

## **TRIBUNAL AMBIVALENCE AND RWANDA'S REJECTION OF FUNCTIONAL IMMUNITY FOR THE ICTR DEFENCE**

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## TRIBUNAL AMBIVALENCE AND RWANDA'S REJECTION OF FUNCTIONAL IMMUNITY FOR THE ICTR DEFENCE

*Allison Turner\**

Persons working on defence teams at the International Criminal Tribunal for Rwanda (ICTR) occupy a nebulous position within the Tribunal's matrix of privileges and immunities. Privileges and immunities extended to United Nations-ICTR servants ultimately fall within the jurisdiction of the United Nations (UN) which created the ICTR under *Security Council Resolution 955*.<sup>1</sup> While Tanzania, where the ICTR is located, is party to a bilateral agreement setting out privileges and immunities for the defence,<sup>2</sup> no such agreement exists with Rwanda<sup>3</sup> where the crime scenes are located and investigations are carried out. The defence is not mentioned in Article 29 of the *Statute of the International Tribunal for Rwanda*,<sup>4</sup> which otherwise clearly articulates the UN privileges and immunities extended to ICTR judges, the Registrar, the Prosecutor and all staff. The failure of the ICTR to consistently recognize and assert

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<sup>1</sup> SC Res. 955, UN SCOR, 3453<sup>rd</sup> Sess., UN Doc. S/Res/955 (1994).

<sup>2</sup> President of the International Criminal Tribunal for Rwanda, *Agreement between the United Nations and the United Republic of Tanzania concerning the headquarters of the ICTR*, Appendix to the *Report 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*, UN GAOR, 51<sup>st</sup> Sess., A/51/399 (1996) [*Headquarters Agreement*].

<sup>3</sup> Rwanda failed to sign an agreement with the United Nations recognizing immunity. "**Recalling** the Letter of the Secretary-General of the United Nations dated 11 August 1997 addressed to the Minister of Foreign Affairs and Cooperation of the Republic of Rwanda on the status of the office and requesting the Government of Rwanda to extend to that office and its staff the privileges and immunities provided for in the Convention on the Privileges and Immunities of the United Nations to which the Republic of Rwanda is a party; **Noting** that a reply to this letter from the Minister of Foreign Affairs and Cooperation of the Republic of Rwanda has not been received by the United Nations [...]" *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*, 3 June 1999, accessed on ICTR web site on 18 August 2010, ("Memorandum"). Nevertheless, paragraph 2 of the Memorandum 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 experts on mission for the United Nations, in accordance with Article VI of the Convention."

<sup>4</sup> *Supra* note 1, Annex, *Statute of the International Tribunal for Rwanda [ICTR Statute]*.

this protection on behalf of the defence has impaired the defence's ability to fulfill its function effectively and independently and compromised the personal safety and security of its members.

## Introduction

The *ICTR Statute* provides that the *Convention on the Privileges and Immunities of the United Nations*<sup>5</sup> shall apply to the ICTR.<sup>6</sup> The President exercises jurisdiction over all functions conferred on him by the *ICTR Statute* and the *Rules of Procedure and Evidence*.<sup>7</sup> The Registrar falls under the authority of the President and is responsible for the administration and servicing of the Tribunal.<sup>8</sup> Thus, the Registrar, under the authority of the President, is responsible for administering matters concerning defence functional immunity.<sup>9</sup> Members of the ICTR defence are required to perform certain duties where the witnesses reside. As a consequence, working in Rwanda is unavoidable. Appearing as *amicus curiae* in five Rule 11 *bis* transfer motions before the ICTR,<sup>10</sup> Human Rights Watch reported on the climate of insecurity that poses a serious threat to the independence and safety of the defence in Rwanda.<sup>11</sup>

<sup>5</sup> *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, 1 U.N.T.S. 15 [UN Convention].

<sup>6</sup> *ICTR Statute*, *supra* note 4, art. 29(1).

<sup>7</sup> ICTR, *Rules of Procedure and Evidence*, online: Rules of Procedure and Evidence <<http://www.ictor.org/ENGLISH/rules/index.htm>> [ICTR RPE]. Rule 19(A) provides that: "The President shall preside at all plenary meetings of the Tribunal, co-ordinate the work of the Chambers and supervise the activities of the Registry as well as exercise all the other functions conferred on him by the Statute and the Rules." The *ICTR RPE* "do not carry a UN document number." Mark A. Drumbl & Kenneth S. Gallant, "Appeals in the Ad Hoc International Criminal Tribunals: Structure, Procedure, and Recent Cases" (2001) 3 J. App. Prac. & Process 589, 609, n. 100.

<sup>8</sup> *ICTR RPE*, *ibid.* Rule 33(A) of the *ICTR RPE* provides: "The Registrar shall assist the Chambers, the Plenary Meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions. Under the authority of the President, he shall be responsible for the administration and servicing of the Tribunal and shall serve as its channel of communication." *Supra* note 4, art. 16 of the *ICTR Statute* provides: "The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda."

<sup>9</sup> See section II.E entitled *United Nations Office of Legal Affairs Legal Opinion* below; documenting that the *United Nations Office of Legal Affairs Legal Opinion on defence functional immunity* issued on 26 November 2007 specifically directs the ICTR to notify authorities for the Government of Rwanda that a defence investigator enjoys functional immunity.

<sup>10</sup> *ICTR RPE*, *supra* note 7, Entitled *Referral of the Indictment to another Court*, Rule 11 *bis* of the *ICTR RPE* provides: "If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State: (i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State."

<sup>11</sup> In relation to the case of Léonidas Nshogoza, Human Rights Watch stated: "In June 2007, one Rwandan lawyer serving as investigator to an accused at the ICTR found himself before the national courts on allegations of corruption and minimizing genocide. The allegations stem from supposed contact that the lawyer had with a protected prosecution witness, who recanted his original testimony before the Tribunal. In the order confirming his detention, he was said to have become an expert in

In the fall of 2006, an ICTR defence lead counsel of Rwandan origin was arrested in Arusha, Tanzania. The following year, the defence investigator for accused Emmanuel Rukundo was arrested and detained in Rwanda for his work. Most recently, in May 2010, Rwanda authorities arrested another ICTR lead counsel, Professor Peter Erlinder. After reviewing the parameters of functional immunity, this article will canvass these cases illustrate how ICTR ambivalence on the question of immunity, and Rwanda's refusal to recognize immunity, have compromised the personal security of members of ICTR defence teams. The insecurity faced by defence members is further brought into sharp relief by Rwanda's forceful campaign for the transfer to its territory of ICTR cases and detainees, and the extradition of its citizens in exile.<sup>12</sup> Arrests based on vague genocide ideology legislation,<sup>13</sup> and the failure to respect the U.N. immunity puts defence members at particularly high risk. Rwanda's defiance of the UN's assertion of immunity over Peter Erlinder last June has meant that the security of ICTR defence members is even more precarious.

## I. Functional Immunity

Functional immunity affords privileges and immunities to agents of governments or international organizations to the extent necessary to allow them to fulfill official functions. Article 29(3) and (4) of the *Statute of the ICTR* reflect this theory of functional immunity, as only acts performed as part of the individual's

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finding witnesses to defend persons accused of genocide, which is not a crime. In September 2007, one lawyer defending a person accused of genocide was himself accused of genocide by a prosecution witness during the trial. When the lawyer asked the judge to instruct the witness to cease such verbal attacks, the judge did not do so but instead, in a decision marred by numerous irregularities, ordered the lawyer jailed for contempt of court and sentenced him to one year in prison. The decision was overturned on appeal the next day, but only after the lawyer spent the night in jail and the Rwandan Bar Association had come to his defence. Two different lawyers who were threatened or harassed as a result of defending persons accused of genocide told HRW researchers that they would not undertake such representation in the future. Three additional lawyers fled Rwanda because of threats or harassment resulting from their defence of persons accused of genocide or related crimes." *Kayishema Brief of Human Rights Watch*, *infra* note 14, at paras. 70-72.

<sup>12</sup> See generally Amnesty International, "Rwanda: Suspects must not be transferred to Rwandan courts for trial until it is demonstrated that trials will comply with international standards of justice", online: Amnesty International: News and Reports <<http://www.amnestyusa.org/document.php?lang=e&id=ENGAFR47014>> 2007.

<sup>13</sup> See *The Prosecutor v. Fulgence Kayishema*, ICTR-2001-67-I, Brief of Human Rights Watch as *Amicus Curiae* in Opposition to Rule 11 *bis* Transfer (3 January 2008) at paras. 33-34 (International Criminal Tribunal for Rwanda, Trial Chamber) [*Kayishema Brief of Human Rights Watch*]: "Genocidal ideology' became well known and frequently used after publication of two reports on the topic, one by a parliamentary commission in 2004 and another by the Rwandan Senate in 2006. These reports also did not define the term, but instead listed hundreds of persons and organizations allegedly guilty of holding or disseminating 'genocidal ideology'. In mid-December 2007, a third parliamentary report once again raised fears about 'genocidal ideology' among Rwandans, concluding that such ideas were widely held in more than 30 Rwandan schools. Teachers and staff were blamed for disseminating 'genocidal ideology' to their pupils. According to the 2006 Rwandan Senate report, questioning the legitimacy of the detention of a Hutu is one manifestation of 'genocidal ideology'. Potential witnesses have reason to fear that their willingness to testify could in itself be taken as proof of this form of 'genocidal ideology'."

“official functions” are covered; no immunity is provided to cover private acts. It differs from diplomatic immunity which is essentially absolute, covering acts performed by the individual whether or not they were required as part of the official functions.<sup>14</sup> Functional immunity has been justified on the basis that without certain privileges and immunities, diplomats or agents would not be able to fulfill their official functions as while it ensures their independence and objectivity.<sup>15</sup>

Article 105(1) of the *Charter of the United Nations*<sup>16</sup> (*UN Charter*) limits privileges and immunities of officials of the UN to those that are “*necessary* for the independent exercise of their functions in connection with the Organisation” [emphasis added]. Thus, the *UN Charter* recognizes the principle of immunity as a function of need, with the aim of preserving the independence and integrity of the work of the organisation, as opposed to a privilege awarded on the basis of one’s formal status.

## II. International Law and ICTR Defence Functional Immunity

### A. The Headquarters Agreement

Article XVII of the *Headquarters Agreement* between the United Republic of Tanzania and the UN provides that “persons performing missions” for the ICTR “shall enjoy the privileges, immunities and facilities under articles VI and VII of the [*UN Convention*], which are necessary for the independent exercise of their duties for the Tribunal.”<sup>17</sup> To the extent required for the independent exercise of their official duties, members of the ICTR defence are persons on mission and thus enjoy functional immunity in virtue of the *Headquarters Agreement*. Articles VI and VII of the *UN Convention* govern the immunities accorded to “experts on mission for the [UN]” and the UN *laissez-passer*, respectively. Sections 22 and 23 of Article VI provide, *inter alia*, as follows:

Section 22. 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

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<sup>14</sup> See Daniel M. Singerman, “It’s Still Good to be the King: An Argument for maintaining the status quo in foreign head of state immunity” (2007) 21 *Emory Int’l L. Rev.* 413 at 425: “The person of a diplomatic agent is immune from criminal jurisdiction in the receiving State. [...] Furthermore, the receiving State is under an affirmative duty to prevent any violation to the person, freedom or dignity of the ambassador. Importantly, the diplomatic agent is even immune from civil or administrative jurisdiction except in limited circumstances. However such immunities are not absolute. The VCDR [*Vienna Convention on Diplomatic Relations*] does not exempt the diplomat from the jurisdiction of the sending state. Furthermore, the diplomatic agent’s immunity may be waived by the sending state.”

<sup>15</sup> Leslie Shirin Farhangi, “Insuring Against Abuse of Diplomatic Immunity” (1986) 38 *Stan. L. Rev.* 1517 at 1521: “If diplomats were liable to ordinary legal and political interference from the state or other individuals, they would be dependent on the good will of the receiving state. Considerations of safety and comfort might materially hamper the exercise of their functions.”

<sup>16</sup> *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, art. 105(1).

<sup>17</sup> *Headquarters Agreement*, *supra* note 2, art. 17.

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 shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations*;

[...]

Section 23. Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.<sup>18</sup>

Article XIX of the Headquarters Agreement entitles ICTR defence counsel to be accorded:

- (a) Exemption from immigration restrictions;
- (b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;
- (c) Immunity from criminal, civil and administrative jurisdiction in respect of words spoken or written and acts performed by him or her in his or her official capacity as counsel. Such immunity shall continue to be accorded to him or her after termination of his or her functions as a counsel of a suspect or accused.

and further provides,

- 4. The right and the duty to waive the immunity referred to in paragraph 2 above in any particular case where it can be waived without prejudice to the administration of justice by the Tribunal and the purpose for which it is granted shall lie with the Secretary-General.

Ordinarily, the power to waive immunity resides with the UN Secretary-General, as is the case with the waiver of immunity for counsel stipulated above. When persons are considered “experts on mission”, however, the *Headquarters Agreement* places the right to waive immunity in the hands of the ICTR President. In all other respects, the privileges and immunities enjoyed by “persons on mission” for the ICTR perfectly mirror those accorded to “experts on mission” for the UN.

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<sup>18</sup> *UN Convention, supra* note 5, art. VI, ss. 22-23 [emphasis added].

## B. The Statute of the ICTR

Privileges and immunities accorded to persons generally associated with the work of the Tribunal are governed by Article 29 of the *ICTR Statute*:

1. The *Convention on the Privileges and Immunities of the United Nations* of 13 February 1946 shall apply to the International Tribunal for Rwanda, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff;
2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law;
3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under Articles V and VII of the Convention referred to in paragraph 1 of this article;
4. 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.<sup>19</sup>

Article 29(4) arguably provides that defence counsel and their staff shall benefit from functional immunity insofar as it is deemed “necessary for the proper functioning” of the Tribunal. The article’s reference to the *UN Convention* points us to the source for further guidance. The “proper functioning” of the ICTR necessarily requires that the defence be able to perform its duties free from undue interference and in security.

## C. The Convention on the Privileges and Immunities of the United Nations

The *Convention on the Privileges and Immunities of the United Nations*<sup>20</sup> forms the basis of the extension of privileges and immunities to persons associated with the work of the ICTR, pursuant to Article 9 of the *ICTR Statute*.<sup>21</sup> The *UN Convention* emphasizes that privileges and immunities are afforded in the best interests of the organization itself, not the individual. Article V, section 20 of the *UN Convention* states: “Privileges and immunities are granted to officials *in the interests of the United Nations* and not for the personal benefit of the individuals themselves.”<sup>22</sup> The *UN Convention* identifies four types of individuals associated with its work: (1) high-level personnel, including the Secretary-General, Assistant Secretaries-General and representatives of member states; (2) the UN itself; (3)

<sup>19</sup> *ICTR Statute*, *supra* note 4, art. 29.

<sup>20</sup> *UN Convention*, *supra* note 5.

<sup>21</sup> *ICTR Statute*, *supra* note 4.

<sup>22</sup> *UN Convention*, *supra* note 5, art. V, s. 20 [emphasis added].

officials of the UN; and (4) experts on mission.<sup>23</sup> Notably, all but high-level personnel are accorded a functional immunity commensurate with their level of responsibilities.

That the *UN Convention* recognizes immunity as being a function of need and not status is reinforced by the extension of varying levels of immunity to different groups. Under section 22 of the *UN Convention*, “experts on mission” are actually accorded an additional privilege to those afforded to “officials” or staff members under section 18: immunity from personal arrest or detention. This extra protection, usually reserved for diplomatic envoys, is afforded to experts on mission because they travel on behalf of, or represent, the organization.<sup>24</sup>

Recognized as the appropriate reference for the extension of privileges and immunities for persons associated with the Tribunal,<sup>25</sup> the *UN Convention* thus affirms the view that such immunities are a function of need, recognized and asserted in the interests of the organization itself.

#### D. 1989 International Court of Justice Advisory Opinion

The International Court of Justice (ICJ), charged with settling disputes with respect to interpretation of the *UN Convention*,<sup>26</sup> considered the scope of the category of “experts on mission” in an advisory opinion on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*.<sup>27</sup> The dispute, between the UN and the Government of Romania, concerned whether the *Special Rapporteur* of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities carried the status of an “expert on mission”. The ICJ determined that *special rapporteurs must* be regarded as experts on mission within the meaning of Section 22 of the *UN Convention*:

55. [...] These rapporteurs or special rapporteurs are normally selected from among members of the Sub-Commission. However, over the past ten years, special rapporteurs have, on at least three occasions, been appointed from outside the Sub-Commission. [...] In any event, rapporteurs or special rapporteurs are entrusted by the Sub-Commission with a research mission. [...] Since their status is neither that of a representative of a member State nor that of a United Nations official, and since they carry out such research independently for the United Nations, they *must* be regarded as experts on missions within the meaning of Section 22, even in the event that they are not, or are no longer, members of the Sub-Commission. Consequently, they enjoy, in accordance with Section 22, the privileges and immunities necessary for the exercise of their functions, and in particular for the

<sup>23</sup> *Ibid.*, arts. I-III, V, VI.

<sup>24</sup> *Ibid.*, art. VI, s. 22. See also Anthony J. Miller, “Legal Aspects of Stopping Sexual Exploitation and Abuse in UN Peacekeeping Operations” (2006) 39 *Cornell Int’l L.J.* 71 at 89, n. 126.

<sup>25</sup> *ICTR Statute*, *supra* note 4, art. 29(1).

<sup>26</sup> *UN Convention*, *supra* note 5, art. VIII, s. 30.

<sup>27</sup> *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, [1989] I.C.J. Rep.177 [*Privileges and Immunities Advisory Opinion*].



establishment of any contacts which may be useful for the preparation, the drafting and the presentation of their reports to the Sub-Commission.<sup>28</sup>

Individuals engaged by the UN whose work benefits the organization are, therefore, generally to be considered “experts on mission” in accordance with Section 22 of the *UN Convention*. Similarly, as members of the ICTR defence undertake missions, interview witnesses, attend government institutions in an effort to procure relevant documentation, and further undertake all other work required to uphold the rights of accused being prosecuted before the Tribunal, they too can arguably be considered “experts on mission”.

### E. United Nations Office of Legal Affairs Legal Opinion

In the context of the *Rukundo* trial, the ICTR Registry sought advice as to whether functional immunity protects defence team members and if so whether it is limited to some or extended to all.<sup>29</sup> Rukundo’s investigator, Léonidas Nshogoza, was arrested in Gitarama, Rwanda on 16 June 2007. The United Nations Office of Legal Affairs (“UN-OLA”) confirmed that ICTR defence investigators enjoyed functional immunity.<sup>30</sup>

In response to a defence motion for immunity,<sup>31</sup> the ICTR Registry filed excerpts from the OLA Legal Opinion on record. After confirming the existence of a contractual relationship between the ICTR and defence investigators, the OLA Legal Opinion went on to anchor Mr. Nshogoza’s functional immunity in Article XVII of the *Headquarters Agreement* and in the ICJ’s interpretation of “experts on mission,” as per the Privileges and Immunities Advisory Opinion referenced above.

Defence investigators are persons performing missions for the Tribunal, and would fall within this provision [Article XVII]. [...]

The provisions of the *General Convention* referred to in Article XVII of the *Headquarters Agreement* are provisions which apply to experts on mission. [...] In the *Advisory Opinion of the ICJ on the Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations*, the International Court of Justice [...] held as follows:

<sup>28</sup> *Ibid.* at 196-197 [emphasis added].

<sup>29</sup> 6 November 2007 Inter-Office Memorandum, from ICTR Deputy Registrar to USG, The Legal Counsel, Office of Legal Affairs, para. 23, *Nshogoza*, Exhibit 75.

<sup>30</sup> *United Nations Interoffice Memorandum from Larry D. Johnson, Assistant Secretary General for Legal Affairs, to Adama Dieng, ICTR Registrar, subject: Pending Rukundo Motion Seeking Acknowledgement of an Immunity from Legal Process Benefiting a Former ICTR Defence Investigator*, dated 26 November 2007 para. 1, [OLA Legal Opinion].

<sup>31</sup> *Rukundo*, Urgent Defence Request for Court Order that United Nations Functional Immunity Applies to Léonidas Nshogoza, Defence Investigator for Emmanuel Rukundo Arrested in Rwanda on 16/06/07, 16 October 2007,

47. 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 Organisation, 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.*

*This definition is broad enough to cover defence investigators and the advantage of classifying them under this provision is the delegation of waiver of immunity to the President of the ICTR.*<sup>32</sup>

The OLA Legal Opinion constituted the first official confirmation at the ICTR that defence investigators enjoy UN functional immunity.

#### **F. Agreement on the Privileges and Immunities of the ICC**

In the context of the International Criminal Court (ICC), the *Rome Statute’s* Article 48(4) contains a provision similar to that under Article 29(4) of the *ICTR Statute*.<sup>33</sup> Additionally, it envisages a further agreement in which privileges and immunities afforded to other persons not within the scope of Articles 48(2) and (3) would be clarified. Article 18 of the *Agreement on the Privileges and Immunities of the ICC*<sup>34</sup> relating to “Counsel and Persons Assisting Defence Counsel” reads:

Counsel shall enjoy the following privileges, immunities and facilities to the extent necessary for the independent performance of his or her functions, including the time spent on journeys, in connection with the performance of his or her functions and subject to production of the certificate referred to in paragraph 2 of this article:

- a) *Immunity from personal arrest or detention* and from seizure of his or her personal baggage;
- b) *Immunity from legal process of every kind* in respect of words spoken or written and all acts performed by him or her in official capacity, which immunity shall

<sup>32</sup> *Ibid.*, para. 4 [emphasis added]. As mentioned earlier, what distinguishes the *Headquarters Agreement* from the *UN Convention* is the entity vested with the authority to waive immunity. The UN Secretary-General has the power to waive immunity generally under the *Convention of Privileges and Immunities* while in the case of the *Headquarters Agreement* the authority to waive immunity resides with the ICTR President.

<sup>33</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90, art. 48(4) [*Rome Statute*].

<sup>34</sup> *Agreement on the Privileges and Immunities of the International Criminal Court*, 9 September 2002, 2271 U.N.T.S. 54 [*Agreement*].

continue to be accorded even after he or she has ceased to exercise his or her functions.<sup>35</sup>

Paragraph 18(4) of the Agreement provides that the same privileges and immunities shall apply *mutatis mutandis* to persons assisting defence counsel. The near identical wording of Article 48(4) of the *Rome Statute* and Article 29(4) of the *ICTR Statute* is highly significant. The *Rome Statute* and accompanying *Agreement* are critical in affirming that a) immunities should be recognized on the basis of need, not legal status; and b) defence counsel and those assisting them, appearing before the ICC, require immunity from personal arrest and detention to guarantee the independent performance of their functions.

In 2001, the ICC asked the International Criminal Tribunal for Former Yugoslavia (ICTY) and the ICTR to make policy recommendations regarding, *inter alia*, privileges and immunities for the defence. In a discussion paper<sup>36</sup> circulated at the end of the Seventh PrepCom meeting at the UN Headquarters in New York, the ICTR advanced its support for defence functional immunity.

The ICTR's position regarding the "Counsel" and "*Laissez Passer*" section of the ICC *Agreement* reads, *inter alia*:

The right of the accused to 'conduct' his defence in person or through legal assistance of his own choosing implies that under the ICC rules, *counsel should be provided with full means for the preparation of the case. This would imply that counsel should be granted immunities allowing a freedom of movement to and from the seat of the Tribunal, wherever it is located, and to and from all the States where investigations are to be carried out.*<sup>37</sup>

Thus, in 2001, the ICTR took a strong stand on the importance of immunities for the defence for freedom of movement as well as the "full means" to prepare their case.

## G. Equality of Arms

The principle of equality of arms between the accused and the prosecution is a component of the right to a fair trial, as enshrined in Article 20 of the *ICTR Statute*.<sup>38</sup> Procedural equity and ensuring that each party is given sufficient time and

<sup>35</sup> *Ibid.*, art. 18(1(a)-(b)) [emphasis added].

<sup>36</sup> *ICTR Discussion Paper on the working documents of the Preparatory Commission of the International Criminal Court* (24 November – 8 December 2000 and 24 February 2001 – 3 March 2001), undated [*ICTR Discussion Paper*].

<sup>37</sup> *Ibid.* at 5 [emphasis added].

<sup>38</sup> *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, ICTR-96-3, Judgement (26 May 2003) at para. 44 (International Criminal Tribunal for Rwanda, Trial Chamber); *The Prosecutor v. Clément Kayishema & Obed Ruzindana*, ICTR-95-1-A, Judgement (1 June 2001), at para. 67 (International Criminal Tribunal for Rwanda, Trial Chamber) [*Kayishema*]; *The Prosecutor v. Ferdinand Nahimana*,

resources to present its case are particularly relevant to respect the “equality of arms” principle.<sup>39</sup> The extent of the immunity extended to the defence does not, *prima facie*, involve questions of procedural equity and the mode of presentation of the case for the accused before the Chamber. However, denial of immunity from domestic legal process for defence members threatens the very capacity of the defence to gather sufficient evidence and witnesses to present a case.

There is a serious “equality of arms” issue inherent in the suggestion that, while prosecution staff benefits from certain privileges and immunities in performance of their official functions, members of the defence do not. This is especially so where the relevant immunity provides a very specific and concrete advantage to the prosecution during investigations in the field. Denying defence members functional immunity from domestic arrest and prosecution, as enjoyed by prosecution staff, brings about the risk of severely compromising the effectiveness of defence investigations and of interfering with the defence’s capacity to perform their official functions free from external pressures.

While the principle of equality of arms does not apply to conditions outside the control of a Court,<sup>40</sup> the extension of immunity from domestic legal process is a matter entirely within the jurisdiction of the Trial Chamber. Indeed, the Trial Chamber is under an obligation to afford the accused *every practicable facility* it is capable of granting under its Rules and Statute to assist the accused in presenting his defence case.<sup>41</sup>

## H. The Reasonable Link between Alleged Conduct and Official Functions

Case law provides that a “reasonable link” between the relevant allegations and the individual’s official functions is sufficient to enliven functional immunity. In *The People v. Leo*, the defendant, a Tanzanian national and employee of the UN in New York, was charged with assault and resisting arrest. He attempted to claim diplomatic immunity on the basis of his status as an employee of the UN. The Court

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ICTR-99-52-T, Decision on the Motion to Stay Proceedings in the Trial of Ferdinand Nahimana (5 June 2003) at para. 4 (International Criminal Tribunal for Rwanda, Trial Chamber); *The Prosecutor v. Ignace Bagilishema*, ICTR-95-1A-T, Judgement (7 June 2001) at para. 14 (International Criminal Tribunal for Rwanda, Trial Chamber).

<sup>39</sup> *Prosecutor v. Naser Oric*, IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case (20 July 2005) at para. 7 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

<sup>40</sup> *Kayishema*, *supra* note 38 at paras. 72-73.

<sup>41</sup> *Prosecutor v. Duško Tadic*, IT-94-1-A, Judgment (15 July 1999) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber). (“Under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case” at para. 52).

rejected his argument, finding no connection between the offence and his employment.<sup>42</sup>

Similarly, it is suggested that the concept of a “reasonable link” between an offence (i.e. event) and employment (i.e. performance of official duties) is a feature of insurance, notably professional liability insurance. This analogy is drawn to assist in analyzing the application of immunity through an insurance “lens”.

Key concepts in insurance such as scope and coverage, for example, are equally applicable to functional immunity. The scope of professional liability insurance is the range of actions or events falling within the performance of one’s professional duties. Similarly, the scope of functional immunity is the range of actions or events that is covered by the immunity, and coverage is the protection afforded. In the insurance world, *claims* or *events* trigger liability coverage,<sup>43</sup> while for functional immunity it is municipal *legal process*, i.e. civil action or criminal prosecution that triggers its application. Section 22 of the *UN Convention* spells out how functional immunity would apply:

Section 22. 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, 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.<sup>44</sup>

<sup>42</sup> *The People v. Leo*, 407 N.Y. S.2d, 941, (1978) (“[A]nalysis of the facts in this case, in the most liberal perspective possible, fails to demonstrate any basis whatsoever upon which to conclude that the defendant was acting in his official capacity or that there was some *reasonable relationship* between the alleged altercation and defendant’s United Nations employment.” at para. 943 [emphasis added]).

<sup>43</sup> Fonds d’assurance responsabilité professionnelle du Barreau du Québec, *Standard Compulsory Professional Liability Insurance Policy*, Section I, clause 1.09 provides: “CLAIM: a) Any written or verbal monetary demand, b) any written or verbal allegation, received by the *Insured*, with respect to failure to render *Professional Services* or to an error or omission in rendering such services under coverages A and B, or with respect to a misappropriation of funds required to be deposited in trust under coverage C.” “Professional Services” is defined under clause 1.04 as “all services which have or should have been rendered by the named *Insured*, directly or indirectly, solely in his capacity as a lawyer and as a member in good standing of the Barreau du Québec, while he was not exempt from the obligation to subscribe to the *Fonds d’assurance*.”

<sup>44</sup> *UN Convention*, *supra* note 5 art. VI, s. 22(a)-(b) [emphasis added].

Section 22 of the *UN Convention* affords functional immunity from “legal process of every kind”. The non-limitative language together with sub-paragraph (c)<sup>45</sup> ensure its extension to *criminal* as well as civil proceedings.

The reasonable link triggering functional immunity under this provision lies, as mentioned above by sub paragraph (b), in the allegations “in respect of words spoken or written and acts done by [the UN servants] in the course of the performance of their mission.” Consequently, functional immunity will apply when the allegations relate to words spoken or written, or to acts done in the course of the performance of one’s mission. In determining the parameters of one’s mission, the *Privileges and Immunities Advisory Opinion* is instructive.

### I. Defining the Expert’s “Mission”

The facts underlying the *Privileges and Immunities Advisory Opinion* are relatively straightforward. A subsidiary organ of Economic and Social Council (ECOSOC)<sup>46</sup> elected Mr. Dumitru Mazilu, a Romanian national, to serve as a member of the Sub-Committee on Prevention of Discrimination and Protection of Minorities for a three-year term. Originally set to expire in December 1986, the mandate was extended for an additional year. In August 1987, Mr. Mazilu apparently sent a telegram to the Sub-Commission advising of his inability to attend the following session and to present his report due to illness. Various further attempts were made to contact him to assist with the preparation of his report and to submit it to the Sub-Commission. However Romania stated that “at Mr. Mazilu’s request” he had been “put on the retired list as being unfit for service.”<sup>47</sup> In a series of letters from 1988, Mr. Mazilu described his personal situation: in the first of these letters he alleged that he had refused to comply with Romania’s request to voluntarily decline to submit his report to the Sub-Commission. He also consistently complained that he and his family were subject to strong pressure.<sup>48</sup>

To assist Mr. Mazilu in the completion and presentation of his report, the Sub-Commission adopted a resolution requesting the Secretary-General to approach Romania and to invoke the applicability of the *UN Convention* to allow assistance to be brought to Mr. Mazilu for the preparation and presentation of his report; and, in the event of disagreement, to request an advisory opinion from the ICJ on the applicability of the *UN Convention*—the *Privileges and Immunities Advisory Opinion*. It is in this context that the question of applicability of Section 22 of the *UN Convention* to the case of Mr. Mazilu before the court was raised.<sup>49</sup>

<sup>45</sup> *UN Convention*, *supra* note 5 art. VI, s. 22(c) (“Inviolability for all papers and documents”).

<sup>46</sup> Commission on Human Rights, subsidiary organ of the Economic and Social Council, created in 1946 in accordance with Articles 55(c) and 68 of the *Charter of the United Nations*, *supra* note 16.

<sup>47</sup> *Privileges and Immunities Advisory Opinion*, *supra* note 27 at 181.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.* at 192, One hundred and twenty-four states, including Romania, were parties to the *UN Convention* in 1989.

The Court examined the applicability of Section 22 *ratione personae*, *ratione temporis* and *ratione loci*, i.e. what is meant by “experts on mission” and then the meaning to be attached to “period of [the] missions.”<sup>50</sup> After noting that both Section 22 and the *travaux préparatoires* were of little assistance,<sup>51</sup> it held:

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.

In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions—increasingly varied in nature—to persons not having the status of United Nations officials. Such persons have been entrusted with mediation, with preparing reports, preparing studies, *conducting investigations or finding and establishing facts*. [...] In addition, many committees, commissions or similar bodies whose members serve, not as representatives of States, but *in a personal capacity*, have been set up within the Organization. [...] In all these cases, the practice of the United Nations shows that the persons so appointed, and in particular the members of these committees and commissions, have been regarded as experts on missions within the meaning of Section 22.<sup>52</sup>

The Court then turned its attention to the meaning of the phrase “during the period of their missions, including the time spent on journeys” and the question as to whether experts on mission are covered only during missions requiring travel:

To answer this question the Court considers it necessary to determine the meaning of the word “*mission*” in French and “*mission*” in English, the two languages in which the General Convention was adopted. [...] *The Court considers that Section 22, in its reference to experts performing missions for the United Nations, uses the word ‘mission’ in a general sense*. While some experts necessarily have to travel in order to perform their tasks, others can perform them without having to travel. In either case, the intent of Section 22 is to ensure the independence of such experts in the interests of the Organization by according them the privileges and immunities necessary for the purpose. *Accordingly, Section 22 is applicable to every expert on mission, whether or not he travels.*<sup>53</sup>

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<sup>50</sup> *Ibid.* at 193.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* at 194 [emphasis added].

<sup>53</sup> *Ibid.* at 194-195 [emphasis added].

Finally, the ICJ asked whether experts on mission can invoke the privileges and immunities under Section 22 against the State of which they are nationals or on the territory where they reside. In this regard, the Court found that the *UN Convention* took one approach when it came to the privileges and immunities afforded to Member State representatives (Article IV, Sections 11, 12 and 13) and another in relation to experts on mission.<sup>54</sup> The Court noted that the privileges and immunities “are not applicable as between a representative and the authorities of the State of which he is a national or of which he is or has been the representative”<sup>55</sup> and observed that Article V (officials of the Organization) and Article VI (experts on mission) do not contain a comparable rule.

In short, the Court was of the opinion that Section 22 of the *UN Convention* is applicable to persons to whom the Organization entrusts a mission, and who are therefore entitled to enjoy the privileges and immunities with a view to the independent exercise of their functions; that during the whole period of such missions, they enjoy these functional privileges and immunities whether or not they travel, and that such privileges and immunities may be invoked as against the State of nationality or of residence unless a reservation to Section 22 has been validly made by that State.<sup>56</sup>

In Mr. Mazilu’s case, membership in the Sub-Commission lapsed on 31 December 1987, though he had thereafter remained a *special rapporteur*.<sup>57</sup> The Court found that at no time during this period did Mr. Mazilu “cease to have the status of an expert on mission within the meaning of Section 22, or ceased to be entitled to enjoy for the exercise of his functions the privileges and immunities provided for therein.”<sup>58</sup>

### III. Three Cases of ICTR Defence Functional Immunity

ICTR Defence counsel, legal assistants and investigators are assigned or hired for determinate or indeterminate periods.<sup>59</sup> All perform work under a mission

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<sup>54</sup> *Ibid.* at 195.

<sup>55</sup> *Ibid.* The Court also found that the difference could be readily explained: “[T]he privileges and immunities of Articles V and VI are conferred with a view to ensuring the independence of international officials and experts in the interests of the Organization. This independence must be respected by all States, including the State of nationality and the State of residence. Some States parties to the *General Convention* [...] have indeed entered reservations to certain provisions of Article V or of Article VI itself [...], as regards their nationals or persons habitually resident on their territory. The very fact that it was felt necessary to make such reservations confirms that in the absence of such reservations, experts on missions enjoy the privileges and immunities provided for under the *Convention* in their relations with the States of which they are nationals or on the territory of which they reside.”

<sup>56</sup> *Ibid.* at 195-196.

<sup>57</sup> *Ibid.* at 197.

<sup>58</sup> *Ibid.*

<sup>59</sup> ICTR Registrar, *Directive no. 1/96 on the Assignment of Defence Counsel* (1996) as amended. Art. 15 entitled *Scope of the Assignment* provides: “(A) A suspect or accused shall only be entitled to have one Counsel assigned to him and that Counsel shall deal with all stages of procedure and all matters arising



with which they were entrusted through the ICTR. Part of that duty will involve visits to crime scenes and interviews of witnesses in Rwanda. As the ICJ held, “[t]he essence of the matter lies not in their administrative position but in the nature of their mission.”<sup>60</sup> The *UN Convention* also provides that immunity survives the expiry of the term of the “mission.”<sup>61</sup> The following three cases illustrate how the ICTR responded to urgent situations involving the security of ICTR defence members and Rwanda’s refusal to recognize the U.N. immunity that ICTR defence members are said to enjoy: Callixte Gakwaya, Léonidas Nshogoza and Peter Erlinder.

### A. Callixte Gakwaya

In February 2006, Rwanda’s Special Representative to the ICTR denounced the assignment of Gakwaya on the grounds that he was a genocide suspect who figured on a list Rwanda had provided to Interpol.<sup>62</sup> In response to the allegations, the ICTR Deputy Registrar confirmed that when he previously met with the Special Representative to inform him of Gakwaya’s assignment, he (the Deputy Registrar) accepted it on a conditional basis.<sup>63</sup> In further response to the Rwandan accusations, the ICTR Deputy Registrar confirmed that the Tribunal had in fact asked Rwanda about Gakwaya on five occasions (the first going back to 2001 when Gakwaya was hired as defence legal assistant on a different case) and that all inquiries went unanswered.<sup>64</sup> The Deputy Registrar indicated that the Tribunal could not refrain from hiring a person unless Rwanda provided reasons, adding that Government’s reference to a partial unnumbered list reflected an unsubstantiated position on the matter.<sup>65</sup>

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out of the representation of the suspect or accused or of the conduct of his Defence. No Counsel shall be assigned to more than one suspect or accused. (B) Where persons accused of the same or different counts are jointly charged or tried, each accused shall be entitled to request assignment of separate Counsel. (C) Whenever appropriate and at the request of the assigned Counsel, the Registrar may, pursuant to Article 13 above, appoint a co-Counsel to assist the assigned Counsel. The first Counsel shall thereafter be designated lead Counsel.” Defence staff members’ missions are determinate renewable contracts with the ICTR normally lasting from three to six months.

<sup>60</sup> *Privileges and Immunities Advisory Opinion*, *supra* note 27 at 194.

<sup>61</sup> *UN Convention*, *supra* note 5, art VI, s. 22(b): “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[.]”

<sup>62</sup> “Selon le [Tribunal pénal international pour le Rwanda (TPIR)], l’embauche d’un avocat recherché par Kigali s’est faite dans la légalité”, Fondation Hirondelle–Agence de presse Hirondelle à Arusha Tribunal Pénal International pour le Rwanda, 3 March 2006. (“Mardi dernier, le représentant du gouvernement rwandais auprès du TPIR Aloys Mutabingwa avait dénoncé la commission de Gakwaya, expliquant que son nom apparaît en 140<sup>e</sup> [sic] position sur la liste (confidentielle) de plus de 300 suspects de génocide remise à Interpol.”)

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.* (“Je ne suis pas en position de prendre des mesures en rapport avec le recrutement en l’absence d’une information sensible du gouvernement rwandais”, affirme O’Donnell, ajoutant qu’il est important de noter au passage que la liste remise à Interpol [sans numéro de référence] n’est qu’un reflet de la position non prouvée du gouvernement rwandais qu’il s’agit d’un génocidaire.”)

In June 2005, the ICTR Registry assigned Mr. Callixte Gakwaya to the *Munyakazi* case.<sup>66</sup> On Friday, 1 September 2006, while on official UN mission as Munyakazi's lead counsel, Mr. Callixte Gakwaya was arrested by Tanzanian police and placed in detention in a Tanzanian prison cell. The ICTR defence counsel association, the *Association des avocats de la défense du TPIR (ADAD)*, called emergency meetings to discuss the situation and to enlist the assistance of the ICTR Registry.

The ICTR Registrar issued a public statement:

Following the arrest of Defence Counsel Callixte Gakwaya, Lead Counsel for the accused Yussuf Munyakasi, on 1 Friday September 2006, the Registrar of the International Criminal Tribunal for Rwanda (ICTR), Mr. Adama Dieng, expressed his strong concern to the Tanzanian authorities and requested clarification of the reasons for the arrest. Mr. Dieng notes that the Tribunal did not receive any prior notice of the intention to arrest Mr. Gakwaya and that no prior consultations have occurred in respect of the case between officials of the ICTR and the Tanzanian police force.

As soon as the Tribunal was informed, appropriate measures were taken to secure the welfare of Mr. Gakwaya in police custody. [...]

*The Registrar notes that the agreement made between the United Nations and the United Republic of Tanzania provides for certain immunities in respect of Counsel admitted to represent those accused before the Tribunal. In particular, the Agreement required that Counsel "shall not be subjected to any measure which may affect the free and independent exercise of his or her functions under the Statute." The Registrar notes that Mr. Gakwaya was present in Tanzania in his official capacity as Counsel for an accused.*

The Registrar wishes to underline that he exercises his functions in full independence in accordance with the *Statute of the Tribunal* and the *Rules of Procedure and Evidence*, and not on the basis of partial interests of the parties before the Tribunal or under external pressures.<sup>67</sup>

Immediately following his release from the Tanzanian prison, Mr. Gakwaya addressed his colleagues indicating that he personally believed that had defence colleagues not been present at the time of the arrest, he would have been eliminated. He also confirmed that the Rwandan Special Representative to the ICTR was present

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<sup>66</sup> "CONSIDERING the Registrar's letter dated 16 June 2005, assigning Mr. Callixte Gakwaya as Lead Counsel to the Accused Yussuf Munyakazi ('the Accused')" *The Prosecutor v. Yussuf Munyakazi*, ICTR-97-36-1, Decision on Withdrawal of the Assignment of Mr. Callixte Gakwaya, Lead Counsel for the Accused Person, Mr. Yussuf Munyakazi (18 September 2006) [*Decision on Withdrawal*].

<sup>67</sup> International Criminal Tribunal for Rwanda, Statement, ICTR/INFO-9-3-16.EN, "Arrest of Counsel Callixte Gakwaya" (5 September 2006), online: ICTR <<http://www.ictr.org/ENGLISH/PRESSREL/2006/9-3-16.htm>> [emphasis added].

when he was brought to the police station.<sup>68</sup> On 18 September 2006, the ICTR Registrar withdrew Mr. Gakwaya's mandate stating, *inter alia*:

**IN VIEW OF** the letter from Mr. Callixte Gakwaya, dated 18 September 2006, where he submits his resignation as Lead Counsel for the Accused in light of the mounting insecure situation resulting from the allegations against him made by the Government of Rwanda that hinder him from fully representing his client's interests; [...] **ACCEPTS** Mr. Gakwaya's resignation as received on 18 September 2006.<sup>69</sup>

While the decision further indicates that the Registry received a list of allegations against Mr. Gakwaya, it does not specify the nature of the allegations nor the date of receipt.<sup>70</sup> Approximately one year after his ordeal in Arusha, Mr. Gakwaya passed away in his country of refuge.

## B. Léonidas Nshogoza

On 16 June 2007 while on official UN mission in Rwanda, Mr. Nshogoza was arrested and detained on allegations of witness tampering and "genocide minimization."<sup>71</sup> The charges alleged conduct dating back to 2004 and 2005 when

<sup>68</sup> Meeting of ICTR Defence members held at the ICTR in Arusha, Tanzania on 6 September 2006.

<sup>69</sup> *Decision on Withdrawal*, *supra* note 66.

<sup>70</sup> *Ibid.* ("FURTHER CONSIDERING the completion of the investigation carried out by the Office of the Registrar after receiving the list of allegations against Mr. Gakwaya from the Government of Rwanda").

<sup>71</sup> *The Prosecutor v. Léonidas Nshogoza*, ICTR-07-91-I, Indictment (17 December 2007), The Rwandan "Information Brief" (i.e. indictment) the C.I.D (Criminal Investigations Department) forwarded to the Public Prosecutor, charges Mr. Nshogoza thusly: "Léonidas Nshogoza has committed the crime of grossly minimizing genocide as provided for under Article 4 of Law No 33 bis/2003 of 06 September 2003 punishable as a crime of genocide, crimes against humanity and war crimes **by looking for witnesses to testify in favour of the perpetrators of the genocide** with the intent to destroy prosecution evidence in the cases he is working. By so doing, he has misled the survivors in order to give weight to defence evidence before the tribunal. Moreover, there is criminal conspiracy between Nshogoza and the Defence witnesses whom he had contacted and promised money though he did not honour the promise he made to them. As his plan had succeeded, he felt it was not necessary to pay for the testimonies that he had already obtained. Nshogoza is also guilty of actively offering bribes and of making such promises. [Identified ICTR defence protected witness] and [Identified ICTR defence protected witness] are guilty of passively offering bribes and of having accepted a promise of that nature, a crime provided for under articles 11, 14 and 15 of Law No 23/2003 of 07 August 2003 on the prevention and repression of corruption and similar crimes." Pro Justice *and Information Brief of Criminal Investigations Officer in Gasabo*, File No 242/SU/JP/KGL/07 Transmitted to the Public Prosecutor's Office on 18 June 2007 (Official ICTR translation, WS07-0624F5F (E) of Kinyarwanda original). See also *Letter from the Substitut du Procureur auprès du Tribunal de grande instance de Gasabo* to the President of the Tribunal de grande instance de Gasabo (no/D11/A/Progsbo), RP 0531/07/TGI/GSBO, dated 28 August 2007. Emphasis added.

Nshogoza was the investigator for Jean de Dieu Kamuhanda.<sup>72</sup> At the time of the arrest, Mr. Nshogoza was the defence investigator for Father Emmanuel Rukundo.<sup>73</sup>

The *Order of the Gasabo Regional Court to Remand Léonidas Nshogoza in Custody* alleged that Nshogoza met with the prosecution witnesses and offered to pay them in exchange for their testimony for the defence. The “genocide minimization” charge refers to accusations of “destruction of evidence”, in particular the alleged *disappearance* of evidence following the two recantations.<sup>74</sup> Mr. Nshogoza was arrested by Rwandan authorities two weeks before the scheduled commencement of the defence case for Emmanuel Rukundo.<sup>75</sup> The *Rukundo* defence sought judicial relief by way, *inter alia*, of a motion for the investigator’s immediate and unconditional release arguing functional immunity and the ICTR’s exclusive jurisdiction.<sup>76</sup> In its 4 July 2007 decision on urgent defence motions, the Trial Chamber held:

Regarding the Defence Motion requesting the unconditional release of Mr. Nshogoza, or in the alternative the deferral of the proceedings to the Tribunal, the Chamber finds that the Defence argument on the alleged illegal detention of Mr. Nshogoza based on the latter’s functional immunity is not adequately documented. Furthermore, the Chamber is not

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<sup>72</sup> This timeframe follows the rendering of the trial judgment in the *Kamuhanda* case. See *The Prosecutor v. Jean de Dieu Kamuhanda*, ICTR-99-54A-T, Judgement, (22 January 2004) (International Criminal Tribunal for Rwanda, Trial Chamber) [*Kamuhanda*].

<sup>73</sup> *The Prosecutor v. Emmanuel Rukundo*, ICTR-2001-70-T, (International Criminal Tribunal for Rwanda) [*Rukundo*]. Two persons, one former prosecution witness and someone who provided a written statement to the Office of the Prosecutor (OTP), approached Nshogoza to recant. Following this development, the *Kamuhanda* defence filed a motion under Rule 115 of the *ICTR RPE* to present additional evidence at the appeal stage. *Kamuhanda, Requête aux fins d’admission de nouveaux moyens de preuve supplémentaires en application de l’article 115 du Règlement de procédure et de preuve* (20 September 2004) (International Criminal Tribunal for Rwanda, Appeals Chamber). The Appeals Chamber granted the defence motion in respect of the two persons who had recanted. *Kamuhanda, Decision on Appellant’s Motion for Admission of Additional Evidence on Appeal*, dated 12 April 2005 (confidential).

<sup>74</sup> At a July 2007 hearing, the Rwandan *Parquet* confirmed he had no evidence to demonstrate that Mr. Nshogoza had “destroyed evidence of genocide”, as alleged in support of the “genocide minimization” charge. Instead, he advanced the theory that Mr. Nshogoza was accomplice to this crime allegedly committed by his two co-accused who had recanted their testimonies. See *Tribunal de Haute Instance de Gasabo decision* dated 30 July 2008. Rwandan Law No. 33 *bis*/2003 of 6 September 2003 punishing the crime of genocide, crimes against humanity and war crimes states: “Article 4. Shall be sentenced to an imprisonment of ten (10) to twenty (20) years, any person who will have [...] rudely minimized [genocide] or [...] who will have hidden or destroyed its evidence.”

<sup>75</sup> Email from *Rukundo* lead counsel to co-counsel and to Defence Section dated 20 June 2007. No arrest warrant exists from this time nor is there mention of an arrest warrant in the *Order to Remand*. The *Rukundo* defence case was scheduled to begin 2 July 2007. *Rukundo, Minutes of Proceedings*, dated 4 May 2007; *Rukundo*, ICTR Official English transcript, dated 2 July 2007.

<sup>76</sup> *The Prosecutor v. Emmanuel Rukundo*, ICTR-01-70-T, Requête confidentielle en extrême urgence en libération inconditionnelle de l’enquêteur de la Défense M. NSHOGOZA ou, subsidiairement, en dessaisissement et du Gouvernement Rwandais de l’affaire NSHOGOZA au profit du TPIR – Articles 28 et 29 § 4 du Statut du TPIR (28 June 2007) (International Criminal Tribunal for Rwanda, Trial Chamber).

inclined to address the issue in light of the ongoing efforts of the Registry to liaise with Rwandan authorities to amicably settle the issue.<sup>77</sup>

The *Rukundo* defence filed a motion to certify the 4 July 2007 decision for appeal, which was later denied.<sup>78</sup> Before the Trial Chamber reached its decision, the Registrar filed submissions to report on the progress of his efforts to liaise with Rwandan authorities.<sup>79</sup>

The Registrar wishes to draw to the attention of the Trial Chamber that a representative of the Deputy Registrar's office met with the Rwandan authorities during the week of 9 July 2007. The view transmitted to the representative of the Deputy Registrar's office was that the case of the investigator is a Rwandan criminal case and that it is amenable only to a legal solution. It was further noted that any representations would be expected to be made formally and that formal responses would be given by the Rwandan authorities.<sup>80</sup>

In the absence of an ICTR confirmation that Nshogoza enjoyed functional immunity, the *Rukundo* defence appealed to the Office of the President.<sup>81</sup> Toward the end of its case, it brought a second motion *de novo* requesting the Trial Chamber to *declare* that Mr. Nshogoza enjoys UN functional immunity from domestic legal process; to *affirm* exclusive jurisdiction in relation to the Rwandan charges; and to *order* the Rwandan Government to immediately discontinue domestic criminal proceedings in favour of this Tribunal.<sup>82</sup> The International Criminal Defence Attorneys Association (ICDAA) filed an *amicus* brief supporting the Defence motion, underscoring the Tribunal's authority to issue binding orders to States "when necessary to appropriately administer justice in a case before it."<sup>83</sup>

<sup>77</sup> *The Prosecutor v. Emmanuel Rukundo*, ICTR-01-70-T, Decision on the Motions Relating to the Scheduled Appearances of Witness BLP and the Defence Investigator (4 July 2007) at para. 7 (International Criminal Tribunal for Rwanda, Trial Chamber).

<sup>78</sup> *The Prosecutor v. Emmanuel Rukundo*, ICTR-01-70-T, Request for Certification to Appeal the Trial Chamber's Decision of 4 July 2007 (confidential), (11 July 2007) (International Criminal Tribunal for Rwanda, Trial Chamber); *The Prosecutor v. Emmanuel Rukundo*, ICTR-01-70-T, Decision on the Defence Motion for Certification to Appeal the Chamber's Decision of 4 July 2007, (25 July 2007) (International Criminal Tribunal for Rwanda, Trial Chamber).

<sup>79</sup> *The Prosecutor v. Emmanuel Rukundo*, ICTR-01-70-T, Registrar's Submissions under Rule 33(B) of the Rules on Efforts of the Registry to Liaise with Rwandan Authorities (confidential) [*Efforts to Liaise*] (20 July 2007). See also *The Prosecutor v. Emmanuel Rukundo*, ICTR-01-70-T, Urgent Defence Request for Court Order that United Nations Functional Immunity Applies to Léonidas Nshogoza, Defence Investigator for Emmanuel Rukundo Arrested in Rwanda on 16/06/07 (16 October 2007) (International Criminal Tribunal for Rwanda, Trial Chamber) [*Motion for Immunity*].

<sup>80</sup> *Efforts to Liaise*, *ibid.* para. 3.

<sup>81</sup> Letter from *Rukundo* Defence Counsel to ICTR President Byron dated 25 July 2007 filed with the ICTR Registry.

<sup>82</sup> *Motion for Immunity*, *supra* note 79.

<sup>83</sup> *The Prosecutor v. Emmanuel Rukundo*, ICTR-01-70-T, Request for Permission to File Brief of Amicus Curiae, International Criminal Defence Attorneys Association (ICDAA) Concerning Urgent Defence Request for Court Order that United Nations Functional Immunity Applies to Léonidas Nshogoza,

On 28 November 2007, the ICTR Registrar filed submissions further to the defence motion for immunity. The Registrar reported that a UN-OLA Legal Opinion concluded that Léonidas Nshogoza enjoyed functional immunity. The Registrar's submissions included, *inter alia*, UN-OLA instructions to the Registrar to take certain action:

4. In conclusion, the Office of Legal Affairs suggests that the best course to adopt is to advise the Trial Chamber that Mr. Nshogoza does benefit from immunity as a person on mission pursuant to Article XVII of the *Headquarters Agreement*, pursuant to which, waiver of that immunity falls to the President of the Tribunal;
5. *The Office of Legal Affairs further advises that the Registrar notify the Rwandan authorities of the immunity of Mr. Nshogoza and inform that no waiver of that immunity has been granted;*
6. The Office of Legal Affairs finally notes that the matter should then be dealt with by the President of the Tribunal;
7. The Registrar further submits that it belongs to the Trial Chamber to decide the legal basis for any immunity, among the alternatives identified by the Office of Legal Affairs;
8. The Registrar awaits the Trial Chamber's instructions on this issue.<sup>84</sup>

On 30 November 2007 the *Tribunal de Grande Instance de Gasabo, proprio motu*, suspended proceedings *sine die* against Nshogoza and unconditionally released him from prison.<sup>85</sup> In its written decision, the Court made no reference to Nshogoza's functional immunity; it did state that it suspended proceedings pending confirmation that it had jurisdiction to try the case, and that the alleged acts violated ICTR rules governing investigators to the extent that they constituted an infraction.<sup>86</sup>

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Defence Investigator for Emmanuel Rukundo Arrested in Rwanda on 16/06/07 (Rule 74 of Rule of procedure and Evidence) (11 November 2007) at paras. 4, 6 (International Criminal Tribunal for Rwanda, Trial Chamber): "4. Recognition of functional immunity in this case is vital to the development of international criminal law and procedure as the basis for fundamental fairness, equality of arms and fair trial guarantees. [...] 6. Because this type of case is appearing for the first time but is of key importance, other international courts and tribunals will be looking to the decision of this Honourable Tribunal in dealing with similar cases in the future."

<sup>84</sup> *Submissions on Functional Immunity, supra* note 30 at paras. 4-8 [emphasis added].

<sup>85</sup> The court released Mr. Nshogoza unconditionally invoking Article 87 of the *Rwandan Code of Criminal Procedure*. See Tribunal de grande instance de Gasabo, Judgement RP 0531/07/TGI/GSBO, dated 30 November 2007.

<sup>86</sup> Tribunal de grande instance de Gasabo, Judgement RP 0531/07/TGI/GSBO, dated 30 November 2007, para. 37: "The Public Prosecutor's Office stated that Léonidas Nshogoza and [identified ICTR protected witness] violated the rules governing the investigators of the Tribunal in Arusha. In his defence, Léonidas Nshogoza said that, in his view, the Public Prosecutor's Office and the Rwandan courts did not have jurisdiction to try him for violating the rules governing the investigators of the Tribunal in Arusha. He requested a stay of decision so that the Higher Instance Court in Gasabo could obtain said rules with the assistance of the Office of the Prosecutor of the Tribunal at Remera. He stated that the Tribunal could then take a decision *on its jurisdiction* over this case and *whether the acts*

Nshogoza was then prosecuted for contempt at the ICTR based on the same allegations raised in the Rwandan proceedings. Shortly after the initial appearance, a Kigali newspaper *The New Times* published an article entitled, “Country Says Still Has Case Against ICTR Investigator” wherein a Rwandan prosecution spokesperson was quoted as saying, in relation to Mr. Nshogoza: “We still have a case against him despite the fact that he surrendered to another court.”<sup>87</sup> Following 17 months of detention pending judgement, Mr Nshogoza was acquitted of all witness bribery charges and convicted on one count of violating a witness protection order.<sup>88</sup>

As at the date of publication, the Rwandan criminal proceedings, based on allegations for which Nshogoza was tried and judged at the ICTR, are still pending.

### C. Peter Erlinder

On 28 May 2010, ICTR Defence Counsel Professor Peter Erlinder was arrested by Rwandan authorities and detained without being formally charged for three weeks. Erlinder was in Rwanda representing a leader of a political opposition party who was arrested when she attempted to register her party for upcoming elections.<sup>89</sup> Allegations against him related to his work at the ICTR.<sup>90</sup>

Erlinder moved the Rwandan court for provisional release and filed an appeal when his motion was denied.<sup>91</sup> Following more than two weeks of imprisonment, on 15 June 2010 the ICTR sent a *Note Verbale* to the Rwandan Government indicating that the UN Office of Legal Affairs “advised the ICTR to formally assert immunity for Professor Erlinder without delay and request his immediate release.”<sup>92</sup> The *Note Verbale* did not limit the application of Erlinder’s functional immunity:

Although no formal copy of the charges brought against Professor Erlinder has been received yet, the ICTR takes the view that the decision of the

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*committed by Léonidas Nshogoza actually constituted a crime under the rules governing the investigators of the Tribunal in Arusha.*” [Unofficial translation of Kinyarwanda original] [Emphasis added]. The Rukundo defence subsequently withdrew its motion for functional immunity on the basis that *OLA Legal Opinion* rendered it moot. *Rukundo, Formal Withdrawal of Defence Motion Further to United Nations’ Confirmation of Immunity for Investigator Léonidas Nshogoza*, dated 4 December and filed 5 December 2007. The defence then seized the ICTR Presidency with the matter of asserting Mr. Nshogoza’s functional immunity to the Rwandan authorities pursuant to the *OLA Legal Opinion*. Letter from Rukundo defence to ICTR President Byron dated and filed 6 December 2007 (Rules 19 and 33 of the *ICTR RPE*). No reply has yet been received to this letter.

<sup>87</sup> Felly Kimenyi, “Rwanda Says Still Has Case against ICTR Investigator” *The New Times* (Kigali) (15 February 2008), online: <http://www.newtimes.co.rw/index.php?issue=13441&article=4200> [Felly Kimenyi].

<sup>88</sup> *Nshogoza*, Judgement, 7 July 2009.

<sup>89</sup> Victoire Ingabire, Chairperson of the United Democratic Forces.

<sup>90</sup> Rwanda Court Decision, RDP0312/10/TGI/GSBO, High Court of Gasabo, 7 June 2010, available online: <http://www.jurist.org/doc/erlinderbail.doc+RDP0312/10/TGI/GSBO+kabuga&cd=3&hl=en&ct=clnk&gl=us&client=firefox-a>.

<sup>91</sup> *Ibid.*

<sup>92</sup> ICTR/RO/06/10/175, Note Verbale to the Ministry of Foreign Affairs and Cooperation of the Government of Rwanda, Cabinet du Greffier, Office of the Registrar, 15 June 2010.

High Court of Gasabo constitutes a sufficient basis to identify a link between the nature of the accusations against Professor Erlinder and his mandate with the Tribunal.<sup>93</sup>

Contemporaneous with the arrest of Erlinder, ICTR defence teams began filing motions for a stay of proceedings.<sup>94</sup> In one decision denying the request for a stay, the *Niyezimana* Trial Chamber recognised ICTR defence immunity albeit with a more limited scope. Gibson recently captured the ICTR's ambivalent approach to defence functional immunity in her account of the Tribunal's response to the Erlinder arrest:

Of further concern is the apparent attempt to limit the scope and extent of the immunity afforded to defence counsel on the part of the ICTR itself. In *Niyezimana*, the Chamber qualified this immunity. It held that 'defence counsel and their investigators [are] experts on UN missions; thus, they are covered by the Immunity Clause and the Memorandum *when they conduct investigations in Rwanda that are related to the preparation of their Defence case.*'

Affording immunity to defence counsel and investigators only 'when they conduct investigations in Rwanda' is not uncontroversial and raises several questions. Would defence counsel be subject to arrest if they remain in Rwanda after the expiry of their mission? What is the status, for example, of a defence investigator who may live in Rwanda, but who is not at the time of his arrest conducting investigations in that capacity? The limitation in *Niyezimana* also appears incompatible with the ICTR's assertion of blanket immunity in the case of Erlinder whose immunity was not explicitly limited to acts related to his defence of Major Ntabakuze.<sup>95</sup>

On 18 June 2010 the Rwandan Court of Appeal reversed the decision of the court of first instance, and Erlinder was released for health reasons. The Rwandan proceedings against Erlinder have not been withdrawn, and it is uncertain whether he will be able to continue representing his client. The Appeals Chamber now seized of the *Ntabakuze* appeal case has not yet rendered its decision on the appellant's motion for injunctive relief,<sup>96</sup> that seeks, *inter alia*, a court order for Rwanda to cease all proceedings against Lead Counsel Erlinder.

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<sup>93</sup> *Ibid.*

<sup>94</sup> See, for example, *Kalimanzira*, Requête en ajournement d'audience d'appel suite à l'arrestation au Rwanda de Me Peter Erlinder, 1 June 2010; Rukundo, Requête aux fins d'ajournement de l'audience des plaidoiries », 2 June 2010.

<sup>95</sup> Kate Gibson, The Arrest of ICTR Defence Counsel Peter Erlinder in Rwanda, ASIL Insight, August 11, 2010, Volume 14, Issue 25, accessed on <http://www.asil.org/search.cfm?displayPage=1441>, 18 August 2010.

<sup>96</sup> *Ntabakuze*, Aloys Ntabakuze's Extremely Urgent Requet 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.



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All members of the ICTR defence enjoy UN functional immunity under Article 22 of the *UN Convention*.

Since the creation of the Tribunal, the ICTR has failed to consistently recognise and assert functional immunity for ICTR defence members. Despite being a signatory to the Convention on Privileges and Immunities of the United Nations, Rwanda has repeatedly ignored U.N. immunity by interfering with defence investigations and by arresting defence members. Defence teams must be able to carry out their duties free from fear of interference, influence, and incarceration. Of critical concern is the high risk faced by ICTR defence members of Rwandan origin and particularly after the Tribunal closes its doors.

In the larger picture, state interference with defence work hinders the Tribunal's search for the truth.

Formal recognition and consistent application of functional immunity for members of the ICTR defence teams is required now. Until the ICTR unequivocally affirms UN functional immunity on behalf of all ICTR defence team members, defence teams are unable to fulfill their functions effectively and independently. Until Rwanda complies with its international obligations, any immunity asserted by the Tribunal on behalf of ICTR defence members is illusory. A UN Security Council resolution requiring all states, and Rwanda in particular, to respect ICTR Defence functional immunity would be step in the right direction.