

PETITION TO:

UNITED NATIONS

WORKING GROUP ON ARBITRARY DETENTION

Chair-Rapporteur: Mr. José Guevara (Mexico)
Vice-Chair on follow-up: Ms. Leigh Toomey (Australia)
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Mr. Seong-Phil Hong (Republic of Korea)

**HUMAN RIGHTS COUNCIL
UNITED NATIONS GENERAL ASSEMBLY**

In the Matter of
Frank Rusagara, Tom Byabagamba, and François Kabayiza
Citizens of the Republic of Rwanda

v.

Government of the Republic of Rwanda

Petition for Relief Pursuant to Resolutions 1991/42, 1994/32, 1997/50, 2000/36, 2003/31
2006/102, 6/4, and 24/7

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July 14, 2017

**QUESTIONNAIRE TO BE COMPLETED BY PERSONS ALLEGING ARBITRARY
ARREST OR DETENTION**

Mr. Frank Rusagara (Sections I through III)

I. IDENTITY

1. *Family Name:* Rusagara
2. *First Name:* Frank Kanyambo
3. *Sex:* Male
4. *Age at the Time of Detention:* 59
5. *Nationality:* Rwandan
6.
 - (a) *Identity document (if any):* Passport
 - (b) *Place of Issue:* Rwanda
 - (c) *On (date):* [REDACTED]
 - (d) *No.:* [REDACTED]
7. *Profession and/or activity (if believed to be relevant to the arrest/detention):* Frank Rusagara is a decorated Rwandan military officer, holds a Ph.D. in history, and is a published author. He was a member of the Rwandan Patriotic Front (“RPF”) when the RPF ended the Rwandan genocide in 1994, and he subsequently served as the President of the Kanombe Military High Court, the Secretary General of the Ministry of Defense, and the military historian for the Rwandan Defense Force (“RDF”), among other positions, before retiring from the military in 2013. He is the brother-in-law of David Himbara, a former economic advisor to Rwandan President Kagame (2000–2002 and 2006–2010) who fled the country after witnessing the physical abuses committed by President Kagame against political dissidents and being threatened himself for questioning President Kagame’s economic policies. Mr. Rusagara and Dr. Himbara maintained contact before and at the time of the former’s arrest. He is also the brother-in-law of Tom Byabagamba, co-applicant in this communication.
8. *Address of usual residence:*
[REDACTED]

II. ARREST

1. *Date of arrest:* August 17, 2014

2. *Place of arrest (as detailed as possible):* Frank Rusagara was arrested at his home, located at Kacyiru sector, Kibaza cell, Bwiza village, Rwanda.
3. *Did they show a warrant or other decision by a public authority?* No
4. *Authority who issued the warrant or decision:* N/A
5. *Relevant legislation applied (if known):* Mr. Rusagara was initially imprisoned for public defamation (Art. 288 of the Penal Code).

III. DETENTION

1. *Date of detention:* Arrested on August 17, 2014; convicted and sentenced on March 31, 2016
2. *Duration of detention (if not known, probable duration):* From August 17, 2014, to the date of this communication
3. *Forces holding the detainee under custody:* Rwandan government authorities
4. *Places of detention (indicate any transfer and present place of detention):* Mr. Rusagara was originally detained at Mulindi Military Prison in Kigali, Rwanda. He has since been transferred to the Kanombe Barracks in Kigali, Rwanda.
5. *Authorities that ordered the detention:* Kanombe Military High Court
6. *Reasons for the detention imputed by the authorities:* Mr. Rusagara was originally charged with public defamation (Art. 288 of the Rwandan Penal Code). Later, Mr. Rusagara was charged with participating in a seditious meeting (Art. 468 of the Rwandan Penal Code), being a “leader who tarnishes the image of the country or the government” (Art. 660 of the Rwandan Penal Code), and illegally possessing a firearm (Art. 671 of the Rwandan Penal Code). Eventually, the government charged Mr. Rusagara with “inciting insurrection or trouble amongst the population” (Art. 463 of the Rwandan Penal Code). The charges under Arts. 288 and 468 of the Rwandan Penal Code were not raised in the government’s ultimate charging document.
7. *Relevant legislation applied (if known):* Articles 463, 660, and 671 of the Rwandan Penal Code

Mr. Tom Byabagamba (Sections IV through VI)

IV. IDENTITY

1. *Family Name:* Byabagamba
2. *First Name:* Tom
3. *Sex:* Male

4. *Age at the Time of Detention:* 47
5. *Nationality:* Rwandan
6. (a) *Identity document (if any):* Passport
(b) *Place of Issue:* Rwanda
(c) *On (date):* Unknown
(d) *No.:* Unknown
7. *Profession and/or activity (if believed to be relevant to the arrest/detention):* Mr. Byabagamba is a decorated Rwandan military officer and holds an M.A. in Strategic Security Studies. After fighting alongside President Kagame in the RPF, Mr. Byabagamba was a long-serving member of the President's security service before leading the Republican Guard from 2003 to 2010. Mr. Byabagamba, the brother of Dr. Himbara, was removed from his position in 2010, shortly after Dr. Himbara departed Rwanda. In 2011, Mr. Byabagamba took on a role in counter-terrorism and the Ministry of Defense and RDF, and he served in the U.N. Mission in South Sudan from 2012 to 2014. Mr. Byabagamba and Dr. Himbara also maintained contact before and at the time of the former's arrest.
8. *Address of usual residence:*



V. ARREST

1. *Date of arrest:* August 23, 2014
2. *Place of arrest (as detailed as possible):* Tom Byabagamba was arrested at his home, located at Remera sector, Nyarutaruma cell, Kibiraro II village, Rwanda.
3. *Did they show a warrant or other decision by a public authority?* No
4. *Authority who issued the warrant or decision:* N/A
5. *Relevant legislation applied (if known):* Unknown

VI. DETENTION

1. *Date of detention:* Arrested on August 23, 2014; convicted and sentenced on March 31, 2016
2. *Duration of detention (if not known, probable duration):* From August 23, 2014 to the date of this communication

3. *Forces holding the detainee under custody:* Rwandan government authorities
4. *Places of detention (indicate any transfer and present place of detention):* Since his arrest, Mr. Byabagamba has been detained in the Kanombe Barracks in Kigali, Rwanda.
5. *Authorities that ordered the detention:* Kanombe Military High Court
6. *Reasons for the detention imputed by the authorities:* Mr. Byabagamba was charged with “inciting insurrection or trouble amongst the population” (Art. 463 of the Rwandan Penal Code), being a “leader who tarnishes the image of the country or the government” (Art. 660 of the Rwandan Penal Code), “concealing objects which were used or meant to commit an offense” (Art. 327 of the Rwandan Penal Code), and “desecrate[ing] the national flag” of Rwanda (Art. 532 of the Rwandan Penal Code).
7. *Relevant legislation applied (if known):* Articles 327, 463, 660, and 532 of the Rwandan Penal Code

Mr. François Kabayiza (Sections VII through IX)

VII. IDENTITY

1. *Family Name:* Kabayiza
2. *First Name:* François
3. *Sex:* Male
4. *Age at the Time of Detention:* Unknown
5. *Nationality:* Rwandan
6. (a) *Identity document (if any):* N/A
(b) *Place of Issue:* N/A
(c) *On (date):* N/A
(d) *No.:* N/A
7. *Profession and/or activity (if believed to be relevant to the arrest/detention):* François Kabayiza is a retired sergeant in the RDF. After his retirement from the military, Mr. Kabayiza worked as a driver for Mr. Rusagara.
8. *Address of usual residence:*



VIII. ARREST

1. *Date of arrest:* August 24, 2014
2. *Place of arrest (as detailed as possible):* N/A
3. *Did they show a warrant or other decision by a public authority?* N/A
4. *Authority who issued the warrant or decision:* N/A
5. *Relevant legislation applied (if known):* N/A

IX. DETENTION

1. *Date of detention:* Arrested on August 24, 2014; convicted and sentenced on March 31, 2016
2. *Duration of detention (if not known, probable duration):* From August 24, 2014 to the date of this communication
3. *Forces holding the detainee under custody:* Rwandan government authorities
4. *Places of detention (indicate any transfer and present place of detention):* Since his arrest, Mr. Kabayiza has been detained in the Kanombe Barracks in Kigali, Rwanda.
5. *Authorities that ordered the detention:* Kanombe Military High Court
6. *Reasons for the detention imputed by the authorities:* Mr. Kabayiza was charged with “illegal possession of arms” (Arts. 670 and 671 of the Rwandan Penal Code) and “knowingly concealing evidence that would facilitate the prosecution of a crime or misdemeanor” (Art. 327 of the Rwandan Penal Code).
7. *Relevant legislation applied (if known):* Articles 327, 670, and 671 of the Rwandan Penal Code.

X. DESCRIBE THE CIRCUMSTANCES OF THE ARREST AND/OR THE DETENTION AND INDICATE PRECISE REASONS WHY YOU CONSIDER THE ARREST OR DETENTION TO BE ARBITRARY

A. Statement of Facts

Part 1 of this Statement of Facts gives background on the current political climate in Rwanda in order to illustrate the Rwandan government’s pattern of silencing perceived opposition

through the abuse of human rights. Part 2 of this Statement of Facts details the circumstances surrounding the arrest and continuing detention of Messrs. Rusagara, Byabagamba, and Kabayiza.

1. Rwanda's Pattern of Political Repression and Human Rights Abuses

a. Background: Genocide of 1994 and President Kagame's Ascent

The specter of the 1994 genocide still dominates Rwandan politics and public life. The violence of that spring and summer emerged from longstanding tensions between the country's two ethnic groups, the Hutus and the Tutsis. In the preceding years, a Hutu-controlled government implemented discriminatory policies that led many Tutsis to flee to neighboring countries. In the early 1990s, the RPF (a group mostly consisting of Tutsi exiles) invaded Rwanda, and a ceasefire was imposed between the RPF and the Rwandan government in 1993.

On April 6, 1994, the ceasefire ended when a plane carrying then-President Juvenal Habyarimana (a Hutu) was shot down. Varying accounts of the attack assign responsibility to Hutu extremists and to the RPF, though President Kagame strongly contests the latter narrative. In the 100 days that followed, Hutu militias killed more than 800,000 of their countrymen, the vast majority of whom were Tutsis.¹ The RPF ended the violence by capturing Kigali in July of 1994, marking the beginning of President Kagame's period of influence at the forefront of a Tutsi-dominated government. He was first elected President in 2003, and since then, he has helped Rwanda to achieve significant economic gains.

b. Limitations on Freedom of Expression

The Kagame Administration, however, has failed to guarantee civil liberties for the Rwandan public, routinely silencing opposition in the media, politics, and civil society. Human rights monitors have noted and condemned Rwanda's restrictions of basic liberties and strict control over dissenting voices and specifically noted that dissenters are accused of violence and face legal trouble.² Following a visit to Rwanda in early 2014, the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association stated:

The Government of Rwanda favours "consensus politics" and discourages public criticism and dissent. I am concerned that there is no genuine pluralistic society. Indeed it appears that every dissenting political leader who rejects this consensus approach gets into legal trouble And in all such cases, these politicians are accused of violence or having links with violent groups.³

¹ See, e.g., BBC News, *Rwanda genocide: 100 days of slaughter* (April 7, 2014), <http://www.bbc.com/news/world-africa-26875506>.

² In one recent instance, the UN Working Group on Arbitrary Detention found that two Rwandan journalists were arbitrarily detained based on their exercise of freedom of speech and denied their rights to a fair trial, *Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fourth session (Rwanda)*, Communication No. 25/2012, UN Doc. A/HRC/WGAD/2012/25 (August 27–31, 2012), available at <http://hrlibrary.umn.edu/wgad/25-2012.pdf>.

³ STATEMENT BY THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE RIGHTS TO FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATION AT THE CONCLUSION OF HIS VISIT TO THE REPUBLIC OF RWANDA (January 27, 2014), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14201&LangID=E>.

In its 2016 country report on Rwanda, Human Rights Watch observed similar problems, indicating that “[t]ight restrictions on freedom of expression and political space remained in place.”⁴ The U.S. Department of State echoed these sentiments in a 2014 release, calling on the Kagame Administration to “fully respect freedom of expression.”⁵ The U.S. State Department reiterated in its 2015 human rights report on Rwanda that “the government generally did not tolerate criticism of the presidency and government policy on security matters.”⁶

In prosecuting dissidents and political opponents, the administration routinely introduces unlikely criminal charges against dissenters. For example, both Human Rights Watch⁷ and Amnesty International⁸ have indicated that charges against opposition leaders Bernard Ntaganda and Victoire Ingabire were politically motivated. Mr. Ntaganda, the founder of the PS-Imberakuri party, was charged with divisionism and endangering national security in response to what many viewed as a “legitimate expression” of opinion.⁹ Ms. Ingabire, President of the FDU-Inkingi party, was convicted of conspiracy to harm the country through war and terror, in addition to charges of “inciting insurrection” under Article 463 of the Rwandan Penal Code.¹⁰ FDU-Inkingi Interim Secretary General faced the same charge under Article 463 in 2013,¹¹ as did Treasurer Leonille Gasengayire in 2016.¹²

The government’s actions have been repeatedly condemned by the world’s main human rights advocates (including the United Nations), which have criticized Rwanda’s use of overly broad laws to unduly limit freedom of expression. In 2012, after requesting that Rwanda “proceed with the immediate release” of two opposition leaders, the UN Working Group on Arbitrary Detention (“Working Group”) urged the Rwandan government to reform its laws to ensure that “safeguards [are] implemented to guarantee that [those laws] are not used to silence dissent or

⁴ Human Rights Watch, *Country Summary: Rwanda* (January 2016), available at https://www.hrw.org/sites/default/files/world_report_chapter_rwanda_pdf.pdf.

⁵ See, e.g., Doina Chiacu, *U.S. criticizes Rwanda over disappearances, press freedom* (June 4, 2014), <http://www.reuters.com/article/us-rwanda-usa-idUSKBN0EF1NL20140604>.

⁶ U.S. DEPT. OF STATE, *RWANDA 2015 HUMAN RIGHTS REPORT* (2016), available at <http://www.state.gov/documents/organization/252929.pdf>.

⁷ Human Rights Watch, *Rwanda: Eight-Year Sentence for Opposition Leader* (October 30, 2012), <https://www.hrw.org/news/2012/10/30/rwanda-eight-year-sentence-opposition-leader>; Human Rights Watch, *Rwanda: Opposition Leader’s Sentence Upheld* (April 27, 2012), <https://www.hrw.org/news/2012/04/27/rwanda-opposition-leaders-sentence-upheld>.

⁸ Amnesty International, *Annual International Report 2014/15* (2015), <https://www.amnesty.org/en/countries/africa/rwanda/report-rwanda/>.

⁹ See Human Rights Watch, *Rwanda: Opposition Leader’s Sentence Upheld* (April 27, 2012), <https://www.hrw.org/news/2012/04/27/rwanda-opposition-leaders-sentence-upheld>.

¹⁰ See N.Y. Times, *Rwanda Opposition Leader Sentenced to 8 Years* (October 30, 2012), <http://www.nytimes.com/2012/10/31/world/africa/rwanda-court-sentences-victoire-ingabire.html>; see also Great Lakes Post, *Rwanda: FDU-Inkingi Calls on the European Commission to Implement the Resolution Passed by the EU Parliament* (October 9, 2016), <http://glpost.com/rwanda-fdu-inkingi-calls-on-the-european-commission-to-implement-the-resolution-passed-by-the-eu-parliament/>.

¹¹ See FDU-Rwanda, *Rwanda: Sylvain Sibomana, FDU-Inkingi interim Secretary General, transferred to Kimironko Prison* (April 11, 2013), <http://www.fdu-rwanda.com/en/english-rwanda-sylvain-sibomana-fdu-inkingi-interim-secretary-general-transferred-to-kimironko-prison-today/>.

¹² See RFI, *Rwanda: indignation des FDU après une nouvelle arrestation d’opposante* (September 8, 2016), <http://www.rfi.fr/afrique/20160907-rwanda-indignation-fdu-arrestation-opposante-L%C3%A9onille-Gasengayire>.

restrict the legitimate activities of political opposition,” as was the case with the two opposition leaders unduly imprisoned.¹³

The European Parliament has expressed a similar view. In a 2016 Resolution criticizing the conviction of Ingabire, the Parliament condemned the “acts of intimidation, arrests, detentions and prosecutions of opposition party leaders, members and activists, as well as journalists and other perceived critics of the Rwandan Government, solely for expressing their views.”¹⁴ The Resolution specifically targeted Article 463 of the Rwandan Penal Code, stating that it “constrains freedom of speech.”¹⁵ The European Parliament added that opposition has been silenced in application of vague national laws that shall be “review[ed] and adjust[ed] in order to guarantee freedom of expression.”¹⁶

c. Targets of the Kagame Administration

Observers of the administration have recognized maneuvers by President Kagame that target potential opponents both inside and outside of the government. Within the government, President Kagame has used public criticism and formal charges to demonstrate his authority. Outside of the government, President Kagame has targeted both political opponents and former members of his administration.

i. Administration Officials

President Kagame has periodically removed and reshuffled prominent members of his inner circle. A U.S. State Department official commented in a 2009 transmission:

A frequent Kagame ploy is to aim his criticism at those he trusts. By doing so, he purportedly shows the rank and file that none are above reproach. The goal of this method of instruction is supposedly to energize listeners to support his various agendas. Kagame’s penchant for sharp criticism of government officials and senior RPF cadre, in full view of their colleagues, disquiets others. They see the public embarrassment as heavy-handed and a way to keep those in Kagame’s inner circle off-balance and in-check.¹⁷

That comment followed a description of one such episode, in which President Kagame criticized several officials—including then-Rwanda Revenue Authority Commissioner General Mary Baine, the wife of Tom Byabagamba—for their failure to identify “malefactors” within the

¹³ *Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fourth session (Rwanda)*, Communication No. 25/2012, UN Doc. A/HRC/WGAD/2012/25 (August 27–31, 2012), para. 55, available at <http://hrlibrary.umn.edu/wgad/25-2012.pdf>.

¹⁴ European Parliament Resolution (2016/2910(RSP)), para. 5, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0378+0+DOC+XML+V0//EN&language=EN>.

¹⁵ *Id.*

¹⁶ *Id.* at para. 5.

¹⁷ WikiLeaks, *Rwanda – Monthly Political Roundup* (June 1, 2009), available at https://wikileaks.org/plusd/cables/09KIGALI335_a.html

party.¹⁸ Ms. Baine was joined by former Mayor of Kigali Rose Kabuye, the wife of Capt. David Kabuye, in facing criticism for undermining the party again in 2014.¹⁹

The term for this strategy is *agatebe* (literally, “a small stool”) which refers to the condition of government and military leaders who have their roles reduced and must wait for the executive to determine their fate. For example, in 2013, the RDF retired 79 officers from active service.²⁰ Many of these individuals had faced *agatebe*, as evidenced by the demotions, suspensions, and arrests that many—at least eight of the 17 generals and colonels in the group—had faced in the preceding years.²¹ Through *agatebe*, President Kagame maintains control over the officials surrounding him: some find their roles permanently reduced, while others are reappointed at the discretion (and under the control) of the Kagame Administration.

ii. Political Opponents and Former Administration Officials

The Kagame Administration also seeks to maintain control by silencing opposition outside the government, focusing on both direct political opponents and former government officials. President Kagame has cracked down on political dissidents and opponents more significantly over the last several years, along with members of the media. Over that period, civic dissent has remained low in Rwanda, and President Kagame has won a second term in office and secured a constitutional amendment that will allow him to run for a third term in 2017. The latest crackdown on opposition figures by the Kagame Administration coincided with the 20th anniversary of the genocide and likely represented President Kagame’s attempt to consolidate power ahead of a referendum that removed term limits from the constitution and allowed President Kagame to run again.²² Moreover, the 2014 crackdown mirrored a 2010 effort to suppress opposition ahead of a national election.²³ In 2015, the U.S. State Department explicitly indicated its hope that President Kagame not pursue a third term in office.²⁴

President Kagame seems to direct particular attention toward former members of his administration. In the years leading up to the 2010 election, several members of President Kagame’s government left Rwanda, including Director of Military Intelligence Patrick Karegeya, Chief of Staff Theogene Rudasingwa, Military Chief Faustin Kayumba Nyamwasa, Prosecutor General Gerald Gahima, Parliament Speaker Joseph Sebarenzi, Rwanda Development Board Chair David Himbara, Rwanda Development Bank Director General Theogene Turatsinze, and Rwanda

¹⁸ *Id.*

¹⁹ Great Lakes Voice, *RPF quizzed Lt Col. Kabuye more than 30 times—Sen. Rutaremwa* (September 8, 2014), <http://greatlakesvoice.com/rpf-quizzed-lt-col-kabuye-more-than-30-times-sen-rutaremera/>.

²⁰ Jean de la Croix Tabaro, *Gatsinzi, five other generals retire*, *The New Times* (October 25, 2013), <http://www.newtimes.co.rw/section/article/2013-10-25/70256/>.

²¹ *The East African*, *History as senior military officers get honourable retirement* (November 1, 2013), <http://www.theeastafrican.co.ke/Rwanda/News/1433218-2056768-nih3of/index.html>.

²² *New York Times*, *Rwanda’s Entrenched President* (January 11, 2016), <http://www.nytimes.com/2016/01/11/opinion/rwandas-entrenched-president.html>.

²³ Democracy Now, *Rwanda Holds Presidential Election Amid Crackdown on Opposition Candidates* (August 9, 2010), http://www.democracynow.org/2010/8/9/rwanda_holds_presidential_election_amid_crackdown.

²⁴ Kevin J. Kelley, *US opposes third term for Paul Kagame*, *THE DAILY NATION* (June 5, 2015), <http://www.nation.co.ke/news/africa/Paul-Kagame-Parliament-Constitution-Rwanda/-/1066/2741356/-/beh0cyz/-/index.html>.

Social Security Director General Henry Gaperi.²⁵ Some of these individuals left the Rwandan political scene, while others organized opposition to the Kagame Administration.

The Rwanda National Congress (“RNC”) is perhaps the most prominent party opposing the Kagame Administration and is an example of the extent to which President Kagame targets both political opponents and former members of his own administration. In the fall of 2010, four former officials—Messrs. Karegeya, Nyamwasa, Rudasingwa, and Gahima—founded the RNC in South Africa.²⁶ In response to its political opposition, the RNC has faced prosecution and political violence.

In 2011, a Rwandan military court convicted Messrs. Karegeya, Nyawasa, Gahima, and Rudasingwa in absentia for threatening national security, “divisionism,” and attempting to organize demonstrations without government permission.²⁷ In 2014, Mr. Karegeya was found strangled in a Johannesburg hotel room.²⁸ Recordings emerged featuring a top Rwandan official discussing a strategy for assassinating Messrs. Karegeya and Nyamwasa,²⁹ and President Kagame did little to quiet rumors that his government was responsible when he said, “I actually wish Rwanda did it. I really wish it.”³⁰

The Kagame Administration’s treatment of the RNC exemplifies its approach to both political opposition and former members of his own administration. While the RNC has attracted particular attention owing to its active opposition to President Kagame, it equally exemplifies the Kagame Administration’s treatment of former officials and those close to them.

d. Lack of Judicial Independence and Fair Trial Rights

In targeting voices of dissent, the Kagame Administration exercises significant control over the country’s judiciary. As Human Rights Watch has observed, the Rwandan Government is particularly influential in high-profile cases involving opposition figures, in which “judges, prosecutors, and witnesses remain vulnerable to pressure from the government”³¹ In a 2008

²⁵ Conversation with AB, April 27, 2017.

²⁶ See, e.g., Human Rights Watch, *Rwanda: Repression Across Borders* (January 28, 2014), <https://www.hrw.org/news/2014/01/28/rwanda-repression-across-borders>.

²⁷ Human Rights Watch, *Rwanda: Prison Term for Opposition Leader* (February 11, 2011), <https://www.hrw.org/news/2011/02/11/rwanda-prison-term-opposition-leader>.

²⁸ See, e.g., BBC News, *Patrick Karegeya: Mysterious death of a Rwandan exile* (March 26, 2014), <http://www.bbc.com/news/world-africa-26752838>.

²⁹ See, e.g., Judi Rever & Geoffrey York, *Assassination in Africa: Inside the plots to kill Rwandan’s dissidents*, *Globe and Mail* (May 2, 2014), <http://www.theglobeandmail.com/news/world/secret-recording-says-former-rwandan-army-major-proves-government-hires-assassins-to-kill-critics-abroad/article18396349/>.

³⁰ Aislinn Laing, *Rwanda’s president Paul Kagame ‘wishes’ he had ordered death of exiled spy chief*, *THE TELEGRAPH* (January 24, 2014), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/rwanda/10595069/Rwandas-president-Paul-Kagame-wishes-he-had-ordered-death-of-exiled-spy-chief.html>.

³¹ See Human Rights Watch, *Rwanda: Eight-Year Sentence for Opposition Leader* (October 30, 2012), <https://www.hrw.org/news/2012/10/30/rwanda-eight-year-sentence-opposition-leader>; Human Rights Watch, *Rwanda: Opposition Leader’s Sentence Upheld* (April 27, 2012), <https://www.hrw.org/news/2012/04/27/rwanda-opposition-leaders-sentence-upheld>.

report, Human Rights Watch described the Rwandan judiciary in terms that remain applicable today:

Judicial authorities operate in a political context where the executive continues to dominate the judiciary and where there is an official antipathy to views diverging from those of the government and the dominant party, [the RPF]. A campaign against ‘divisionism’ and ‘genocidal ideology’ imposes the risk of serious consequences on persons who question official interpretations of the past and who would prefer other than the official vision of the future.³²

This lack of judicial independence is an important tool for the Kagame Administration, which brings charges against dissenters and exercises significant control over the outcome of their trials. As documented by Human Rights Watch, officials in the executive branch have applied pressure directly to members of the judiciary,³³ in addition to pressuring potential witnesses to testify in accordance with the government’s interests.

In addition to these overarching issues, the Rwandan criminal justice system exhibits features that violate commonly recognized standards of fair trial rights. For example, numerous reports indicating the torture of prisoners have emerged in recent years. The U.S. State Department has described allegations of the torture of prisoners in several of its annual reports on human rights in Rwanda,³⁴ and Amnesty International focused a 2012 report on several instances of extrajudicial detention and the torture of prisoners.³⁵

Furthermore, Rwandan military courts regularly exercise jurisdiction over civilian accomplices of soldiers accused of crimes, though the Rwandan Constitution and the organic law establishing the courts do not expressly provide such jurisdiction.³⁶ The 2011 trial of Karegeya, Nyamwasa, Gahima, and Rudasingwa, for instance, was conducted in military court despite two of the defendants being charged as civilians.³⁷ In 2014, a military court affirmed its own

³² Human Rights Watch, *Law and Reality: Progress in Judicial Reform in Rwanda* (July 2008), http://www.hrw.org/sites/default/files/reports/rwanda0708_1.pdf.

³³ *Id.*

³⁴ *See, e.g.*, U.S. STATE DEPT., RWANDA 2016 HUMAN RIGHTS REPORT (2017), available at <https://www.state.gov/documents/organization/265502.pdf>; U.S. STATE DEPT., RWANDA 2012 HUMAN RIGHTS REPORT (2013), available at <https://www.state.gov/documents/organization/204366.pdf>.

³⁵ Amnesty International, *Rwanda: Shrouded in Secrecy* (2012), <https://www.amnesty.org/download/Documents/16000/afr470042012en.pdf>.

³⁶ *See, e.g.*, GERALD GAHIMA, TRANSITIONAL JUSTICE IN RWANDA: ACCOUNTABILITY FOR ATROCITY 231 n.5 (1st ed. 2012) (“Article 3, Amendment of the Fundamental Law of 18 January 1996 (Official Gazette 1996, No. 3, 1 February 1996) provides: The first part of Article 49 of the Arusha Peace Agreement, in its protocol relating to the integration of the armed forces of the two sides, is amended and complemented in the following manner: ‘Military courts have jurisdiction to try members of the national armed forces of the two sides, as well as civilians who are accomplices in the crimes that have been committed by members of the armed forces as they are established in criminal law. . . .’ The 2003 Constitution of Rwanda and Organic Law No. 07/2004 of 25/04/2004 determining the organization, functioning and jurisdiction of courts are both silent on the jurisdiction of military courts. In practice, Rwanda’s military courts continue to exercise criminal jurisdiction over civilians who are alleged to be accomplices of defendants who are military personnel.”)

³⁷ Daily Nation, *Exiled former Rwandan top officials handed jail terms* (January 14, 2011), <http://mobile.nation.co.ke/news/africa/3126394-1089824-format-xhtml-414tuh/index.html>.

competence to try 14 civilians and two former soldiers for an alleged terrorist plot.³⁸ A 2011 report from the U.S. Department of State estimated that, from January to October 2010, Rwandan military courts tried 62 civilians as accomplices of military personnel.³⁹

2. Background Information on Frank Rusagara, Tom Byabagamba, and François Kabayiza

Frank Rusagara is a decorated Rwandan military officer who devoted his career to supporting his country. He was born in Rwanda in 1955 but was exiled to Uganda at the age of six. Mr. Rusagara lived, studied, and worked in Uganda before moving briefly to Kenya, where he worked as a teacher.⁴⁰

Mr. Rusagara returned to Rwanda in 1994 when he joined the RPF during the conflict that ended the Rwandan genocide, electing to stay in Rwanda and help rebuild his homeland after the national tragedy.⁴¹ Mr. Rusagara served diligently in the Rwandan military, reaching the rank of Brigadier General in the RDF before being forced to retire in 2013 (along with many other military officers, as noted below).⁴² Throughout Mr. Rusagara's career, he served as director of the Nyakinama military school and chief justice of the Kanombe Military High Court (the same court that later sentenced him to 20 years of imprisonment for "spreading rumors" and "tarnishing the image of the government").⁴³ As previously noted, Mr. Rusagara holds a PhD in history, is a published author, and formerly served as Military Historian for the RDF.⁴⁴

Mr. Rusagara served as Rwanda's Defense Attaché at the Rwandan Embassy in the United Kingdom until October 2013, when he was called back to Rwanda and forced to retire from the RDF along with 78 other military officers.⁴⁵ No reason was given by the Rwandan government for this forced retirement.⁴⁶ After his retirement, Mr. Rusagara attempted to return to London where his wife and their five children were living, but he was not granted the necessary travel documents and was forced to remain in Rwanda until his arrest in August 2014.⁴⁷ Again, no reason was given

³⁸ U.S. STATE DEPT., RWANDA 2013 HUMAN RIGHTS REPORT (2014), available at <https://www.state.gov/j/drl/rls/hrrpt/2013/af/220149.htm>.

³⁹ U.S. DEPT. OF STATE, RWANDA 2010 HUMAN RIGHTS REPORT (2011), available at <http://www.state.gov/documents/organization/252929.pdf>.

⁴⁰ *About the Author: Frank Rusagara*, AFRICAN BOOKS COLLECTIVE, 2015, <http://www.africanbookscollective.com/books/resilience-of-a-nation>.

⁴¹ *Id.*

⁴² Jean de la Croix Tabaro, *Gatsinzi, five other generals retire*, The New Times (October 25, 2013), <http://www.newtimes.co.rw/section/article/2013-10-25/70256/>.

⁴³ Human Rights Watch, *Rwanda: Ex-Military Officers Convicted Over Comments* (April 1, 2016), <https://www.hrw.org/news/2016/04/01/rwanda-ex-military-officers-convicted-over-comments>.

⁴⁴ *Former RDF Boss Rusagara Arrested Over 'Link' to Exiled Opposition*, The East African (August 20, 2014), <http://www.theeastafrican.co.ke/Rwanda/News/Former-RDF-boss-Rusagara-arrested-over-link-to-exiled-opposition/-/1433218/2425662/-/abendaz/-/index.html>.

⁴⁵ The East African, *History as Senior Military Officers Get Honourable Retirement* (November 1, 2013), <http://www.theeastafrican.co.ke/Rwanda/News/-/1433218/2056768/-/15xmvuz/-/index.html>.

⁴⁶ Conversation with AB, November 2, 2016.

⁴⁷ *Id.*

by the Rwandan government as to why Mr. Rusagara was not granted the necessary travel documents.⁴⁸

Mr. Rusagara's brother-in-law, Tom Byabagamba, is also a decorated military officer in the RDF and had been closely associated with President Kagame. From 1990 to 2010, Mr. Byabagamba worked in the personal guard to President Kagame. In 2010, he became head of the Republican Guard, personally charged with leading security for President Kagame.⁴⁹ Mr. Byabagamba left the Republican Guard in 2013 and served as an officer in the RDF until the point of his arrest and conviction. Mr. Byabagamba is married to Ms. Baine, who had served as Permanent Secretary in the Ministry of Foreign Affairs before being replaced after her husband's arrest.⁵⁰

Mr. Byabagamba's brother (and Mr. Rusagara's brother-in-law), Dr. David Himbara, is a former economic advisor to President Kagame who fled the country after witnessing President Kagame's harsh treatment of both close allies and political dissidents. Dr. Himbara worked as an economic advisor for President Kagame from 2000 through 2002 and from 2006 through 2010.⁵¹ Dr. Himbara first became wary of President Kagame's leadership style in 2009 when he witnessed the president physically abuse another staff member and was himself threatened after questioning President Kagame's economic policies.⁵² In 2010, an election year, Dr. Himbara witnessed President Kagame imprison and execute numerous political opponents.⁵³

This conduct led Dr. Himbara to flee Rwanda in 2010, first to South Africa and later to Canada, where he currently resides.⁵⁴ Just after Dr. Himbara left Rwanda, President Kagame ordered Mr. Byabagamba to bring Dr. Himbara back to the country.⁵⁵ Mr. Byabagamba refused to intervene and was removed from his position as Commander of the Republican Guard shortly thereafter.⁵⁶ In the period following Dr. Himbara's departure from Rwanda, Messrs. Byabagamba and Rusagara maintained contact with their brother despite pressure from colleagues to dissociate themselves from him because of his political ideologies.⁵⁷ Dr. Himbara remains an outspoken critic of President Kagame and the Rwandan government, even raising his concerns in a speech before the U.S. House of Representatives Sub-Committee on Africa, Global Health, Global Human Rights, and International Organizations.⁵⁸

⁴⁸ *Id.*

⁴⁹ Conversation with AB, July 21, 2016.

⁵⁰ Kamuzinzi, *Col. Tom Byabagamba's Brother Arrested*, Inyenyeri News, January 1, 2015, <http://www.inyenyerinews.org/justice-and-reconciliation/col-tom-byabagambas-brother-arrested/>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Author biography: David Himbara*, THE HUFFINGTON POST, available at <http://www.huffingtonpost.com/david-himbara/>.

⁵⁵ Conversation with AB and BC, March 25, 2017.

⁵⁶ *Id.*

⁵⁷ Human Rights Watch, *Rwanda: Ex-Military Officers Convicted Over Comments*, April 1, 2016. <https://www.hrw.org/news/2016/04/01/rwanda-ex-military-officers-convicted-over-comments>.

⁵⁸ See Hearing Transcript, *Hearing before the Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations of the Committee on Foreign Affairs*, House of Representatives, 114th Congress, 31-37, May 20, 2015, available at <http://docs.house.gov/meetings/FA/FA16/20150520/103498/HHRG-114-FA16-Transcript-20150520.pdf>.

François Kabayiza is also a former officer in the RDF. A retired sergeant, Mr. Kabayiza worked most recently as Mr. Rusagara's driver.⁵⁹

3. Circumstances of Frank Rusagara's, Tom Byabagamba's, and François Kabayiza's Arrest, Trial, and Detention

a. Arrests

On August 13, 2014, a few days prior to Mr. Rusagara's arrest, Mr. Rusagara was summoned to the office of Major General Jack Nziza, who is known as a trusted ally to President Kagame.⁶⁰ Two other retired military members were present in Mr. Nziza's office.⁶¹ During this meeting, Mr. Nziza threatened Mr. Rusagara and also pressured another of the retired military officials to distance himself from Mr. Rusagara.⁶² One of the two men present would later be a prosecution witness in the case against Messrs. Rusagara, Byabagamba, and Kabayiza.⁶³

Four days after the confrontation with Mr. Nziza, on August 17, 2014, Mr. Rusagara was arrested at his home. At approximately 6:00 p.m., the Military Police arrived in two jeeps to Mr. Rusagara's house and arrested him, despite no arrest warrant being presented.⁶⁴ Mr. Rusagara was taken directly to Kanombe Military Police Barracks and locked in a small room for six days.⁶⁵ Only after six days was an arrest warrant written before Mr. Rusagara in the same room where he was detained.⁶⁶ Mr. Rusagara's home was searched the day after his arrest, despite no search warrant being shown.⁶⁷

Prior to being arrested, Mr. Rusagara owned two pistols that had been given to him as gifts during peace keeping missions in Israel and South Africa.⁶⁸ In Rwanda, only active members of the RDF are allowed to possess a firearm, unless with written permission of the Inspector General.⁶⁹ When Mr. Rusagara retired in October 2013, he did not return these two pistols, believing he could keep them because they were personal gifts from his service abroad.⁷⁰ Mr. Kabayiza, knowing that a civilian housemaid still had access to Mr. Rusagara's home where the pistols were located, delivered the pistols to Mr. Byabagamba out of safety concerns and because, unlike Mr. Kabayiza and Mr. Rusagara, Mr. Byabagamba was still active in the military and thus had permission to possess firearms.⁷¹

⁵⁹ Human Rights Watch, *Rwanda: Ex-Military Officers Convicted Over Comments*, April 1, 2016. <https://www.hrw.org/news/2016/04/01/rwanda-ex-military-officers-convicted-over-comments>.

⁶⁰ Letter from DE, April 2017.

⁶¹ *Id.*

⁶² Human Rights Watch, *Rwanda: Ex-Military Officers Convicted Over Comments*, April 1, 2016. <https://www.hrw.org/news/2016/04/01/rwanda-ex-military-officers-convicted-over-comments>.

⁶³ Letter from DE, April 2017.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Conversation with BC and CD, April 7, 2017.

⁶⁸ Kim Aine, *Rwanda: Col Byabagamba, Rusagara Appeal Jail Sentences*, Chimp Reports, April 1, 2016, <http://www.chimpreports.com/rwanda-col-byabagamba-rusagara-appeal-jail-sentences/>.

⁶⁹ Article 671 of the Rwandan Penal Code.

⁷⁰ Judgment, Op. Cit., para. 161.

⁷¹ *Id.* at para. 188.

Mr. Byabagamba was arrested at his home on August 23, 2014, despite no arrest warrant being presented and no specific charges for the arrest being given.⁷² After the arrest of Mr. Rusagara, it had become apparent that Mr. Byabagamba would also be arrested.⁷³ In fact, at the time of Mr. Byabagamba's arrest, a military spokesperson told reporters that Mr. Byabagamba was arrested as part of investigations into the case involving Mr. Rusagara and another military officer accused of similar crimes, Capt. David Kabuye.⁷⁴ Moreover, Mr. Byabagamba's wife, Mary Baine, had been fired from her position as Permanent Secretary in the Ministry of Foreign Affairs only a few months prior and subsequently questioned by the RPF.⁷⁵

After Mr. Byabagamba's arrest, the military officials returned to search Mr. Byabagamba's home, despite no search warrant being presented.⁷⁶ Mr. Byabagamba's electronics and personal firearm were taken.⁷⁷ Mr. Byabagamba was eventually charged with "knowingly concealing evidence that would facilitate the prosecution of a crime," which is only one of the four crimes he would later be found guilty of.⁷⁸

Mr. Kabayiza was arrested on August 24, 2014, on charges of possession of an illegal firearm and concealing evidence.⁷⁹

b. Trial, Sentencing, and Detention

Mr. Rusagara was originally detained at Mulindi Military Prison in Kigali, Rwanda. He has since been transferred to the Kanombe Military Police Barracks in Kigali, Rwanda. After their arrests, Messrs. Byabagamba and Kabayiza also were held in Kanombe Military Police Barracks, where they remain to this day.⁸⁰ At Kanombe, Messrs. Rusagara and Byabagamba have both been held in solitary confinement under constant surveillance.⁸¹

Mr. Byabagamba first met his lawyers on August 26, 2014; however, the meeting was held in the presence of the prosecutor.⁸² Mr. Byabagamba met his lawyers confidentially only after pre-trial hearings were complete and after the Kanombe Military High Court ruled that Mr. Byabagamba be detained for 30 days.⁸³ Messrs. Rusagara, Byabagamba, and Kabayiza first

⁷² Conversation with BC and CD, April 7, 2017.

⁷³ *Id.*

⁷⁴ Ignatius Ssuuna, *Kagame's Former Top Security Officer Arrested*, DAILY MONITOR, August 26, 2014, <http://www.monitor.co.ug/News/World/Kagame-s-former-top-security-officer-arrested/-/688340/2431760/-/m4frb7z/-/index.html>.

⁷⁵ Conversation with BC and CD, April 7, 2017.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* See also, Judgment, Op. Cit.

⁷⁹ Human Rights Watch, *Rwanda: Ex-Military Officers Convicted Over Comments*, April 1, 2016, <https://www.hrw.org/news/2016/04/01/rwanda-ex-military-officers-convicted-over-comments>. Because visitors have been prevented from communicating with Mr. Kabayiza, counsel has been unable to ascertain the events surrounding his arrest or the aspects in which his experience differed from those of Messrs. Rusagara and Byabagamba.

⁸⁰ Anthony Kushaba, *Two More Rwandan Army Officers Arrested*, UGANDA RADIO NETWORK, August 25, 2014, <http://ugandaradionetwork.com.dedi3883.your-server.de/a/story.php?s=66484>.

⁸¹ Letter from DE, April 2017; Conversation with BC and CD, April 7, 2017.

⁸² Conversation with BC, April 8, 2017.

⁸³ *Id.*

appeared in court together on August 28, 2014.⁸⁴ Around March 2015, the Court denied bail for all three defendants.⁸⁵ The Court did so based on a stated concern that the defendants would flee before the trial, though it provided no evidence to support this conclusion and required the defendants to affirmatively prove that they were not flight risks, rather than the government shouldering the burden of proof.⁸⁶ In fact, the judge presiding over the bail hearing, Mr. Chance Ndagano, was later a witness for the prosecution in the trial.⁸⁷

Messrs. Rusagara, Byabagamba, and Kabayiza were tried jointly in the Kanombe Military High Court. The trial, which was public, originally began on January 27, 2015, but had to be delayed nearly a year, until January 5, 2016, because Mr. Kabayiza was too ill to stand trial.⁸⁸ Mr. Kabayiza said in Court, Mr. Rusagara alleged in Court, and many sources agree, that Mr. Kabayiza was tortured while detained in order to compel testimony against Messrs. Rusagara and Byabagamba.⁸⁹ Mr. Kabayiza alleged that he had been tortured so extensively that his body was partly paralyzed.⁹⁰ The Court did not order an investigation into the allegations of torture, though the physical signs of torture were apparent—Mr. Kabayiza struggled to walk into the courtroom on his own, displayed bruises, and had lost some of his ability to speak despite being healthy prior to his arrest.⁹¹ In fact, the Court accepted Mr. Kabayiza’s testimony, which was forced through torture, and used it to convict the three men.⁹²

The prosecution brought charges of “spreading rumors with intent to incite insurrection or trouble among the population,” “committing an act aimed at tarnishing the image of the country or the government,” and “illegal possession of firearms” against Mr. Rusagara.⁹³ The prosecution brought charges of “spreading rumors with intent to incite insurrection or trouble among the population,” “committing an act aimed at tarnishing the image of the country,” “contempt of the national flag,” and “knowingly concealing evidence that would facilitate the prosecution of a crime” against Mr. Byabagamba.⁹⁴ Messrs. Rusagara and Byabagamba denied the allegations in full.⁹⁵ The prosecution brought charges of “illegal possession of firearms” and “knowingly concealing evidence that would facilitate the prosecution of a crime” against Mr. Kabayiza.⁹⁶ Mr. Kabayiza pled not guilty.⁹⁷

⁸⁴ Conversation with BC and CD, April 7, 2017.

⁸⁵ Muvunyi Timothy, *Gen. Rusagara, Col. Byabagamba Denied Bail*, GREAT LAKES VOICES, March 2, 2015, <http://greatlakesvoice.com/gen-rusagara-col-byabagamba-denied-bail/>.

⁸⁶ *Id.*

⁸⁷ Judgment, Op. Cit., para. 24.

⁸⁸ Rodrigue Rwirahira, *Rusagara, Byabagamba trial begins in substance*, The New Times (January 6, 2016), <http://www.newtimes.co.rw/section/article/2016-01-06/195873/>.

⁸⁹ Conversation with AB, November 2, 2016.

⁹⁰ Edmund Kagire, *Rwanda military trial resumes amid torture claims*, The East African (January 28, 2015) <http://www.theeastafrican.co.ke/news/Rwanda-military-trial-resumes-amid-torture-claims/-/2558/2604626/-/6dhtbk/-/index.html>.

⁹¹ Conversation with AB, November 2, 2016.

⁹² Judgment, Op. Cit., para. 163.

⁹³ *Id.* at para. 3.

⁹⁴ *Id.* at paras. 1-2.

⁹⁵ *Id.* at para. 5.

⁹⁶ *Id.* at para. 4.

⁹⁷ *Id.* at para. 5.

In regards to the charges of “spreading rumors with intent to incite insurrection or trouble among the population” and “committing an act aimed at tarnishing the image of the country” against Mr. Rusagara, the Court made its ruling for both charges based on the same evidence.⁹⁸ Among other similar expressions, Mr. Rusagara was accused of saying “Rwanda is a police state,” Rwanda is a “banana republic,” “Kagame is a dictator,” “Where is the government of yours heading to?” and “in Rwanda there is no right to freedom of expression.”⁹⁹ These statements were allegedly made at the Nyarutarama Tennis Club, a membership-only sports club, and Car Wash, a bar.¹⁰⁰ Mr. Rusagara was also accused of sharing news reports titled “Kayumba accuses Kagame,” “Patrick Karegeya: We know where the missiles came from,” “More than three hundred people had welcomed with rotten eggs the President of the Republic while on a State visit to the United Kingdom,” “Dr. Rudasingwa: What is in the commitment? Seven demons that keep Kagame in power,” and “Association in Africa: inside the plots to kill Rwanda’s dissidents”¹⁰¹ These news reports were sent as links, each to an individual, by Mr. Rusagara using his personal email address.¹⁰²

Additionally, the Court brought the charge of “illegal possession of firearms” against Mr. Rusagara for owning two pistols that Mr. Rusagara received as personal gifts.¹⁰³ The pistols were confiscated on August 24, 2014, while Mr. Rusagara remained imprisoned.¹⁰⁴

In Mr. Byabagamba’s case, the Court also used the same evidence for both “spreading rumors with intent to incite insurrection or trouble among the population” and “committing an act aimed at tarnishing the image of the country.”¹⁰⁵ Mr. Byabagamba was accused of saying, in a variety of places including the Officers’ Mess, a Kinyarwanda proverb which means “when will you stop the rampant massacres?”¹⁰⁶ One of the prosecution witnesses who accused Mr. Byabagamba of saying this was Colonel David Bukenya, who would later state that he was forced to sign a witness statement he had not read.¹⁰⁷ Mr. Byabagamba was further accused of saying “the government of Rwanda killed the son of retired Lieutenant Rutagarama,” the “government of Rwanda took a haphazard decision which left stranded Tanzanian trailers at the border post,” and “Lieutenant Joel Mutabazi was arbitrarily detained.”¹⁰⁸ Mr. Bukenya also provided supporting testimony regarding the allegation of claiming the Rwandan government’s decision was a “haphazard decision.”¹⁰⁹ Moreover, Mr. Byabagamba faced the allegation that he inquired as to why Lieutenant Frank Karakire was talking to President Kagame on the telephone, saying “what do you want with that man?”¹¹⁰

⁹⁸ *Id.* at para. 140.

⁹⁹ *Id.* at paras. 65-70.

¹⁰⁰ *Id.* at para. 67.

¹⁰¹ *Id.* at paras. 83-139.

¹⁰² *Id.*

¹⁰³ *Id.* at para. 161.

¹⁰⁴ *Id.* at para. 168.

¹⁰⁵ *Id.* at para. 42.

¹⁰⁶ *Id.* at para. 24.

¹⁰⁷ *Id.* at para. 26.

¹⁰⁸ *Id.* at paras. 27-37.

¹⁰⁹ *Id.* at para. 29.

¹¹⁰ *Id.* at para. 31.

Mr. Byabagamba was charged with “contempt of the national flag” for allegedly not saluting the flag during a ceremony in South Sudan.¹¹¹ Additionally, Mr. Byabagamba was charged with “knowingly concealing evidence that would facilitate the prosecutions of a crime” by failing to immediately turn in Mr. Rusagara’s pistols—the gifts he had received on foreign military service—that Mr. Byabagamba received from Mr. Kabayiza.¹¹² The Court states that Mr. Byabagamba’s “failure to hand over the said arms therefore indicates that he had hid them so that the crime of illegal possession of arms charged against Rtd Brig Gen Frank Kanyambo Rusagara could not be prosecuted.”¹¹³

With respect to the charges against him, Mr. Kabayiza petitioned the Court to not consider his previous verbal testimony, which was forced by means of torture.¹¹⁴ Mr. Kabayiza further argued that he never said some of the statements in the testimony, and that the prosecution added these to his testimony.¹¹⁵ After no further inquiry into the allegations of torture and falsifying evidence, the Court concluded that Mr. Kabayiza was not subjected to torture and that his previous testimony would be admitted as evidence.¹¹⁶

The trial of Messrs. Byabagamba, Rusagara, and Kabayiza was plagued with procedural errors. Oftentimes, for example, the defense lawyers were told a specific date for the next meeting of the Court, and when they appeared, they were told that the hearing or trial would reconvene on another day.¹¹⁷ The defense lawyers would then request a substitute date, because they had previously scheduled court dates for other trials for which they served as counsel.¹¹⁸ However the Court would go ahead with the original date, causing Messrs. Rusagara, Byabagamba, and Kabayiza to show up without legal representation and thereby receiving punishment, such as fines, for this.¹¹⁹

One of the prosecution witnesses, Capt. David Kabuye, declared after the trial that he was “forced” to testify against Messrs. Rusagara, Byabagamba and Kabayiza.¹²⁰ Mr. Kabuye’s testimony was elicited through tremendous torture.¹²¹ Although Mr. Kabuye had been charged around the same time and with crimes similar to those raised against Messrs. Rusagara, Byabagamba, and Kabayiza, he was acquitted of all charges and released on December 15, 2015, shortly after his testimony.¹²²

¹¹¹ *Id.* at para. 54.

¹¹² *Id.* at para. 50.

¹¹³ *Id.* at para. 53.

¹¹⁴ *Id.* at para. 170.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at paras. 173-74.

¹¹⁷ Conversation with BC and CD, April 7, 2017.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Human Rights Watch, *Rwanda: Ex-Military Officers Convicted Over Comments*, Op. Cit. The prosecution and the Court relied extensively on David Kabuye’s testimony. See, for instance, paras. 63, 65-68, 72 and 77 of the Judgment, Op. Cit.

¹²¹ Letter from DE, April 2017.

¹²² See Human Rights Watch, *Rwanda: Ex-Military Officers Convicted Over Comments* (April 1, 2016), <https://www.hrw.org/news/2016/04/01/rwanda-ex-military-officers-convicted-over-comments>.

Messrs. Rusagara, Byabagamba and Kabayiza were not allowed to examine all the witnesses that testified against them.¹²³ Rather, they were only allowed to examine four out of the eleven prosecution witnesses.¹²⁴ Among the seven witnesses that could not be cross-examined was Colonel Chance Ndagano, who served as judge in the pre-trial detention phase and, later on, testified for the prosecution.¹²⁵

The defendants did have the opportunity to cross-examine Colonel David Bukenya. This cross-examination exposed the fact that while at the Nyakinama military academy, Mr. Bukenya was forced to sign a witness statement he had not read.¹²⁶ Following Mr. Bukenya's testimony regarding false statements, the Court abruptly ended the defense's opportunity for cross-examination.¹²⁷ In addition, although the Court acknowledged the existence of contradictions in Mr. Bukenya's testimony, the Court nonetheless relied on the testimony to convict Mr. Byabagamba.¹²⁸ This occurred on March 4, 2016.¹²⁹

On March 31, 2016, the Court found both Mr. Rusagara and Mr. Byabagamba guilty of all of the charges raised against them.¹³⁰ The Court found Mr. Kabayiza not liable for the crime of illegal possession of arms and guilty for the crime of knowingly concealing evidence.¹³¹ Mr. Rusagara was sentenced to 20 years in prison.¹³² Mr. Byabagamba was sentenced to 21 years in prison and was stripped of his office in the military.¹³³ Mr. Kabayiza was sentenced to 5 years in prison and a fine of 500,000 Rwandan francs.¹³⁴ After the sentences were read out, the men were driven directly back to the military prison.¹³⁵ Messrs. Rusagara, Byabagamba, and Kabayiza appealed the ruling soon thereafter; however, more than one year later, no Court date has yet been set for the appeal.¹³⁶

For the entirety of their detention at Kanombe Military Police Barracks, Messrs. Rusagara and Byabagamba have been held full-time in solitary confinement.¹³⁷ Detention in solitary confinement was not a condition of Mr. Rusagara's and Mr. Byabagamba's sentence.¹³⁸ Despite the fact that visitors are allowed at specified visiting times, Mr. Byabagamba was not allowed to see or speak to his mother, who resided in Rwanda, since his arrest.¹³⁹ She passed away before the trial began.¹⁴⁰ Additionally, Mr. Rusagara was never able to speak to his wife since his arrest, and

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at paras. 38-39.

¹²⁷ Conversation with BC, April 8, 2017.

¹²⁸ Judgment, Op. Cit., paras. 38-39. See also Human Rights Watch, *Rwanda: Ex-Military Officers Convicted Over Comments*, Op. Cit.

¹²⁹ Conversation with BC and CD, April 7, 2017.

¹³⁰ Judgment, Op. Cit., paras. 216-17.

¹³¹ *Id.* at paras. 218-19.

¹³² *Id.* at para. 223.

¹³³ *Id.* at paras. 220-21.

¹³⁴ *Id.* at para. 223.

¹³⁵ Conversation with BC and CD, April 7, 2017.

¹³⁶ *Id.*

¹³⁷ Conversation with BC and CD, April 7, 2017; Letter from DE, April 2017.

¹³⁸ See Judgment, Op. Cit.

¹³⁹ Conversation with AB, November 2, 2016.

¹⁴⁰ *Id.*

she passed away in September after a lengthy battle with cancer.¹⁴¹ Messrs. Rusagara, Byabagamba, and Kabayiza have all had family members and others refused from visitation during proper visiting hours multiple times with no reason given.¹⁴² Moreover, the Red Cross was initially allowed entrance into the prison in order to see prisoners, including the three men; however, the Red Cross has since been refused access.¹⁴³ Also, Mr. Rusagara’s lawyer has been prevented from visiting him on more than one occasion.¹⁴⁴

B. Legal Analysis

The arrest and detention of Messrs. Rusagara, Byabagamba, and Kabayiza are arbitrary¹⁴⁵ under Categories II and III as established by the Working Group. The detention is arbitrary under Category II because it resulted from Mr. Rusagara’s and Mr. Byabagamba’s peaceful exercise of their rights to freedom of expression. The detention is arbitrary under Category III because the government’s detention, prosecution and conviction of Messrs. Rusagara, Byabagamba, and Kabayiza failed to meet minimum international standards of due process.

1. Arbitrary Deprivation of Liberty under Category II

A detention is arbitrary under Category II when it results from the exercise of fundamental rights or freedoms protected under international law, including the right to freedom of expression.¹⁴⁶

The right to freedom of expression is expressly protected under international and Rwandan law. Article 19(2) of the International Covenant on Civil and Political Rights (“ICCPR”), to which Rwanda is party, provides that “[e]veryone shall have the right of freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”¹⁴⁷ The right to free expression is also protected by Article 9(2) of the African Charter on

¹⁴¹ *Id.*

¹⁴² Conversation with BC and CD, April 7, 2017.

¹⁴³ Conversation with AB and BC, March 25, 2017.

¹⁴⁴ Conversation with CD, April 3, 2017.

¹⁴⁵ An arbitrary deprivation of liberty is defined as any “depriv[ation] of liberty except on such grounds and in accordance with such procedures as are established by law.” *International Covenant on Civil and Political Rights*, G.A. Res 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 52, UN Doc. A/6316 (1966), 999 UNT.S. 171, entered into force on March 23, 1976, at art. 9(1). Such a deprivation of liberty is specifically prohibited by international law. *Id.* “No one shall be subjected to arbitrary arrest, detention or exile.” *Universal Declaration of Human Rights*, G.A. Res. 217A (III), UN Doc. A/810, at art. 9, (1948). “Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law...” *Body of Principles for the Protection of Persons under Any Form of Detention or Imprisonment*, G.A. Res. 47/173, 43 UN GAOR Supp. (No. 49) at 298, UN Doc. A/43/49 (“Body of Principles”), at principle 2.

¹⁴⁶ A detention is arbitrary under Category II “when the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13-14 and 18-21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18-19, 21-22 and 25-27 of the International Covenant on Civil and Political Rights.” *Methods of Work of the Working Group on Arbitrary Detention*, UN Doc. A/HRC/33/66 (“Revised Methods of Work”), at para. 8b.

¹⁴⁷ ICCPR, at art. 19(2): “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”.

Human and Peoples' Rights ("ACHPR"),¹⁴⁸ to which Rwanda is also party,¹⁴⁹ and by Article 19 of the Universal Declaration of Human Rights ("UDHR").¹⁵⁰ Furthermore, according to Article 38 of the Rwandan Constitution, "[f]reedom . . . of expression [is] recognised and guaranteed by the State."¹⁵¹

In its General Comment 34, commenting on the right to freedom of expression under the ICCPR, the United Nations Human Rights Committee ("UNHRC") said that "in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high . . . all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition."¹⁵² In its Communication No. 1128/2002, the UNHRC added that freedom of expression encompasses "the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or punishment."¹⁵³ Thus, expressing views concerning public figures or a government is at the core of the right to freedom of expression.

Despite these protections under international law and Rwandan law, Messrs. Rusagara and Byabagamba have been arbitrarily detained, prosecuted, and convicted under impermissibly broad laws, and without adequate due process, solely for exercising their rights to freedom of speech.

a. The Convictions of Messrs. Rusagara and Byabagamba Are Based on Impermissibly Broad Laws

In order to achieve its goal of repressing anyone it views as a threat, the Kagame Administration uses intentionally vague, broad laws. Messrs. Rusagara and Byabagamba were imprisoned in application of the following vague and intentionally broad laws:

- (a) Article 463 of the Rwandan Penal Code, which punishes "any person who by speeches held in meetings or in public places, or writings, or images or emblems, any posters, sold or on sale or displayed to the public, knowingly spreads rumors, excites the population against the established government, or incites or attempts to incite citizens against each other or attempts to alarm the population

¹⁴⁸ ACHPR, at art. 9(2): "Every individual shall have the right to express and disseminate his opinions within the law".

¹⁴⁹ Organization of African Unity, *African Charter on Human and Peoples' Rights*, June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

¹⁵⁰ UDHR, at art. 19: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

¹⁵¹ Rwandan Constitution, at art. 38.

¹⁵² General Comment 34, para. 38, available at <http://bangkok.ohchr.org/programme/documents/general-comment-34.aspx>. See, also, para. 34.

¹⁵³ Communication No. 1128/2002, *Rafael Marques de Morais v. Angola*, U.N. Doc. CCPR/C/83/D/1128/2002 (2005), para. 6.7, available at <http://www.chr.up.ac.za/index.php/browse-by-country/angola/197-angola-marques-de-morais-v-angola-2005-ahrlr-3-hrc-2005.html>.

with intention to cause trouble on the national territory of the Republic of Rwanda.”

(b) Article 660 of the Rwandan Penal Code, which punishes “any person who commits acts aimed at tarnishing the image of the country or the government.”

(c) Article 532 of the Rwandan Penal Code, which punishes “any person who, publically and intentionally, contempt, despises, removes, destroys or desecrates the national flag or official emblems of the sovereignty of the Republic of Rwanda.”

These provisions (included in the Rwandan Penal Code) are extremely broad and ambiguous, and criminalize the legitimate and protected exercise of freedom of expression. For instance, the UNHRC has expressed “concern regarding laws on such matters as . . . disrespect for flags and symbols,”¹⁵⁴ such as Article 532 of the Rwandan Penal Code. Although Rwanda has committed to amend its overly-broad laws to prevent new political convictions from taking place, this has not happened.¹⁵⁵

Messrs. Rusagara and Byabagamba were convicted under provisions of the Rwandan Penal Code that are improperly broad and ambiguous and criminalize the legitimate and protected exercise of freedom of expression and political opposition.

b. The Convictions of Messrs. Rusagara and Byabagamba Are Politically Motivated

The conviction of Messrs. Rusagara and Byabagamba is transparently motivated by a desire to repress dissent and fits squarely in the pattern of the Kagame Administration’s human rights violations.

First, as explained in X(A)(3)(b) above, Messrs. Rusagara and Byabagamba were imprisoned for making comments that were deemed critical of the Kagame administration. Second, the Rwandan military is subject to permanent scrutiny to keep in line with the government’s views and policies. This is especially the case for senior officers such as Messrs. Rusagara and Byabagamba, given the influence they can exert on their subordinates and outside of the military. These men were imprisoned because of the perceived threat their speech posed to the government.¹⁵⁶ Third, the convictions of Messrs. Rusagara and Byabagamba were likely retaliation for their family ties to, and contact with, Dr. Himbara. As explained in X(A)(2) above, Dr. Himbara is an outspoken critic of the Rwandan government who fled the country on 2010. Last, the prison sentences of 20 and 21 years which were given to Messrs. Rusagara and Byabagamba,

¹⁵⁴ General Comment No. 34, at para. 38.

¹⁵⁵ Communication of the Ministry of Justice of the Republic of Rwanda (November 2015), available at http://www.minijust.gov.rw/fileadmin/Documents/International_Reports/Recommendations_accepted_by_Rwanda.pdf.

¹⁵⁶ Conversation with AB and BC, March 25, 2017.

respectively, were disproportionate to the crimes for which they were charged and are further evidence that the convictions are politically motivated.

The Kagame Administration's influence on the trial—and the concept of *agatebe*—extended also to the witnesses who testified for the prosecution. Of the witnesses who testified against either Mr. Rusagara or Mr. Byabagamba, or both, at least five were retired by the Rwandan military at the same time as Mr. Rusagara.¹⁵⁷ Furthermore, several witnesses had faced the types of scandal or charges that the Kagame Administration frequently uses to control officials. Colonel Kamili Karege and Colonel John Bosco Mulisa, who both provided testimony against Messrs. Rusagara and Byabagamba, were suspended and relieved of their military duties in 2009¹⁵⁸ before being retired alongside Mr. Rusagara. Colonel Richard Masozera (who provided testimony against Mr. Byabagamba) had been fired from a post in the Civil Aviation Authority ostensibly for joining a “subversive” faction in the RPF in September 2014.¹⁵⁹ Furthermore, Capt. David Kabuye may have faced pressure on multiple fronts: his own criminal charges, as discussed in Section X(A)(3)(b) above, and the recent removal of his wife, Rose Kabuye, from her post as a top advisor to President Kagame.¹⁶⁰

The Kagame Administration uses scandal and formal charges to keep officials perceived to be subordinate in check. In this case, the Kagame Administration sought charges against two formerly high-ranking officials in order to make the statement that no official is independent of President Kagame's control, and the Rwandan government used several other current and former officials in the same tenuous positions to provide testimony against the defendants. As in the case of Ms. Ingabire, the Kagame Administration has targeted Messrs. Rusagara and Byabagamba, who now face decades in prison. The government's charges in this case both violate the defendants' rights to freedom of expression and also mask the political motivations underlying this prosecution.

c. None of the Exceptions to the Right to Freedom of Expression

Apply in this Case

Article 19 of the ICCPR provides for certain exceptions to the right to freedom of expression based on national security, public order, public health or morals, and the respect of the rights and reputations of others.¹⁶¹ These exceptions do not apply in this case. According to the

¹⁵⁷ This group included Brigadier General Alex Ibambasi, Brigadier General Geoffrey Byegyeka, Brigadier General Steven Karyango, Colonel Kamili Karege, and Colonel John Bosco Mulisa. See Jean de la Croix Tabaro, *Gatsinzi, five other generals retire*, The New Times (October 25, 2013), <http://www.newtimes.co.rw/section/article/2013-10-25/70256/>.

¹⁵⁸ See Edwin Musoni, *RDF suspends two senior commanders*, The New Times (January 14, 2009), <http://www.newtimes.co.rw/section/article/2009-01-14/45284/>.

¹⁵⁹ See Great Lakes Voice, *Col. Udahemuka replaces Col. Masozera at Civil Aviation Authority* (September 9, 2014), <http://greatlakesvoice.com/col-udahemuka-replaces-col-masozera-at-civil-aviation-authority/>.

¹⁶⁰ See Great Lakes Voice, *RPF quizzed Lt Col. Kabuye more than 30 times—Sen. Rutaremara* (September 8, 2014), <http://greatlakesvoice.com/rpf-quizzed-lt-col-kabuye-more-than-30-times-sen-rutaremera/>.

¹⁶¹ Article 19(3) of the ICCPR provides that “[t]he exercise of the [right to freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For the respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health and morals.”

three-prong test developed by the UNHRC,¹⁶² in order to be permissible under international law, any limitation to freedom of expression must be (1) “provided by law,” (2) for the protection of an “enumerated purpose” (e.g. national security or public order), and (3) “necessary” to achieve that purpose.¹⁶³

These exceptions shall be construed narrowly and, in any case, restrictions to the right to freedom of expression “may not put in jeopardy the right itself.”¹⁶⁴ The government may not merely invoke one of the enumerated exceptions, but must “specify the precise nature of the threat” posed by the protected activity,¹⁶⁵ establish a “direct and immediate connection between the expression and the threat,”¹⁶⁶ and demonstrate why the limitation was necessary. In short, general and unsupported allegations will not suffice as a basis for limiting the right to freedom of expression.¹⁶⁷

The arrest and detention of Messrs. Rusagara and Byabagamba fall well outside of the narrow (potential) restrictions to the right to freedom of expression. Indeed, Messrs. Rusagara’s and Byabagamba’s comments neither place national security, public order, public health or morals at risk, nor violate the rights or reputations of others. These men were convicted for expressing their views (on the Kagame’s administrations actions and policies) in the context of *private* conversations held with individuals.

In addition, the fact that Messrs. Rusagara and Byabagamba were members of the military when they allegedly expressed their views (in the case of Mr. Rusagara, only some of them, as he was forced to retire in 2013)¹⁶⁸ does not alter the foregoing. As the European Court of Human Rights (“ECHR”) has expressed, “Article 10 [which provides for the right to freedom of expression] does not stop at the gates of army barracks. It applies to military personnel as to all other persons within the jurisdiction of the Contracting States.”¹⁶⁹ While the narrow limitations mentioned above also apply to the military (e.g. officers can’t disclose military secrets as this may jeopardize national security;¹⁷⁰ rules of conduct may be imposed to preserve military discipline,

¹⁶² *Park v. Republic of Korea*, UN Human Rights Committee, Communication No. 628/1995, UN Doc. CCPR/C/64/D/628/1995, para. 10.3, (November 3, 1998).

¹⁶³ *Shin v. Republic of Korea*, UN Human Rights Committee, Communication No. 926/2000, UN Doc. CCPR/C/80/D/926/2000, para. 7.2, (March 16, 2004).

¹⁶⁴ See UN Human Rights Committee, *General Comment No. 34*, UN Doc. CCPR/C/G/34, para. 21, (September 12, 2011).

¹⁶⁵ *Sohn v. Republic of Korea*, UN Human Rights Committee, Communication No. 518/1992, UN Doc. CCPR/C/54/518/1992, para. 10.4, (July 19, 1995).

¹⁶⁶ General Comment No. 34, at para. 35. See also *Sohn v. Republic of Korea*, at para. 10.4.

¹⁶⁷ In *Kim v. Republic of Korea*, the UNHRC rejected the argument that punishing the distribution of materials that coincided with the policy statements of the Democratic Peoples’ Republic of Korea, was “necessary” for the protection of national security. The UNHRC noted that “North Korean policies were well known within the territory of the State party and it is not clear how the (undefined) ‘benefit’ that might arise for the DPRK [Democratic Peoples’ Republic of Korea] from the publication of views similar to their own created a risk to national security, nor is it clear what was the nature and extent of any such risk.” *Kim v. Republic of Korea*, Communication No. 574/1994, UN Doc. 574/1994 CCPR/C/64/D/574/1994, para. 12.4, (January 4, 1999). See also *Sohn v. Republic of Korea*, at para. 10.4.

¹⁶⁸ See section VII(A)(3)(b) *supra*.

¹⁶⁹ *Grigoriades v. Greece*, Application No. 24348/94, decided by the European Court of Human Rights on November 25, 1997, para. 45, available at [http://hudoc.echr.coe.int/eng#{"dmdocnumber":\["695993"\],"itemid":\["001-58116"\]}](http://hudoc.echr.coe.int/eng#{).

¹⁷⁰ *Hadjianastassiou v. Greece*, Application No. 12945/87, decided by the ECHR on December 16, 1992, available at [http://hudoc.echr.coe.int/eng#{"dmdocnumber":\["695656"\],"itemid":\["001-57779"\]}](http://hudoc.echr.coe.int/eng#{)

necessary to guarantee public order),¹⁷¹ Messrs. Rusagara’s and Byabagamba’s alleged comments do not jeopardize any of these values. They do not refer to the army or involve any confidential information, were not aimed at the uprising of the armed forces and were given as part of *private* conversations.

To consider that Messrs. Rusagara’s and Byabagamba’s comments are contrary to Article 19 of the ICCPR would ignore that, in a democratic society, public officers are subject to heightened scrutiny,¹⁷² and would be contrary to General Comment 34, according to which “[p]aragraph 3 [limitations to freedom of expression] may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.”¹⁷³ By imprisoning and convicting Messrs. Rusagara and Byabagamba, Rwanda has effectively denied their right to freedom of expression. While the UNHRC does allow restrictions on speech in limited circumstances, it does not allow governments to undercut freedom of expression in this way.¹⁷⁴

For the above reasons, by arbitrarily arresting and convicting Messrs. Rusagara and Byabagamba, Rwanda violated Articles 19 of the ICCPR and the UDHR, Article 9 of the ACHPR, and Article 38 of the Rwandan Constitution.

2. Arbitrary Deprivation of Liberty under Category III

According to Category III of the Working Group’s Revised Methods of Work, a deprivation of liberty is arbitrary “[w]hen the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character.”¹⁷⁵

Due process is one of the tenets of the right to a fair trial. The minimum international standards of due process are established in the UDHR, the ICCPR, the Body of Principles, the United Nations Standard Minimum Rules for the Treatment of Prisoners (“Mandela Rules”)¹⁷⁶ and

¹⁷¹ *Grigoriades v. Greece*, Op. Cit.

¹⁷² The ECHR has said that “*freedom of expression also applies to the ‘informations’ or ‘ideas’ that harm, shock or disturb the State or any fraction of the population. This goes along pluralism, tolerance and an open spirit without which it would not be a ‘democratic society’ (...). This is not different when the beneficiaries [of the right to freedom of expression] are militaries (...)*”. Vereinigung Demokratischer Soldaten Österreichs et Gubi v. Autriche, para. 36, available at <https://www.article19.org/resources.php/resource/3124/en/echr:-vereinigung-demokratischer-soldaten-%C3%96sterreichs-and-gubi-v.-austria>.

¹⁷³ General Comment 34, Op. Cit., para. 23.

¹⁷⁴ *Id.*, para. 21.

¹⁷⁵ The Revised Methods of Work, Category III, paragraph c.

¹⁷⁶ *Id.*, at paragraphs 7(a) and (b).

the ACHPR.¹⁷⁷ The Rwandan Constitution also guarantees that “[e]veryone has the right to due process of law.”¹⁷⁸

a. Rwanda Violated Messrs. Rusagara’s and Byabagamba’s Right Not to Be Subjected to Arbitrary Arrest

Article 9(1) of the ICCPR, which confirms the right to liberty and freedom from arbitrary detention, guarantees that “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”¹⁷⁹ This right is reiterated by Article 9 of the UDHR, Article 6 of the ACHPR and Principles 2 and 36(2) of the Body of Principles.¹⁸⁰ The UNHRC has interpreted this right to mean that “procedures for carrying out legally authorized deprivation of liberty should also be established by law and State parties should ensure compliance with their legally prescribed procedures.”¹⁸¹ Under Rwandan law, an arrest warrant is a mandatory pre-condition to any arrest.¹⁸²

The arrests of Messrs. Rusagara and Byabagamba did not comply with international law; indeed, as explained in X(A)(3)(a) above, they failed to meet the standards of Rwanda’s own laws, as Messrs. Rusagara and Byabagamba were not shown arrest warrants at the time of their detention. In the case of Mr. Rusagara, an arrest warrant was only provided six days after his arrest.

Through the arbitrary arrest of Messrs. Rusagara and Byabagamba, Rwanda violated Article 9(1) of the ICCPR, Article 9 of the UDHR, Article 6 of the ACHPR, Principles 2 and 36(2) of the Body of Principles, and Article 51 of the Rwandan Code of Criminal Procedure.

b. Rwanda Violated Messrs. Rusagara’s and Byabagamba’s Right Not to Be Subjected to Unlawful Searches of their Domiciles

Article 17 of the ICCPR prohibits unlawful interference with home privacy, stating that “No one shall be subjected to arbitrary or unlawful interference with his privacy, home or correspondence.” An identical guarantee is provided by Article 12 of the UDHR.¹⁸³ Rwandan law

¹⁷⁷ ACHPR, at art. 6 (“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained”) and art. 7 (“Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.”).

¹⁷⁸ Rwandan Constitution, at art. 29 (“Everyone has the right to due process of law”).

¹⁷⁹ ICCPR, at art 9(1).

¹⁸⁰ UDHR, at art 9; ACHPR, at art. 6; Body of Principles, at principles 2 and 36(2).

¹⁸¹ UN Human Rights Committee, *General Comment No. 35*, UN Doc. CCPR/C/GC/35, para. 23 (December 16, 2014).

¹⁸² Rwandan Code of Criminal Procedure, at art. 51: “A warrant to bring by force and arrest warrant shall be enforced by any law enforcement officer and must be shown to the persons against whom they are issued and such persons shall be given a copy of the warrant. In case of emergency, such warrants may be sent by any means available. The original or copy of a warrant to bring by force or an arrest warrant shall be immediately sent to the person responsible for its enforcement” (emphasis added).

¹⁸³ UDHR, at art. 12.

recognizes the right to privacy, providing that any domicile search shall be accompanied by the exhibition of a search warrant.¹⁸⁴

As explained in X(A)(3)(a) above, the searches of Messrs. Rusagara's and Byabagamba's domiciles were performed in breach of these laws. Indeed, their domiciles were searched without the proper search warrants, and these men were absent during these searches, which were made after their arrests. In the case of Mr. Byabagamba, several personal items were taken during the search.

Through the arbitrary searches of Messrs. Rusagara's and Byabagamba's domiciles, Rwanda violated Article 17 of the ICCPR, Article 12 of the UDHR, and Articles 68 and 69 of the Rwandan Code of Criminal Procedure.

c. Rwanda Violated Messrs. Rusagara's, Byabagamba's, and Kabayiza's Right to *Habeas Corpus*

According to Article 9(3) of the ICCPR, a detainee shall "be brought promptly before a judge or other officer authorized by law to exercise judicial power" to challenge the legality of his continued detention (right to *habeas corpus*, also incorporated in Article 9(4) for non-criminal defendants).¹⁸⁵ The UNHRC has interpreted the term "promptly" to be within about 48 hours, except in exceptional circumstances,¹⁸⁶ and has noted that this right shall be observed "even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity."¹⁸⁷ In addition, the UNHRC has stated that the bail judge or officer should be "independent, objective and impartial in relation to the issues dealt with,"¹⁸⁸ and thus that "a public prosecutor cannot be considered as an officer exercising judicial power under paragraph 3."¹⁸⁹ The right to *habeas corpus* is reiterated in Principles 4, 11, 32(1) and 37 of the Body of Principles.¹⁹⁰ Aside from acting as a check on arbitrary detention, these provisions also safeguard other related

¹⁸⁴ Rwandan Code of Criminal Procedure, at art. 67: "A Prosecutor or Judicial Police Officer vested with powers to conduct a search and visit any place where evidence can be found must show a valid service card and a search warrant signed by the competent authority. A copy of the search warrant shall be given to the suspect, if present and the owner of the premises to be searched" (emphasis added).

¹⁸⁵ ICCPR, at Article 9(4) ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful").

¹⁸⁶ General Comment No. 35, at para. 33.

¹⁸⁷ *Id.* at para. 32.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Body of Principles, at principle 4 ("Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority."), principle 11 ("A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law."), principle 32(1) ("A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful") and principle 37 ("A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention.").

rights such as freedom from torture.¹⁹¹

As explained in X(A)(3)(b) above, after Messrs. Rusagara's, Byabagamba's, and Kabayiza's arrests occurred on August 17, August 23, and August 24, 2014, respectively, they were not brought "promptly" before a judge to challenge the legality of their detention. These men only appeared before a judge on August 28, 2014 (*i.e.*, between 4 and 11 days after their arrest).¹⁹² In addition, and as explained in X(A)(3)(b) above, the judge presiding over the bail hearing later appeared as a prosecution witness in the trial, which evidences that the judicial determination to deny the defendants' bail was not "independent, objective and impartial," as required by Article 9(3) and 9(4) of the ICCPR.

By denying Messrs. Rusagara, Byabagamba, and Kabayiza prompt access to an unbiased judge to challenge the legality of their detention, Rwanda violated Article 9(3) and 9(4) of the ICCPR, and Principles 4, 11, 32(1), and 37 of the Body of Principles.

d. Rwanda Violated Messrs. Rusagara's and Byabagamba's Right Not to Be Subjected to Prolonged and Indefinite Solitary Confinement

The Mandela Rules prohibit that any person be subjected to prolonged or indefinite solitary confinement.¹⁹³ According to Rule 44 of the Mandela Rules, solitary confinement is prolonged if it is "for a time period in excess of 15 consecutive days."¹⁹⁴ Rule 45(1) adds that "solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority."¹⁹⁵

As explained in X(A)(3)(b) above, from the time of their arrests three years ago, Messrs. Rusagara and Byabagamba have been held full-time in solitary confinement at the Kanombe prison. This situation continues to the present date.

As a result, Rwanda violated (and continues to violate) Rules 43(1) and 45(1) of the Mandela Rules.

e. Rwanda Violated Messrs. Rusagara's, Byabagamba's, and Kabayiza's Right to Release Pending Trial

In addition to the right to *habeas corpus*, Article 9(3) of the ICCPR also enshrines the right to an individual's release pending trial, providing that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody."¹⁹⁶ The UNHRC has found that "[d]etention pending trial must be based on an individualized determination that [such detention] is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime Pretrial detention should not be

¹⁹¹ General Comment No. 35, at para. 34. Other rights that may be at risk are those guaranteed by articles 6, 7, 10 and 14 of the ICCPR. *Id.*, at para. 35.

¹⁹² See sections VII(A)(3)(a) and VII(A)(3)(b).

¹⁹³ Mandela Rules, at rule 43(1).

¹⁹⁴ Mandela Rules, at rule 44.

¹⁹⁵ Mandela Rules, at rule 45(1).

¹⁹⁶ ICCPR, at art 9(3).

mandatory for all defendants charged with a particular crime, without regard to individual circumstances.”¹⁹⁷ Principles 38 and 39 of the Body of Principles further confirm that, except in special cases, a criminal detainee is entitled to release pending trial.¹⁹⁸

As explained in X(A)(3)(b) above, Messrs. Rusagara, Byabagamba, and Kabayiza were only heard by a bail judge several months after their arrest, in March 2015, at which time bail was denied. In maintaining the detention of the defendants, the Court did not perform an analysis of the specific circumstances of each of the detainees. Instead, it inverted the burden of proof required for determinations of bail: because the defendants could not affirmatively show that they would remain in Rwanda to stand trial, they could not be released. The exception (detention) became the rule.

By not releasing Messrs. Rusagara, Byabagamba, and Kabayiza pending trial, Rwanda violated Article 9(3) of the ICCPR and Principles 38 and 39 of the Body of Principles.

f. Rwanda Violated Messrs. Rusagara’s, Byabagamba’s, and Kabayiza’s Right to be Tried Without Undue Delay

Article 14(3)(c) of the ICCPR guarantees that every defendant shall have the right to “be tried without undue delay.”¹⁹⁹ As stated by the UNHRC, “[a]n important aspect of the fairness of a hearing is its expeditiousness,”²⁰⁰ and “in cases where the accused are denied bail by the court, they must be tried as expeditiously as possible.”²⁰¹ In addition, this right “relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal.”²⁰² The right to be tried without undue delay is reiterated by Principle 38 of the Body of Principles.²⁰³

As explained in X(A)(3)(b) above, Messrs. Rusagara, Byabagamba and Kabayiza were arrested on August 17, 23 and 24, 2014, respectively. Although their trial began on January 27, 2015, it was delayed for a year (until January 5, 2016) because of Mr. Kabayiza’s medical condition. Given that Mr. Kabayiza was extremely ill because he was tortured while detained, his illness cannot serve as a pretext for the unjustifiable delay of Messrs. Rusagara’s, Byabagamba’s, and Kabayiza’s trial. The need for trial without undue delay was exacerbated by the fact that, as mentioned above, Messrs. Rusagara, Byabagamba and Kabayiza were denied bail.

As such, Rwanda violated Article 14(3)(c) of the ICCPR and Principle 38 of the Body of Principles.

¹⁹⁷ General Comment No. 35, at para. 38.

¹⁹⁸ Body of Principles, at principle 38 (“A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.”) and principle 39 (“Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.”).

¹⁹⁹ ICCPR, at art 14(3)(c).

²⁰⁰ General Comment No. 32, at para. 27.

²⁰¹ *Id.*, at para. 35.

²⁰² *Id.*

²⁰³ Body of Principles, at principles 38.

g. Rwanda Violated Messrs. Rusagara’s and Byabagamba’s Right to Defense and to Communicate with Counsel

Article 14(3)(d) of the ICCPR guarantees the right to defense, by stating that a criminal defendant has the right to “be tried in his presence, and to defend himself in person or through legal assistance of his own choosing.” In addition, Article 14(3)(b) of the ICCPR guarantees a criminal accused the right “to communicate with counsel of his own choosing.”²⁰⁴ The UNHRC has clarified that such guarantee “requires that the accused is granted prompt access to counsel,”²⁰⁵ and that “State parties should permit and facilitate access to counsel for detainees in criminal cases from the outset of their detention.”²⁰⁶ Principles 18(1) and (3) of the Body of Principles further provide for the right of a detainee to “communicate and consult with his legal counsel,” and that such right “may not be suspended or restricted save in exceptional circumstances.”²⁰⁷ Likewise, Article 7 of the ACHPR provides that “[e]very individual shall have the right to have his cause heard. This comprises...the right to defense, including the right to be defended by counsel of his choice.”²⁰⁸ Rule 119 of the Mandela Rules also provides for the right to access legal advice,²⁰⁹ and the Rwandan Constitution states that “[e]veryone has the right to due process of law, which includes the right . . . to defence and legal representation.”²¹⁰

As explained in X(A)(3)(b) above, because the dates of the Court hearings were repeatedly modified the same day they were scheduled to be held, oftentimes, Messrs. Rusagara, Byabagamba, and Kabayiza appeared before Court without legal representation, thus being deprived of their right to be defended by counsel.

In addition, from the outset of their detention, Messrs. Rusagara and Byabagamba were denied several times the right to communicate and meet with counsel and are still repeatedly prevented from doing so.²¹¹ No justifications were given for these denials, and there were no exceptional circumstances that justified them. Notably, Messrs. Rusagara and Byabagamba have been held incommunicado for repeated and extended periods of time, including in the crucial first few days after their arrest.

As such, Rwanda has violated (and continues to violate) Articles 14(3)(b) and 14(3)(d) of the ICCPR, Principles 18(1) and (3) of the Body of Principles, Article 7 of the ACHPR, Rule 119 of the Mandela Rules, and Article 29(1) of the Rwandan Constitution.

h. Rwanda Violated Mr. Byabagamba’s Right to Confidentiality with Counsel

²⁰⁴ ICCPR, at art. 14(3)(b).

²⁰⁵ General Comment No. 32, at para. 34.

²⁰⁶ General Comment No. 35, at para. 35.

²⁰⁷ Body of Principles, at principles 18(1) and (3).

²⁰⁸ ACHPR, at art. 7.

²⁰⁹ Mandela Rules, at Rule 119: “*If an untried prisoner does not have a legal adviser of his or her own choice, he or she shall be entitled to have a legal adviser assigned to him or her by a judicial or other authority in all cases where the interests of justice so require and without payment by the untried prisoner if he or she does not have sufficient means to pay. Denial of access to a legal adviser shall be subject to independent review without delay.*”

²¹⁰ Rwandan Constitution, at art. 29.

²¹¹ Conversation with BC, April 8, 2017.

In commenting on Article 14(3)(b) of the ICCPR, which guarantees an accused criminal the right to communicate with counsel,²¹² the UNHRC notes that “[c]ounsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality.”²¹³ Principle 18(3) of the Body of Principles further provides for the right of a detainee to be assisted by and communicate with his legal counsel “without delay or censorship and in full confidentiality,”²¹⁴ and that such right “may not be suspended or restricted save in exceptional circumstances.”²¹⁵ Similarly, Rule 61 of the Mandela Rules specifies that consultations with a legal adviser shall be “in full confidentiality Consultations may be within sight, but not within hearing, of prison staff.”²¹⁶

As explained in X(A)(3)(b) above, before the pre-trial hearing, in the instances where Mr. Byabagamba was allowed to meet with counsel, these meetings were always held in presence of a prosecutor (without any justification).²¹⁷ Only after the end of the pre-trial hearing were some of these meetings (but not all of them) allowed to take place in confidentiality.²¹⁸

Rwanda has thus violated (and continues to violate) Article 14(3)(b) of the ICCPR, Principle 18(3) of the Body of Principles, and Rule 61 of the Mandela Rules.

i. Rwanda Violated Messrs. Rusagara’s and Byabagamba’s Right to Be Visited by Family

Principle 19 of the Body of Principles provides that “detained or imprisoned persons shall have the right to be visited by and to correspond with, in particular, members of his family . . . subject to reasonable conditions and restrictions as specified by law or lawful regulations.”²¹⁹ Similarly, this right is protected by the Mandela Rules, notably Rule 43 stating that “[d]isciplinary sanctions or restrictive measures shall not include the prohibition of family contact,” Rule 58 stating that “[p]risoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals,” and Rule 106 stating that “[s]pecial attention shall be paid to the maintenance and improvement of such relations between a prisoner and his or her family as are desirable in the best interests of both.”²²⁰

As explained in X(A)(3)(b) above, from the time of their arrest, Messrs. Rusagara and Byabagamba have been prevented several times from being visited by family members. This has happened in a random fashion and despite the fact that family members’ attempts to visit took place during authorized visiting hours. This continues to happen to date. Notably, as a result of

²¹² ICCPR, at art. 14(3)(b): “*In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.*”

²¹³ General Comment No. 32, at para. 34.

²¹⁴ Body of Principles, at principle 18(3).

²¹⁵ *Id.*

²¹⁶ Mandela Rules, at Rule 61.

²¹⁷ Conversation with BC, April 8, 2017.

²¹⁸ Conversation with BC, April 8, 2017.

²¹⁹ Body of Principles, at principle 19.

²²⁰ Mandela Rules, at Rules 43, 58 and 106.

these undue limitations, Messrs. Rusagara and Byabagamba were unable to meet and/or communicate with some of their family members before they died.

Rwanda has thus violated (and continues to violate) Principle 19 of the Body of Principles as well as Rules 43, 58, and 106 of the Mandela Rules.

j. Rwanda Violated Messrs. Rusagara's, Byabagamba's, and Kabayiza's Right to a Fair Hearing and to Examine the Witnesses That Testified Against Them

Article 14(1) of the ICCPR guarantees the right “to a fair and public hearing.”²²¹ This is an “absolute requirement . . . not capable of limitation.”²²² One of the key tenets of a fair hearing is the principle of equality of arms,²²³ which requires that both parties have the same procedural rights and, specifically, that “each side be given the opportunity to contest all the arguments and evidence adduced by the other party.”²²⁴ Notably, Article 14(3)(e) of the ICCPR provides that every defendant shall have the right “[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”²²⁵ Article 10 of the UDHR and Article 7(1) of the ACHPR reiterate these requirements.²²⁶ While not explicitly guaranteeing the right to a fair hearing, the Rwandan Constitution does state that “[e]veryone has the right to due process of law.”²²⁷

The trial of Messrs. Rusagara, Byabagamba, and Kabayiza was not a fair one, as it was plagued with inconsistencies and procedural violations, as explained in X(A)(3)(b) above.

First, Messrs. Rusagara, Byabagamba, and Kabayiza were not allowed to examine all the witnesses that testified against them.²²⁸ They were only allowed to examine four out of the eleven witnesses presented by the prosecution. One of the witnesses that could not be examined was Colonel Chance Ndagano, who served as judge in the pre-trial detention phase.

Second, one of the prosecution witnesses acknowledged after the trial that he was “forced” to testify against Messrs. Rusagara and Byabagamba.²²⁹ This was the case of Captain David

²²¹ ICCPR, at art 14(1).

²²² Alex Conte & Richard Burchill, *Defining Civil and Political Rights*, 165, (Ashgate 2009 2nd ed.).

²²³ General Comment No. 32, at para. 8.

²²⁴ *Id.*, at para. 13.

²²⁵ Commenting on this provision, the UNHRC has said that “*the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant*”. General Comment 32, para. 13, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en.

²²⁶ UDHR, at art. 10 (“*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*”); ACHPR, at art 7(1)(d) (“*Every individual shall have the right to have his cause heard. This comprises: [...] (d) the right to be tried within a reasonable time by an impartial court or tribunal.*”).

²²⁷ Rwandan Constitution, at art. 29.

²²⁸ See Human Rights Watch, *Rwanda: Ex-Military Officers Convicted Over Comments* (April 1, 2016), <https://www.hrw.org/news/2016/04/01/rwanda-ex-military-officers-convicted-over-comments>.

²²⁹ Human Rights Watch, *Rwanda: Ex-Military Officers Convicted Over Comments*, Op. Cit. The prosecution and the Court relied extensively on David Kabuye’s testimony. See, for instance, paras. 63, 65-68, 72 and 77 of the Judgment, Op. Cit.

Kabuye, who at the time of his testimony was serving prison time for crimes similar to those raised against Messrs. Rusagara and Byabagamba. Captain David Kabuye was released from jail shortly after his testimony.

Third, the Court convicted Messrs. Rusagara, Byabagamba, and Kabayiza based on the witness statement of Colonel David Bukenya, which he had not read and was forced to sign.²³⁰ The Court relied on this witness statement despite acknowledging the existence of contradictions in the statement and despite Colonel Bukenya's testimony that he had been forced to sign it.²³¹

Fourth, the Court convicted Messrs. Rusagara, Byabagamba, and Kabayiza based on the witness statement of Mr. Kabayiza, who was tortured and forced to produce that testimony.

By having been denied the right to present their case fully, and by being convicted based on illegal and knowingly inaccurate evidence, Rwanda violated Messrs. Rusagara's, Byabagamba's, and Kabayiza's right to a fair trial and to examine the witnesses that testified against them, in violation of Article 14(1) and 14(3)(e) of the ICCPR, Article 10 of the UDHR, and Article 7(1) of the ACHPR.

k. Rwanda Violated Mr. Kabayiza's Right to Freedom from Torture

The right to freedom from torture is well protected by international and Rwandan law. Article 7 of the ICCPR guarantees that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."²³² Article 10(1) of the ICCPR further provides that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."²³³ This right is reiterated by the Articles 1 and 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), to which Rwanda is party, Article 5 of the UDHR, Article 5 of the ACHPR, Principle 6 of the Body of Principles,²³⁴ and Rules 1 and 43 of the Mandela Rules.²³⁵ Article 14 of the Rwandan Constitution also prohibits "torture or physical abuse, or cruel, inhuman or degrading treatment."²³⁶ Any imposition of suffering that is not severe enough to qualify as torture still constitutes cruel, inhuman or degrading treatment,²³⁷ which term "should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental."²³⁸

Article 14(3)(g) of the ICCPR specifically prohibits the infliction of physical or mental pain or suffering by a public official with the intention to coerce a confession.²³⁹ International

²³⁰ Conversation with BC, April 8, 2017.

²³¹ Judgment, Op. Cit., paras. 38-39; conversation with AB and BC, March 25, 2017.

²³² ICCPR, at art. 7

²³³ *Id.*, at art. 10(1).

²³⁴ UDHR, at art. 5; ACHPR, at art. 5; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/RES/39/46 (December 10, 1984); Body of Principles, at principle 6.

²³⁵ Mandela Rules, at rule 43.

²³⁶ Rwandan Constitution, at art. 14.

²³⁷ M. Nowak, *UN Covenants on Civil and Political Rights: CCPR Commentary* 445, 2nd ed., Kehl am Rhein: Engel, 163 (2005).

²³⁸ Body of Principles, at principle 6(1).

²³⁹ ICCPR, at art. 14(3)(g).

law's particular concern with torture as an interrogatory tool is further reflected in the definition of torture in CAT, which defines the term as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession,"²⁴⁰ as well as in Principle 21(2) the Body of Principles, which guarantees that "no detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgment."²⁴¹

As detailed in X(A)(3)(b) above, while detained, Mr. Kabayiza was tortured in order to compel testimony against Messrs. Rusagara and Byabagamba. When Mr. Kabayiza appeared at Court, he showed physical signs of torture and bruises, barely being able to walk. In spite of the torture inflicted upon him, the Court convicted Messrs. Rusagara, Byabagamba and Kayabiza based on the latter's testimony.

By torturing Mr. Kabayiza, Rwanda violated Articles 7, 10(1), and 14(3)(g) of the ICCPR, Article 5 of the UDHR, Article 5 of the ACHPR, Articles 1 and 4 of the CAT, Principles 6 and 21(2) of the Body of Principles, Rules 1 and 43 of the Mandela Rules, and Article 14 of the Rwandan Constitution.

1. Rwanda Violated Mr. Rusagara's Right to Be Tried by a Competent Tribunal Established by Law

According to Article 14(1) of the ICCPR, everyone has the right to be judged by "a competent . . . tribunal established by law." Article 29(3) of the Rwandan Constitution also states that "[e]veryone has the right to due process of law, which includes the right . . . to appear before a competent Court."²⁴²

Mr. Rusagara was forced to retire from the military in October 2013.²⁴³ As the Court concedes, some of the crimes he was accused of were allegedly committed in 2014, when he was a civilian. In spite of this, he was judged and convicted by the Kanombe Military High Court in March 2016.

The trial of civilians by military courts is accepted only in very exceptional circumstances. As the UNHRC has noted:

[W]hile the [ICCPR] does not prohibit the trial of civilians in military courts, nevertheless such trials should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14 [of the ICCPR]. It is incumbent on a state party that does try civilians before military courts to justify the practice. The [UNHRC] considers that the state party must

²⁴⁰ CAT, at art 1(1).

²⁴¹ Body of Principles, at principle 21(2). Also, "it shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess..." *Id.*, at principle 21(1).

²⁴² Rwandan Constitution, at art. 29(3).

²⁴³ VII(A)(2) above.

demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high-security civilian courts are inadequate to the task and that recourse to military courts is unavoidable. . . . [T]he mere invocation of domestic legal provisions for the trial by military court of certain categories of serious offences [does not] constitute an argument under the [ICCPR] in support of recourse to such tribunals.²⁴⁴

Military courts can only *exceptionally* judge civilians because these trials “raise serious problems as far as the equitable, impartial and independent administration of justice.”²⁴⁵ However, as explained in X(A)(1)(d) above, Rwandan military courts regularly exercise jurisdiction over civilians as accomplices to soldiers accused of crimes.

There are no circumstances that justify the fact Mr. Rusagara was judged and convicted by the Kanombe Military High Court. Contrary to the above-mentioned UNHRC guidance, the Court did not explain why, in the case of Mr. Rusagara, “the regular civilian courts [were] unable to undertake the trials,” why “other alternative forms of special or high-security civilian courts [were] inadequate to the task,” or why “recourse to military courts [was] unavoidable.” In spite of this, and of the challenges raised by Mr. Rusagara to the competence of the Court, the Court upheld its jurisdiction and convicted Mr. Rusagara to spend 20 years in prison.

Finally, and notwithstanding the foregoing, there were also irregularities in the composition of the military court that judged Mr. Rusagara. According to Rwandan law, the judge and prosecutor of the case must be of an equal or more senior category of rank than the defendant. However, as evidenced by the signatures of the judgment, the judges composing the Court were majors,²⁴⁶ which is a lower category than that of Mr. Rusagara, who retired from the military as a Brigadier General. Thus, made up as it was, the composition of the Court was contrary to Rwandan law.

In light of the foregoing, Rwanda violated Article 14(1) of the ICCPR and Article 29(3) of the Rwandan Constitution.

m. Rwanda Violated Messrs. Rusagara’s, Byabagamba’s and Kabayiza’s Right to Be Tried by an Independent Tribunal

According to Article 14(1) of the ICCPR, everyone has the right to be judged by an “independent . . . tribunal established by law.” The requirement of judicial independence under Article 14(1) establishes an objective standard, which is treated as an “absolute requirement . . . not capable of limitation.”²⁴⁷ As noted by the UNHRC, “The requirement of independence refers,

²⁴⁴ Human Rights Committee, eighty-ninth session, March 12-13, 2007, Communication No. 1172/2003 *Salim Abbasi v. Aleria*, para. 8.7, available at http://dag.un.org/bitstream/handle/11176/265242/CCPR_C_89_D_1172_2003-EN.pdf?sequence=1&isAllowed=y (emphasis added).

²⁴⁵ General Comment 32, Op. Cit., para. 22.

²⁴⁶ Judgment, Op. Cit.

²⁴⁷ Alex Conte & Richard Burchill, *Defining Civil and Political Rights*, 165, (Ashgate 2009 2nd ed.).

in particular, to . . . the actual independence of the judiciary from political interference by the executive branch and the legislature.”²⁴⁸ The right to be tried by an independent tribunal is reiterated by Article 10 of the UDHR²⁴⁹ and Article 26 of the ACHPR.²⁵⁰ The Rwandan Constitution also states that “in exercising their judicial functions, judges at all times do it in accordance with the law and are independent from any power and authority.”²⁵¹

As explained in X(A)(1)(d) above, the Rwandan judiciary is not independent. The U.S. State Department has cited “constraints on judicial independence” in Rwanda, stating that “government officials sometimes attempt[] to influence individual cases.”²⁵² In a report titled “Law and Reality,” Human Rights Watch stated that:

The appointment of judges, required by law to be on the basis of merit, is also conditioned by political considerations. Several judges and lawyers told Human Rights Watch researchers that both ethnicity and affiliation with the RPF are considered in deciding judgeships. . . . Sometimes less than competent people are chosen because of that. . . . According to judges and other jurists, many judges hold political party membership, most often in the RPF, although the law on judicial conduct prohibits judges from belonging to political parties.²⁵³

Through these partisan judges, the Rwandan Government exerts influence in high-profile cases of opposition figures, such as occurred in the present case.

As such, Messrs. Rusagara, Byabagamba and Kabayiza were not tried by an independent tribunal, and Rwanda thus violated Article 14(1) of the ICCPR, Article 10 of the UDHR and Article 26 of the ACHPR.

n. Rwanda Violated Messrs. Rusagara’s and Byabagamba’s Right Not to Be Convicted for a Non-Crime

According to Article 15 of the ICCPR, “[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.” Article 11(2) of the UDHR provides for the same guarantee.²⁵⁴ Likewise, the ACHPR provides that “[n]o one may be

²⁴⁸ General Comment No. 32, at para. 19 (emphasis added).

²⁴⁹ UDHR, at art. 10: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

²⁵⁰ ACHPR, at art. 26: “States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.”

²⁵¹ Rwandan Constitution, at art. 151(5). See also art. 150.

²⁵² U.S. STATE DEPT., RWANDA 2013 HUMAN RIGHTS REPORT (2014), available at <https://www.state.gov/documents/organization/220359.pdf>.

²⁵³ Human Rights Watch, *Law and Reality: Progress in Judicial Reform in Rwanda* (July 2008), page 46, http://www.hrw.org/sites/default/files/reports/rwanda0708_1.pdf.

²⁵⁴ UDHR at art. 11(2): “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed”.

condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed.”²⁵⁵ The Rwandan Constitution states that “[e]veryone has the right to due process of law, which includes the right . . . not to be subjected to prosecution, arrest, detention or punishment on account of any act or omission which did not constitute an offence under national or international law at the time it was committed.”²⁵⁶ In addition to constituting arbitrary detention under Category III, convicting someone for a non-crime also constitutes arbitrary detention under Category I, as there is no “legal basis justifying the deprivation of liberty.”²⁵⁷

Article 463 of the Rwandan Penal Code, under which Messrs. Rusagara and Byabagamba were convicted, punishes the insurrection that is incited, and the trouble amongst the population that is created, by “speeches held in meetings or public places, or writings, images or emblems, any posters, sold or on sale or displayed to the public.” This provision assumes that a speech is given in a meeting or public place, which simply was not the case here. As explained in X(A)(3)(b) above, and as the Court concedes,²⁵⁸ Messrs. Rusagara’s and Byabagamba’s comments were made during conversations at the Nyarutarama Tennis Club²⁵⁹ and Car Wash,²⁶⁰ a bar, or while having meal at the Officers’ Mess,²⁶¹ respectively. No speeches are mentioned in the judgment for the simple reason that no speeches were made.

By convicting Messrs. Rusagara and Byabagamba of a non-crime, Rwanda violated Article 15 of the ICCPR, Article 11 of the UDHR, Article 7 of the ACHPR and Article 39 of the Rwandan Constitution.

3. Conclusion

For all of these reasons, the convictions of Messrs. Rusagara, Byabagamba, and Kabayiza violated both Rwandan and international law and are thus illegal. In addition, the sentences that each defendant received were disproportionate to the crimes for which they were charged. Even if each individual committed all of the offenses the Rwandan government alleged at trial, and even ignoring the Rwandan government’s many procedural violations, the charges did not merit sentences of 21 years for Mr. Byabagamba and 20 years for Mr. Rusagara. Such lengthy sentences

²⁵⁵ ACHPR, at art. 7: “No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed”.

²⁵⁶ Rwandan Constitution, at art. 39(4).

²⁵⁷ The Revised Methods of Work, para. 8.

²⁵⁸ Judgment, Op. Cit., para. 72 (“Rtd Brig Gen Frank Kanyambo Rusagara uttered all these criticisms while at Nyarutarama Tennis Club”) and para. 41 (“Court finds that the accused [Mr. Byabagamba] uttered all the above incriminated words while at the Officers’ Mess”).

²⁵⁹ Judgment, Op. Cit., para. 124 (“the Court finds that critical statements like: “Rwanda is a Police State (...) were uttered by Rtd. Gen. Frank Kanyambo Rusagara before people who were more than one person while at Nyarutarama Tennis Club and elsewhere”).

²⁶⁰ Judgment, Op. Cit., para. 67 (“(...) Rtd Brig Gen Frank Kanyambo Rusagara spread rumours because he was fully aware that that issue was pending before courts of law, and that he made such utterances while in a public place in the bar of Car Wash (...”).

²⁶¹ *Id.*, para. 41 (“The place at which Col. Tom Byabagamba uttered the incriminated statements can reasonably be established in front of army officers, apart from those who sat with him [for meal at the Officers’ Mess], even others in the hall could hear him”).

for making statements in bars and sharing news articles are excessive and present further evidence that the Rwandan government is seeking to stifle free expression through these convictions.

XI. INDICATE INTERNAL STEPS, INCLUDING DOMESTIC REMEDIES, TAKEN ESPECIALLY WITH THE LEGAL AND ADMINISTRATIVE AUTHORITIES, PARTICULARLY FOR THE PURPOSE OF ESTABLISHING THE DETENTION AND, AS APPROPRIATE, THEIR RESULTS OR THE REASONS WHY SUCH STEPS OR REMEDIES WERE INEFFECTIVE OR WHY THEY WERE NOT TAKEN.

Although Messrs. Rusagara, Byabagamba, and Kabayiza appealed their sentence over one year ago, the appeal has been ineffective as the Rwandan Supreme Court has still not set a date for hearing or moved forward on their case. Messrs. Rusagara, Byabagamba, and Kabayiza maintain that they have not committed any crime and wholly refute the allegations against them.

XII. FULL NAME AND ADDRESS OF THE PERSON(S) SUBMITTING THE INFORMATION (TELEPHONE AND FAX NUMBER, IF POSSIBLE).

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