, the Prosecution responded to the Motion, arguing that it should be dismissed in its entirety.¹² Ntabakuze filed his Reply on 15 June 2010.¹³

8. On 15 June 2010, the Registrar filed further submissions indicating that the Registry had consulted with the Office of Legal Affairs of the United Nations regarding the possible immunity of Erlinder on the basis of the Decision of the High Court of Gasabo and that the Office of Legal Affairs had advised the Tribunal to assert Erlinder's immunity without delay.¹⁴ The Registrar accordingly sent a fourth *note verbale* to the Rwandan Ministry of Foreign Affairs and Cooperation asserting that Erlinder benefited from immunity and requesting his immediate release.¹⁵

⁶ See *The Public Prosecutor of the High Court of Gasabo v. Carl Peter Erlinder*, Case No. RONPJ0678/Kig/NM, Court Decision dated 7 June 2010, filed by Ntabakuze on 11 June 2010 ("Decision of the High Court of Gasabo"), paras. 39 (p. 20), 40.

⁷ See Decision of the High Court of Gasabo, paras. 7, 8, 10. See also Registrar's Submissions of 11 June 2010, para. 7.

⁸ Registrar's Submissions of 11 June 2010, para. 8. See also *ibid.*, Annex 3: *Note Verbale* from the Registrar to the Minister of Foreign Affairs and Cooperation dated 9 June 2010.

⁹ Order in Relation to Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 9 June 2010 ("Order of 9 June 2010"), para. 4.

¹⁰ Registrar's Submissions of 11 June 2010, para. 9.

¹¹ Registrar's Submissions of 11 June 2010, paras. 5-9.

¹² Prosecutor's Response to "Aloys Ntabakuze's Extremely Urgent Request for Injunctions Against the Government of Rwanda for the Illegal Arrest of and Investigation Against Lead Counsel, P. Erlinder, for Statements Made in the Course of Appellant's Defence", 11 June 2010 ("Response"), para. 12.

¹³ Reply – Motion for Injunctions Against the Government of Rwanda for Illegal Arrest of Lead Counsel Peter Erlinder for Statements Made in the Course of Appellant's Defence – Articles 19, 20, 28 & 29 of the Statute and Rule 54, 15 June 2010 ("Reply").

¹⁴ Further Registrar's Submissions Under Rule 33 (B) of the Rules of Procedure and Evidence in Respect of the Appeals Chamber Order to the Registrar Dated 9 June 2010, 15 June 2010 ("Registrar's Submissions of 15 June 2010"), paras. 5, 6.

¹⁵ Registrar's Submissions of 15 June 2010, para. 6. See *ibid.*, Annex: *Note Verbale* from the Registrar to the Minister of Foreign Affairs and Cooperation dated 15 June 2010.

9. On 17 June 2010, Ntabakuze filed annexes to his Reply.¹⁶ The same day, the High Court of Rwanda at Kigali, ruling on Erlinder's appeal against the Decision of the High Court of Gasabo, granted him bail "on health grounds".¹⁷ The High Court of Rwanda, however, ordered that investigations into Erlinder's case proceed while he is not in detention.¹⁸

10. On 21 June 2010, Ntabakuze filed an addendum to his Reply, in which he requested that the Appeals Chamber endorse the findings of the Office of Legal Affairs and instruct the Registrar to seek formal recognition of Erlinder's immunity and confirmation of the discontinuance of all proceedings against him.¹⁹

11. On 24 June 2010, the Registrar indicated that he was still awaiting a formal copy of the charges brought against Erlinder.²⁰

12. On 5 July 2010, Anatole Nsengiyumva submitted that his Defence team supported and associated itself with the Motion.²¹

13. On 7 July 2010, the Appeals Chamber issued a further order for information relating to the exact nature and basis of the charges against Erlinder.²² On 15 July 2010, the Registrar filed submissions indicating that Rwanda had advised that Erlinder had not been formally charged and that he had been detained as a suspect pending the completion of the ongoing investigations and that he was subsequently released on bail on health grounds.²³ The materials which formed the basis

¹⁶ Annexes to Reply – Motion for Injunctions Against the Government of Rwanda for Illegal Arrest of Lead Counsel Peter Erlinder for Statements Made in the Course of Appellant's Defence – Articles 19, 20, 28 & 29 of the Statute and Rule 54, dated 15 June 2010, filed 17 June 2010.

¹⁷ Addendum to the Urgent Motion for Extension of Time for Filing of Brief in Reply to Respondent's Brief in Anatole Nsengiyumva's Appeal, 21 June 2010, Annex B: *Carl Peter Erlinder v. Prosecution*, High Court of Rwanda at Kigali, Case No. RPA 0646/10/HC/KIG, 17 June 2010 ("Decision of High Court of Rwanda at Kigali"), para. 41. *See also* Addendum to Reply – Motion for Injunctions Against the Government of Rwanda for Illegal Arrest of Lead Counsel Peter Erlinder for Statements Made in the Course of Appellant's Defence – Articles 19, 20, 28 & 29 of the Statute and Rule 54, 21 June 2010 ("Addendum to Reply"), Annex, p. 5 ("Bail on Health Grounds Will Not Deter Prosecution", Office of the Spokesperson for the Rwanda Ministry of Foreign Affairs and Cooperation, 17 June 2010); Registrar's Further Submissions Under Rule 33(B) of the Rules of Procedure and Evidence in Respect of the Appeals Chamber's Order Instructing the Registrar to Seek Clarification from Rwandan Authorities on the Motives of the Arrest of Peter Erlinder, 24 June 2010 ("Registrar's Submissions of 24 June 2010"), para. 6.

¹⁸ Decision of High Court of Rwanda at Kigali, para. 42. *See also* Addendum to Reply, Annex p. 5 ("Bail on Health Grounds Will Not Deter Prosecution", Office of the Spokesperson for the Rwanda Ministry of Foreign Affairs and Cooperation, 17 June 2010); Registrar's Submissions of 24 June 2010, para. 6.

¹⁹ Addendum to Reply, para. 6.

²⁰ Registrar's Submissions of 24 June 2010, para. 7.

²¹ Anatole Nsengiyumva's Support for "The Ntabakuze Motion for Injunction Against the Government of Rwanda for Illegal Arrest of Lead Counsel Peter Erlinder for Statements Made in the Course of Appellant's Defence – Articles 19, 20, 28, & 29 of the Statute and Rule 54", Dated 2nd June 2010, dated 4 July 2010, filed 5 July 2010, para. 2.

²² Further Order in Relation to Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 7 July 2010, para. 4.

²³ Registrar's Submissions Under Rule 33(B) of the Rules of Procedure and Evidence on the Further Order in Relation to Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, dated 14 July 2010, filed 15 July 2010 ("Registrar's Submissions of 15 July 2010"), para. 6.

of the investigations for genocide denial disclosed by the Prosecutor General of Rwanda were annexed to the Registrar's submissions.²⁴ On 26 July 2010, Ntabakuze filed further submissions on Erlinder's immunity and on the materials annexed to the Registrar's Submissions of 15 July 2010.²⁵

B. Submissions

14. Ntabakuze requests the Appeals Chamber to order the Registrar to take immediate action to secure Erlinder's release and to stop all proceedings against him.²⁶ He submits that, while Erlinder was not in Rwanda in connection with his functions before the Tribunal, the Prosecutor of Rwanda made it clear that the charges against him are directly connected to statements he made outside Rwanda, including before the Tribunal in the course of Ntabakuze's defence.²⁷ In Ntabakuze's view, these charges "constitute intimidation and serious interference with a legal process"²⁸ and directly impact his rights to a fair and expeditious trial.²⁹ In this regard, he asserts that Erlinder, as his Lead Counsel, benefits from functional immunity³⁰ and requests the Appeals Chamber to endorse the position of the Office of Legal Affairs of the United Nations that Erlinder enjoys immunity from the proceedings pending against him in Rwanda.³¹

15. Ntabakuze also contends that Rwanda's exercise of its domestic jurisdiction is improper "as it is based on an undefined offence, allegedly committed outside of Rwanda's territory, and which has not only never been internationally recognised but is also protected in most jurisdictions by laws protecting one's freedom of expression."³² He further argues, *inter alia*, that the arrest of and charges against Erlinder "will also have the foreseeable result of substantially impeding other defence teams before the Tribunal of performing their functions."³³ Under these circumstances, he contends that it is for the Tribunal to enjoin the Rwandan government "to refrain from interfering with the functions of defence members, refrain from intimidating and harass[ing] defence members on the basis of their functions before this Tribunal, and therefore to release Lead Counsel [...] with immediate effect and to drop all charges brought against him."³⁴

²⁴ Registrar's Submissions of 15 July 2010, para. 7, Annex 1.

²⁵ Observations on Registrar's Submissions re: Appellant's Motion for Injunctions, Arising from the Illegal Arrest of Lead Counsel Professor Peter Erlinder for Public Discussion of Issues Related to Appellant's Defence, in Light of Articles 19, 20, 28 & 29, Rule 54 and, the UN-OLA Immunity Ruling, 26 July 2010 ("Observations of 26 July 2010").

²⁶ Motion, para. 25.

²⁷ Motion, para. 16. *See also ibid.*, para. 2; Reply, paras. 5-9, 12; Observations of 26 July 2010, para. 17.

²⁸ Motion, para. 19.

²⁹ Motion, paras. 6, 19, 22.

³⁰ Reply, paras. 11-17; Addendum to Reply, para. 5; Observations of 26 July 2010, para. 5.

³¹ Addendum to Reply, para. 6; Observations of 26 July 2010, para. 2 (p. 11/11).

³² Motion, para. 22. *See also ibid.* para. 17.

³³ Motion, para. 22. *See also ibid.*, para. 20; Reply, paras. 18-21; Observations of 26 July 2010, paras. 9, 18.

³⁴ Motion, para. 23.

16. The Prosecution responds that the Motion should be denied in its entirety.³⁵ It submits that Ntabakuze has not demonstrated that an injunction against the Rwandan government is warranted given that it is not yet established that the charges against Erlinder relate to his work at the Tribunal.³⁶ It asserts that he would only benefit from immunity from legal process in relation to words spoken or acts done in relation to his position as Defence Counsel before the Tribunal.³⁷ It further submits that Ntabakuze's right to a fair and expeditious trial is not at present impeded because all the submissions in his appeal have been filed and no date has been set for the appeal hearing.³⁸ Finally, it submits that Ntabakuze has not demonstrated that Erlinder's arrest will impact the ability of other defence counsel before the Tribunal to fulfil their mandates.³⁹ In this respect, it notes that other defence counsel working on cases before the Tribunal have not been affected.⁴⁰

17. In his Observations of 26 July 2010, regarding the materials submitted by Rwanda as forming the basis of the investigation against Erlinder, Ntabakuze contends that Erlinder's writings and other documents arise from his mandate with the Tribunal and either repeat, comment upon, or contextualise arguments made before the Tribunal.⁴¹ In this regard, he submits that much of the material refers to issues discussed in his final trial brief, closing arguments, motions, exhibits, and pending grounds of appeal.⁴² He further asserts that Erlinder was not the author of some of the materials.⁴³

C. Discussion

18. The Appeals Chamber emphasizes that it will not lightly intervene in the domestic jurisdiction of a state. As the Chamber seized of Ntabakuze's appeal, however, it has the duty to ensure the fairness of the proceedings in this case. To this end, it has competence under Article 28 of the Statute of the Tribunal ("Statute") and Rules 54 and 107 of the Rules to issue any related order. Accordingly, the Appeals Chamber will only consider whether Rwanda's exercise of its domestic jurisdiction in Erlinder's case threatens the fairness of the proceedings in this case. The Appeals Chamber will therefore not address Ntabakuze's arguments that are not relevant to this enquiry. The Appeals Chamber thus turns to consider Ntabakuze's arguments that Erlinder benefits from functional immunity and that the legal process against Erlinder in Rwanda will impede his ability to adequately represent Ntabakuze in this case, thereby resulting in the infringement of Ntabakuze's right to a fair trial.

³⁵ Response, para. 12.

³⁶ Response, paras. 4-6.

³⁷ Response, para. 6.

³⁸ Response, paras. 8, 9, 12.

³⁹ Response, paras. 10, 12.

⁴⁰ Response, para. 11.

⁴¹ Observations of 26 July 2010, para. 12.

19. Article 29 of the Statute, addressing the status, privileges, and immunities of the Tribunal, provides that:

Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda.⁴⁴

The Appeals Chamber considers that Defence Counsel fall within the category of persons required at the seat or meeting place of the Tribunal and as such must be accorded such treatment as is necessary for the proper functioning of the Tribunal. The proper functioning of the Tribunal requires that Defence Counsel be able to investigate and present arguments in support of their client's case without fear of repercussions against them for these actions. Without such assurance, Defence Counsel cannot be reasonably expected to adequately represent their clients.

20. Additionally, the Memorandum of Understanding Between the United Nations and the Republic of Rwanda to Regulate Matters of Mutual Concern Relating to the Office in Rwanda of the International Tribunal for Rwanda of 3 June 1999 ("Memorandum of Understanding"),⁴⁵ which governs the privileges and immunities of the Tribunal's operations in Rwanda, should also be taken into account. Of particular relevance to the present situation, the Memorandum of Understanding provides that the government of Rwanda shall extend:

To other persons assigned to the Office whose names shall be communicated to the Government of Rwanda for that purpose, the privileges and immunities accorded to experts on mission for the United Nations, in accordance with Article VI of the Convention.⁴⁶

With respect to whether Defence Counsel fall within the meaning of "other persons assigned to the Office", the Appeals Chamber notes that while Defence Counsel are not employees of the Tribunal they are assigned or appointed by the Tribunal to their positions as Defence Counsel. Furthermore, the procedures associated with Defence Counsel going on mission to Rwanda indicate that the Tribunal considers Defence Counsel to be acting in official capacity and on assignment in association with the Tribunal. For instance, Defence Counsel may request logistical support from the Tribunal while performing their missions in Rwanda.⁴⁷

21. The Appeals Chamber further notes that the Memorandum of Understanding sets out the rights and facilities granted to the Tribunal by the Government of Rwanda on its territory.

⁴² Observations of 26 July 2010, para. 14(a)-(c), (g), (h), (l), (m), (o), (q)-(u).

⁴³ Observations of 26 July 2010, para. 14(c)-(f), (i), (k), (m), (p).

⁴⁴ Statute, Article 29(4).

⁴⁵ United Nations Treaty Series vol. 2066, p. 5.

⁴⁶ Memorandum of Understanding, para. 2, referring to Convention on the Privileges and Immunities of the United Nations, adopted by General Assembly Resolution A/RES/22(I)A, 13 February 1946 ("Convention").

These rights and facilities include various access rights such as the "right to question victims and witnesses, to gather evidence and all useful information and to conduct investigations in the field".⁴⁸ The Appeals Chamber considers that, as the rights of access to undertake investigations are fundamental to the preparation of the Defence case, in concluding the Memorandum of Understanding it was contemplated that it applied to Defence Counsel as well as officials of the Tribunal. Indeed, if the Memorandum of Understanding did not extend to Defence Counsel, the right of equality of arms would be meaningless as the Defence would have no guarantee of access to potential witnesses and evidence to allow them to prepare their case.

22. In light of the procedural practice of the Tribunal as well as the purpose of the Memorandum of Understanding, the Appeals Chamber finds that Defence Counsel fall within the meaning of "other persons assigned to the Office" and therefore are to be accorded the privileges and immunities due to experts performing missions for the United Nations pursuant to Article VI of the Convention.⁴⁹

23. This is further supported by the interpretation of the International Court of Justice as to who can be considered an expert according to Section 22 of the Convention:

The purpose of Section 22 is nevertheless evident, namely, to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organization, and to guarantee them 'such privileges and immunities as are necessary for the independent exercise of their functions'. The experts thus appointed or elected may or may not be remunerated, may or may not have a contract, may be given a task requiring work over a lengthy period or a short time. The essence of the matter lies not in their administrative position but in the nature of their mission.⁵⁰

Applying this reasoning to Defence Counsel on mission, the Appeals Chamber concludes that they are to be considered experts on mission within the meaning of the Convention. While Defence Counsel are not officials of the Tribunal, some guarantee is necessary for the independent exercise of their Tribunal assigned functions which are integral to its functioning. Accordingly, the nature of their mission, which is to engage in preparations for proceedings before the Tribunal, is the defining factor in granting them such privileges and immunities as granted to experts on mission – not their administrative status with the Tribunal.

⁴⁷ See Request for Logistical Support in Kigali on Mission Assignment form. See also Work Schedule form which requires that the Request for Logistical Support forms be submitted to the Defence Counsel and Detention Management Section at least 25 working days before the mission starts.

⁴⁸ Memorandum of Understanding, para. 3(vi). Other rights provided for include the freedom of movement in Rwanda, right of access to prisons, the right to access all documents the consultation of which may be necessary for the smooth functioning of the Office, the right to make direct contact with national and local authorities, including the armed forces, individuals, intergovernmental and non-governmental organisations, private institutions and the media. Memorandum of Understanding, para. 3(ii)-(v), (vii).

⁴⁹ Convention on the Privileges and Immunities of the United Nations, adopted by General Assembly Resolution A/RES/22(I)A, 13 February 1946.

⁵⁰ Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989, para. 47.

24. The Appeals Chamber also notes that the response of the Prosecutor General of Rwanda to the Registrar's invocation of the Memorandum of Understanding as affording to persons carrying out functions on behalf of the Tribunal, such as Defence Counsel, the immunities provided for in Article VI of the Convention⁵¹ reflects support for the application of the relevant provisions of the Memorandum of Understanding to Defence Counsel of the Tribunal operating in Rwanda: "[...] I wish to state on record, that [Erlinder's] arrest is not at all related to his assignments at the ICTR and that we remain in full compliance with the provisions of the memorandum of understanding [g]overn[ing] our cooperation".⁵²

25. Article VI of the Convention provides that experts performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions. In particular, Section 22 of Article VI of the Convention, invoked in the Registrar's *note verbale* of 15 June 2010,⁵³ provides that:

Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

(a) immunity from personal arrest or detention and from seizure of their personal baggage;

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

26. Accordingly, Defence Counsel benefit from immunity from personal arrest or detention 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

⁵¹ Registrar's Submissions of 11 June 2010, Annex 1: *Note Verbale* from the Registrar to the Minister of Foreign Affairs and Cooperation dated 31 May 2010 ("The ICTR attaches the utmost importance to the respect of the immunity which Defence Counsel assigned to cases before [the] ICTR enjoy, when they carry out the mandate vested on them by [the] ICTR. [...] The ICTR wishes to recall the 3 June 1999 Memorandum of Understanding (MOU) Between the United Nations and the Republic of Rwanda to Regulate Matters of Mutual Concern Relating to The Office in Rwanda of the International Criminal Tribunal for Rwanda. Pursuant to the said MOU, Rwanda will extend to persons carrying out functions on behalf of [the] ICTR, including experts on mission, the same privileges and immunities, as provided for in Articles VI and VII of the General UN Convention on the Privileges and Immunities to which the Republic of Rwanda is a party."). See also Registrar's Submissions of 15 June 2010, Annex: *Note Verbale* from the Registrar to the Minister of Foreign Affairs and Cooperation dated 15 June 2010.

⁵² Registrar's Submissions of 11 June 2010, Annex 2: Correspondence from Mr. Martin Ngoga, Prosecutor General of Rwanda, to the Registrar of the Tribunal dated 2 June 2010. See also Registrar's Submissions of 15 July 2010, para. 9 ("The Rwandan Prosecutor General also stressed that Mr. Erlinder's arrest was not based on his work before this Tribunal and clarified that he would respect any conflicting judicial finding of the ICTR. In this respect, he indicated to the President of the ICTR that he stands ready to remove any disclosed documents that might be deemed to be linked to the ICTR business.").

⁵³ Registrar's Submissions of 15 June 2010, Annex: *Note Verbale* from the Registrar to the Minister of Foreign Affairs and Cooperation dated 15 June 2010.

Article 29 of the Statute. In light of this, the Appeals Chamber turns to consider whether Erlinder benefited from immunity in relation to his arrest and investigation in Rwanda.

27. The Appeals Chamber recalls that, at the time of his arrest, Erlinder was not in Rwanda in his capacity as Ntabakuze's Defence Counsel. He was therefore not immune from personal arrest or detention as provided for under Section 22(a) of Article VI of the Convention. Nonetheless, Erlinder benefits from immunity from legal process in respect of words spoken or written and acts done by him in the course of his representation of Ntabakuze before the Tribunal.

28. The vast majority of the material submitted by Rwanda as forming the basis for the investigation of Erlinder consists of articles written in Erlinder's private or academic capacity on issues ranging from the Rwandan presidential candidate, Victoire Ingabire,⁵⁴ the alleged role played by Rwanda in the Democratic Republic of the Congo,⁵⁵ the alleged role of the Rwandan Patriotic Front ("RPF") and President Paul Kagame in the shooting down of President Juvénal Habyarimana's plane and the ensuing genocide,⁵⁶ and the alleged related cover-up by the United States and the United Kingdom.⁵⁷ Some of the documents are also media reports by other authors

⁵⁴ Registrar's Submissions of 15 July 2010, Annexes 1(d) ("Rwanda Presidential candidate Victoire Ingabire – punished for independent thinking?" by Peter Erlinder, Black Star News, 14 May 2010); 1(n) ("Personally Hand Delivered – Open Letter" by Peter Erlinder, 6 May 2010).

⁵⁵ Registrar's Submissions of 15 July 2010, Annexes 1(g) ("U.S./U.K. Allies Grab Congo Riches and Millions Die 2001-03 UN Expert Reports" by Peter Erlinder, Global Research, 4 November 2008); 1(h) ("Former Chief UN Rwanda Prosecutor, Carla Del Ponte: 'Obama War-Crimes Nominee – Complicit in War Crimes Cover-up.' Does Obama Know... or Care?" by Peter Erlinder, undated); 1(l) ("Genocide/War-Crimes Cover-up and UN Falsification of History: The Untold Story of Suppressed UN Prosecutors' Memoirs and the Realpolitik of the UN International Criminal Tribunals" by Peter Erlinder, paper presented at the International Criminal Bar Association Conference, Barcelona, 12 March 2010); 1(s) ("The International Criminal Tribunal for Rwanda: A Model for Justice or Juridically Created 'Victor's Impunity'?" by Peter Erlinder, paper presented at *La justice internationale [sic] aujourd'hui*, Paris, 30, 31 May 2008); 1(u) ("The Real Authors of the Congo Crimes. Nkunda has been arrested but who will arrest Kagame?" by Peter Erlinder, Global Research, 2 February 2009).

⁵⁶ Registrar's Submissions of 15 July 2010, Annexes 1(a) ("Bush and Other War Criminals Meet in Rwanda: The Great 'Rwanda Genocide' – Coverup" by Peter Erlinder, Global Research, undated); 1(g) ("U.S./U.K. Allies Grab Congo Riches and Millions Die 2001-03 UN Expert Reports" by Peter Erlinder, Global Research, 4 November 2008); 1(l) ("Genocide/War-Crimes Cover-up and UN Falsification of History: The Untold Story of Suppressed UN Prosecutors' Memoirs and the Realpolitik of the UN International Criminal Tribunals" by Peter Erlinder, paper presented at the International Criminal Bar Association Conference, Barcelona, 12 March 2010); 1(q) ("Open Letter to Prime Minister Harper: Regarding State Visit of Current President of Rwanda" by Peter Erlinder, 6 April 2006); 1(s) ("The International Criminal Tribunal for Rwanda: A Model for Justice or Juridically Created 'Victor's Impunity'?" by Peter Erlinder, paper presented at *La justice internationale [sic] aujourd'hui*, Paris, 30, 31 May 2008).

⁵⁷ Registrar's Submissions of 15 July 2010, Annexes 1(a) ("Bush and Other War Criminals Meet in Rwanda: The Great 'Rwanda Genocide' – Coverup" by Peter Erlinder, Global Research, undated); 1(h) ("Former Chief UN Rwanda Prosecutor, Carla Del Ponte: 'Obama War-Crimes Nominee – Complicit in War Crimes Cover-up.' Does Obama Know... or Care?" by Peter Erlinder); 1(l) ("Genocide/War-Crimes Cover-up and UN Falsification of History: The Untold Story of Suppressed UN Prosecutors' Memoirs and the Realpolitik of the UN International Criminal Tribunals" by Peter Erlinder, paper presented at the International Criminal Bar Association Conference, Barcelona, 12 March 2010); 1(o) ("Letters on Rwanda: Peter [E]rlinder's response to the article 'Rwanda: Perpetrators of genocide jailed'" by Peter Erlinder, World Socialist Website, 13 February 2009); 1(s) ("The International Criminal Tribunal for Rwanda: A Model for Justice or Juridically Created 'Victor's Impunity'?" by Peter Erlinder, paper presented at *La justice internationale [sic] aujourd'hui*, Paris, 30, 31 May 2008); 1(u) ("The Real Authors of the Congo Crimes. Nkunda has been arrested but who will arrest Kagame?" by Peter Erlinder, Global Research, 2 February 2009).

on similar issues referring to Erlinder,⁵⁸ and conference programmes and notes on conference proceedings in which Erlinder participated.⁵⁹ There is also a copy of a case filed in the United States against President Paul Kagame and others by the widows of Presidents Habyarimana and Ntaryamira whom Erlinder is representing.⁶⁰ While some of these documents comment upon the *Bagosora et al.* case and in some cases refer to evidence tendered in that case,⁶¹ they constitute private commentary on the case rather than words spoken or written in the course of Erlinder's representation of Ntabakuze in the *Bagosora et al.* case. Accordingly, Erlinder does not benefit from immunity from legal process in respect of those materials.

29. However, there is one document entitled "Military I – Convicting Major Ntabakuze Would be an 'Offence to Common Sense'" which is an Hirondele News article dated 31 May 2007 reporting on the closing arguments Erlinder made on behalf of Ntabakuze in the *Bagosora et al.* case.⁶² The article summarises Erlinder's arguments before the Tribunal and quotes some of his submissions in the case. The Appeals Chamber finds that proceeding against Erlinder on the basis of submissions he made in the course of Ntabakuze's closing arguments before the Tribunal violates his functional immunity from legal process for words spoken or written in the course of his functions before the Tribunal. The Appeals Chamber considers that this interferes with the proper functioning of the Tribunal, which requires that Defence Counsel be free to advance arguments in their client's case without fear of prosecution.

⁵⁸ Registrar's Submissions of 15 July 2010, Annexes 1(e) ("Africa's Female Mandela? Victoire Ingabire Umuoza on Trial" by Annie Garrison, UnitedProgressives.org, 20 May 2010); 1(f) ("Ngoga Confirms Purpose of 'Thought-Crime' Charges: 'Shut-Up Victoire Ingabire' and Political Opposition!", FDU website, 14 May 2010); 1(i) ("The Rwanda Hit List: Revisionism, Denial and the Genocide Conspiracy II", by Keith Harmon Snow, The African Executive, April 2010); 1(k) ("What Really Happened in Rwanda?" by Christian Davenport and Allan C. Stam, Miller-McCune Online, 6 October 2009); 1(m) ("Lawsuit alleges Rwandan President triggered Rwanda Genocide", undated); 1(p) ("U.S. lawyers to defend Victoire Ingabire, first female presidential candidate in Rwanda – jailed by President Gen. Paul Kagame" by International Humanitarian Law Institute, directed by Peter Erlinder, San Francisco Bay View, 23 April 2010).

⁵⁹ Registrar's Submissions of 15 July 2010, Annexes 1(j) ("The Second International Criminal Defence Conference: 'Lessons from the Defense at the Ad Hoc UN Tribunals, and Prospects for International Justice at the ICC'", Brussels, 21-23 May 2010); 1(t) ("Liste des présentations", Brussels, 21-23 May 2010); 1(v) ("Compte-rendu de la conférence TPIR: son héritage du point de vue de la Défense, La Haye, 14-16 novembre 2009").

⁶⁰ Registrar's Submissions of 15 July 2010, Annex 1(r) (*Habyarimana and Ntaryamira v. Paul Kagame et al.*, United States District Court for the Western District of Oklahoma, Case No. Civ-10-437-W, Complaint With Jury Demand, undated).

⁶¹ See Registrar's Submissions of 15 July 2010, Annexes 1(b) ("Rwanda: No Conspiracy, No Genocide Planning... No Genocide?" by Peter Erlinder, Jurist, 23 December 2008); 1(l) ("'Genocide/War-Crimes Cover-up and UN Falsification of History: The Untold Story of Suppressed UN Prosecutors' Memoirs and the Realpolitik of the UN International Criminal Tribunals" by Peter Erlinder, paper presented at the International Criminal Bar Association Conference, Barcelona, 12 March 2010); 1(o) ("Letters on Rwanda: Peter [E]rlinder's response to the article 'Rwanda: Perpetrators of genocide jailed'" by Peter Erlinder, World Socialist Website, 13 February 2009); 1(s) ("The International Criminal Tribunal for Rwanda: A Model for Justice or Juridically Created 'Victor's Impunity'?" by Peter Erlinder, paper presented at *La justice internationale [sic] aujourd'hui*, Paris, 30, 31 May 2008); 1(u) ("The Real Authors of the Congo Crimes. Nkunda has been arrested but who will arrest Kagame?" by Peter Erlinder, Global Research, 2 February 2009).

⁶² Registrar's Submissions of 15 July 2010, Annex 1(c) ("Military I – Convicting Major Ntabakuze Would be 'An Offence to Common Sense'", Hirondele News, 31 May 2007).

30. The Appeals Chamber recalls Rwanda's intention to respect Erlinder's functional immunity,⁶³ and stresses the need to respect it. Ntabakuze's right to a fair trial cannot be protected where Erlinder faces investigation or prosecution in Rwanda on the basis of words spoken or written in the course of his representation of Ntabakuze before the Tribunal.

D. Disposition

31. For the foregoing reasons, the Appeals Chamber, pursuant to Articles 19, 20, 28, and 29 of the Statute and Rules 54 and 107 of the Rules,

ALLOWS the Motion in part;

REQUESTS the Republic of Rwanda to desist from proceeding against Erlinder in relation to words spoken or written in the course of his representation of Ntabakuze before the Tribunal; and

DISMISSES the remainder of the Motion.

Done in English and French, the English version being authoritative.

Done this sixth day of October 2010,
At The Hague,
The Netherlands.



[Seal of the Tribunal]

Judge Patrick Robinson
Presiding

⁶³ Registrar's Submissions of 15 July 2010, para. 9.