



AMERICAN **BAR** ASSOCIATION

Center for Human Rights



The Case of Paul Rusesabagina

June 2021

TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

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Staff at the American Bar Association Center for Human Rights helped to draft this report. The **American Bar Association** (ABA) is the largest voluntary association of lawyers and legal professionals in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. The **ABA Center for Human Rights** has monitored trials and provided pro bono assistance to at-risk human rights defenders in over 60 countries. It is an implementing partner in the Clooney Foundation for Justice's TrialWatch initiative.

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The **Clooney Foundation for Justice's TrialWatch initiative** is focused on monitoring and responding to trials around the world that pose a high risk of human rights violations. TrialWatch is global in scope and focused on trials targeting journalists, LGBTQ persons, women and girls, minorities, and human rights defenders. It works to expose injustice and rally support to secure justice for defendants whose rights have been violated.

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EXECUTIVE SUMMARY



The American Bar Association Center for Human Rights has been monitoring criminal proceedings against Paul Rusesabagina in Rwanda since September 2020 as part of the Clooney Foundation for Justice's TrialWatch initiative. This report, co-authored by TrialWatch expert Geoffrey Robertson QC and the ABA Center for Human Rights, details many aspects of the proceedings thus far which cause grave disquiet as to their fairness, and which may have irretrievably prejudiced the defense. Given the analysis below, which draws on standards established by the United Nations Human Rights Committee and African human rights bodies, the fairness of the proceedings appears to have been compromised such as to call into question any verdict convicting Mr. Rusesabagina.

Mr. Rusesabagina's trial opened on February 17. After the defendants were led into the courtroom, the first thing the judges did was to adjourn for five minutes to enable photographs to be taken, raising concerns that the trial was more public spectacle than judicial undertaking. These concerns persisted throughout the trial.

At a hearing on March 12, 2021, Mr. Rusesabagina, who is charged alongside 20 co-accused with various terrorism-related offenses, stated that he would no longer participate in his trial. Mr. Rusesabagina explained that his withdrawal was based on the court's rulings that the trial could proceed despite his transfer to Rwanda outside of any legal framework and despite restrictions on his access to case materials. Since that date, Mr. Rusesabagina and his lawyers have not attended the trial, which has consisted of prosecution and defense presentations.

While the continuation of the trial in Mr. Rusesabagina's absence may itself be consistent with international and regional human rights standards, the circumstances surrounding and subsequent to his withdrawal disclose severe violations of his fair trial rights. In particular, Mr. Rusesabagina has been denied his right to adequately prepare for trial and his right to confidential communication with counsel – potentially to the irreparable detriment of the defense.

Namely, the prison authorities, which are supervised by the Minister of Justice – the prosecuting authority in Mr. Rusesabagina's case – insisted on intercepting, reading, and, oftentimes, retaining all communications between counsel and Mr. Rusesabagina on the pretext that they were entitled to maintain security and check for any escape plans. Even after the Minister of Justice and court ordered the prison to take greater care in distinguishing between non-privileged and privileged materials, officials heightened restrictions, subjecting Mr. Rusesabagina's lawyers to intrusive searches for

documents prior to entering the prison and, in one case, confiscating a document marked privileged and confidential. Any openness Mr. Rusesabagina might have felt in discussing the case and strategy with his lawyers has thus been extinguished.

The authorities further failed to effect simple reforms to address the lack of facilities available to Mr. Rusesabagina (which the court itself had deemed a problem), so that Mr. Rusesabagina could prepare for trial. On March 12, when the court ruled that the trial could proceed, the authorities had yet to return seized case documents to Mr. Rusesabagina or provide him with a computer (to review some 3,000 pages of court papers).

Where an accused withdraws from trial, courts are obligated to make all efforts to ensure that his or her fair trial rights are upheld. This often takes the form of appointing amicus counsel – an independent lawyer to probe the testimony of witnesses hostile to the defendant. Here, the court made no effort to this end: to the contrary, the court presiding over Mr. Rusesabagina's case failed to ask questions testing the motives or credibility of the two witnesses against Mr. Rusesabagina who testified in hearings immediately following his withdrawal from the trial. Of subsequent witnesses, the court went so far as to ask leading questions about Mr. Rusesabagina's guilt. This conduct strayed far from the principle that an accused's withdrawal from the proceedings necessitates ever vigilant protection of his fair trial rights. Further, the verdict will not have been based on evidence which has been properly tested and will thus lack credibility.

More broadly, there have been allegations that the authorities are attempting to pressure Mr. Rusesabagina to resume participation in the trial before the verdict. Notably, the trial has taken place against a backdrop in which President Paul Kagame has repeatedly made comments characterizing Mr. Rusesabagina as guilty, a severe violation of the presumption of innocence.

In this context, the overwhelming question is whether Mr. Rusesabagina's trial, both initially, and thereafter *in absentia*, can be considered fair. Taking into consideration the developments to date and noting that final conclusions on this matter will be issued after the verdict, it is doubtful that the court is prepared to offer the guarantees of fairness that these proceedings require in order to be credible if they are to result, as seems predetermined, in a conviction which may carry a sentence of life imprisonment.

Lastly, it appears that the Belgian authorities have assisted the Rwandan authorities in Mr. Rusesabagina's prosecution since his transfer to Rwanda. This assistance, repeatedly referenced by the prosecution in submissions to the court, raises serious questions for the government of Belgium, whose diplomats have been present at the trial. In light of the above analysis, Belgium should clarify the scope and nature of its

previous assistance, whether and how it addressed the potential that its support might facilitate fair trial violations, and whether it plans on continuing such support.

The court heard from civil parties on June 16, and prosecution closing arguments have now commenced. Defense closing arguments are expected to begin the week of June 21. This report is being released now, before the conclusion of the trial, to underscore the continuing importance of fair trial guarantees and the severity of the concerns regarding what has transpired to date. A full report will be released after the verdict is issued.

PROCEDURAL HISTORY



This report covers events subsequent to the release of the Center’s [background briefing](#) and [TrialWatch Expert Geoffrey Robertson’s accompanying statement](#) in January 2021. Similarly, the present report is being released in conjunction with a statement from co-author and TrialWatch Expert Geoffrey Robertson, which raises additional concerns about the fairness of the proceedings that will be fully evaluated in the final report on the case.

A. PRETRIAL MOTIONS

Mr. Rusesabagina’s trial was scheduled to start on January 26, 2021. It was subsequently postponed to February 17, 2021.¹

In the period leading up to trial, the defense filed several motions alleging violations of Mr. Rusesabagina’s rights. A motion filed on January 21, for example, requested that the court release Mr. Rusesabagina and permanently stay the proceedings on the basis of his “illegal and enforced disappearance and extraordinary rendition to Rwanda.”² The motion further alleged that the prison authorities had been confiscating and not returning case-related materials delivered by defense counsel to Mr. Rusesabagina in prison, hindering his ability to prepare for trial.³ As mentioned in the Center’s background briefing, the authorities have reportedly confiscated not only case documents but also exchanges between counsel and Mr. Rusesabagina, such as defense strategy memoranda.⁴ The January motion filed by defense counsel noted that even if confiscation had not occurred, Mr. Rusesabagina lacked the necessary tools (not “even paper and a pen”) to review case-related documents.⁵

A second motion filed on February 12 stated that the aforementioned violations relating to prison officials’ interception and retention of case-related materials had persisted and put forth additional arguments with respect to Mr. Rusesabagina’s transfer to Rwanda.⁶ The motion “request[ed] a postponement of the start of the trial until the issues raised by

¹ Prior to trial, there were certain hearings that were not held in public in which Mr. Rusesabagina was interrogated by the prosecution and judges. This represents a serious violation of his rights and will be discussed in the final report issued after the verdict.

² Rusesabagina Defense Team, Motion Re Fundamental Rights, January 21, 2021.

³ Id.

⁴ American Bar Association Center for Human Rights, “Background Briefing on Proceedings Against Paul Rusesabagina”, January 26, 2021. Available at https://www.americanbar.org/groups/human_rights/reports/background_briefing_rwanda_paul_rusesabagina/.

⁵ Rusesabagina Defense Team, Motion Re Fundamental Rights, January 21, 2021.

⁶ Rusesabagina Defense Team, Motion Re Fundamental Rights, February 12, 2021.

the Defendant have been adjudicated, and until adequate and reasonable time and facilities have been provided for his preparation for trial.”⁷

B. START OF THE TRIAL

The trial commenced on February 17. As noted above, the defendants were led into the courtroom in handcuffs. The first thing the court did was to adjourn for 5 minutes to enable photographs to be taken.

As of the opening of trial, the court had not yet responded to defense motions. The prosecution notified the court that three defendants – Callixte Nsabimana (Sankara), Herman Nsengimana, and Jean-Damascene Nsabimana – had been joined to the case, making the total number of accused 21.⁸ At the beginning of the hearing, Mr. Rusesabagina stepped forward and stated that he had been kidnapped.⁹ The remainder of the hearing consisted of defense and prosecution arguments on the issue of Mr. Rusesabagina’s transfer to Rwanda. The court asked the parties to submit written pleadings regarding the circumstances of Mr. Rusesabagina’s arrest and transfer to Rwanda and adjourned the hearing to February 26.¹⁰

On February 26, the court ruled that the discussion regarding Mr. Rusesabagina’s arrest and detention was “irrelevant” and that the trial should proceed.¹¹ According to the court, “jurisdiction in the criminal codes [was] clear.”¹² Mr. Rusesabagina’s defense counsel, Gatera Gashabana, stated that in light of the ruling the defense required additional time to submit a new motion on the issue of adequate time and facilities (as noted above, the court had yet to rule on the defense’s previous motions in this regard), particularly so as to consult with Mr. Rusesabagina on how to proceed.¹³ Mr. Gashabana further raised the issue of the continuing seizure of documents by the prison authorities, which the presiding judge stated he was not familiar with (despite submitted defense motions stating as much).¹⁴ Over the prosecution’s objections, the court adjourned the hearing for the submission of pleadings on these two issues.¹⁵ Mr. Gashabana additionally stated that he would appeal the court’s ruling on jurisdiction and the relevance of the circumstances of Mr. Rusesabagina’s transfer to Rwanda.¹⁶

⁷ Id.

⁸ Trial Monitor’s Notes, February 17, 2021.

⁹ Id.

¹⁰ Id.

¹¹ Trial Monitor’s Notes, February 26, 2021.

¹² Id.

¹³ Id.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

C. MINISTER OF JUSTICE INTERVIEW AND THE PRISON VISIT

On February 26, Minister of Justice Johnston Busingye gave an interview with Al Jazeera in which he acknowledged that the Rwandan government had worked with an associate of Mr. Rusesabagina to lure him to Kigali.¹⁷ He further stated that the confidentiality of Mr. Rusesabagina's communications with counsel had been protected and that the government had in no way intercepted any materials intended for Mr. Rusesabagina or otherwise violated his right to confidential communications with counsel.¹⁸

Mr. Busingye's public relations team, however, accidentally sent Al Jazeera a video of the team preparing Mr. Busingye for the interview.¹⁹ During this conversation, Mr. Busingye stated that prisons insist on "finding out what is happening inside prisons ... including legal documents" so as to maintain safety.²⁰ He indicated that the prison authorities had thus reviewed materials relayed to Mr. Rusesabagina in prison and that the authorities had found a document that contained escape plans²¹ (the veracity of these allegations has been contested by the defense, which has asserted that the purported escape plan was a set-up to enable guards to kill Mr. Rusesabagina).²²

Following the release of this video, Al Jazeera conducted a follow-up interview with Mr. Busingye, in which Mr. Busingye alternately stated that the confidentiality of communications between Mr. Rusesabagina and his counsel was protected by law and that the prison authorities were entitled to examine all documents entering the prison.²³ He additionally asserted that notwithstanding the fact that the Minister of Justice oversees the prison system, prison authorities act autonomously and would not normally inform him of the contents of any examined materials except where serious issues arose.²⁴

Later on in the interview, Mr. Busingye appeared to contradict this statement. The interviewer asked: "When you looked at the communications of Rusesabagina and his

¹⁷ Al Jazeera, "Rwanda Paid for the Flight that Led to Paul Rusesabagina Arrest", February 26, 2021. Available at <https://www.aljazeera.com/program/upfront/2021/2/26/rwanda-paid-for-flight-that-led-to-paul-rusesabagina-arrest>.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² Hotel Rwanda Rusesabagina Foundation, "Is the Escape Plan the Setup for Rwanda to Kill Paul Rusesabagina?", March 1, 2021. Available at <https://hrrfoundation.com/2021/03/01/is-the-escape-plan-the-setup-for-rwanda-to-kill-paul-rusesabagina/>.

²³ Al Jazeera, "Rwanda Paid for the Flight that Led to Paul Rusesabagina Arrest", February 26, 2021.

²⁴ Id.

attorney and found no security concerns you left it alone?”²⁵ Mr. Busingye responded: “Yes”, implying that he had looked at the communications in question.²⁶ With respect to the circumstances of Mr. Rusesabagina’s arrival in Kigali, Mr. Busingye stated that Rwanda had paid for the plane.²⁷

The Rwandan Ministry of Justice subsequently released a statement on Twitter “clarify[ing]” its position on these issues.²⁸ Namely, the Ministry stated that communications between an accused and defense counsel were protected by law; that all other materials entering the prison were subjected to “routine safety checks”; that the Minister became aware of a potential violation of Mr. Rusesabagina’s right to confidential communications in December 2020; and that he subsequently instructed the prison authorities to return relevant documents to Mr. Rusesabagina and to take greater care in distinguishing between privileged and non-privileged materials.²⁹

In light of these developments, the judges and all parties visited the prison on March 1. Mr. Rusesabagina restated points made at previous hearings, noting that the authorities were continuing to seize case related documents, and requesting that he be provided a computer so as to be able to review the case file, which was in excess of 3,000 pages.³⁰ Defense counsel asserted that Mr. Rusesabagina had been unable to contribute to the defense strategy given such obstacles.³¹ The prison authorities responded that they had indeed confiscated documents pursuant to security regulations and that there had occasionally been delays in returning the documents (the defense in contrast stated that the materials had not just been delayed in reaching Mr. Rusesabagina, but were never returned at all).³² The prison authorities further avowed that they would attempt to obtain a computer for Mr. Rusesabagina.³³ Upon viewing Mr. Rusesabagina’s cell the judges “found that he had a table and a shelf available, which could help him.”³⁴

On March 5, the trial continued. The court summarized the prison visit and noted that Mr. Rusesabagina did not have adequate facilities to prepare for his defense, that case related documents had been confiscated and should not be confiscated going forward, and that “other things that people have sent to him through his defense lawyer” could be examined by prison management for compliance with safety regulations.³⁵ This

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ Twitter, Ministry of Justice of Rwanda Post, February 26, 2021. Available at https://twitter.com/Rwanda_Justice/status/1365375804423561216/photo/1.

²⁹ Id.

³⁰ High Court Chamber for International Crimes, Report on the Prison Visit Following the Problems Raised by Paul Rusesabagina, March 1, 2021.

³¹ Id.

³² Id.

³³ Id.

³⁴ Id.

³⁵ Trial Monitor’s Notes, March 5, 2021.

pronouncement was reflected in a written ruling issued on March 9 in which the court declared, among other things, that:

Paul Rusesabagina does not have sufficient means to allow him to prepare for his trial ... The other thing that has been observed and that needs to be corrected is that there are documents from his trial, as well as other documents, that have been seized, and their return to his person is taking a long time. [T]he documents which form part of the case file which Rusesabagina Paul exchanges with his lawyers should not be seized. As regards other documents which are not part of the trial file, as well as various other objects which are sent to him through his lawyers, they should make a list (inventory) and hand them over to him through the prison administration.³⁶

D. THE BISHOP'S TESTIMONY, RULING ON TRANSFER TO RWANDA, AND MR. RUSESABAGINA'S EXIT FROM THE TRIAL

At the hearing on March 5, following discussion of the prison visit, Mr. Rusesabagina again raised the issue of his transfer to Rwanda.³⁷ Defense counsel noted that the defense had submitted written pleadings but that it had not received the prosecution's response.³⁸ The prosecution stated that it was ready to make oral arguments and also wished to present a witness who could speak to the circumstances of Mr. Rusesabagina's arrest.³⁹ Over defense objections, the court ruled that oral arguments were sufficient and that the witness could make a statement.⁴⁰

According to the court, the Bishop "w[ould] not testify as a witness under oath ... [but would] only come as a witness to give information as to how Paul came to Rwanda, because he is the only one who has the full information."⁴¹ The defence responded: "if he is not under oath, he will not be truthful."⁴² The court restated that the Bishop would "speak as an informant, not as a witness," and the prosecution added "this is just information – we can come to his sworn testimony later."⁴³ As discussed below, there was

³⁶ High Court Chamber for International Crimes, Conclusions of the Visit to Mageragere Prison Following the Problems Raised by Paul Rusesabagina, March 1, 2021.

³⁷ Trial Monitor's Notes, March 5, 2021.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

no such occasion as the court's response to the Bishop's statement (as well as other issues) provoked Mr. Rusesabagina to withdraw from the proceedings.

The Bishop stated that he had met Mr. Rusesabagina in 2017, at which point Mr. Rusesabagina told him that he led the FLN and asked the Bishop to introduce him to leaders in Burundi.⁴⁴ The Bishop claimed that as a "man of God" he despised the killing of women and children, which he alleged Mr. Rusesabagina had orchestrated as part of a plan to wage war on the Kagame government.⁴⁵ According to the Bishop, he "manipulated" Mr. Rusesabagina to persuade him that they were flying to Burundi and not Kigali, working with a member of Rwandan intelligence who arranged and paid for the charter flight.⁴⁶ The defense was not permitted to question the Bishop, as the court proceeded immediately to arguments on the merits of a so-called "luring" operation.

The prosecution argued that such an operation complied with international law.⁴⁷ The defense responded that bypassing extradition frameworks and luring Mr. Rusesabagina to a country to which he would never have returned voluntarily violated international law.⁴⁸ The court adjourned the trial to March 10 for a ruling on this issue.⁴⁹

On March 10, the court ruled that Mr. Rusesabagina's transfer to Rwanda was legal and that the proceedings could continue, relying on the fact that Mr. Rusesabagina was allegedly tricked into boarding the plane, not brought to Rwanda by force.⁵⁰ At the subsequent hearing on March 11, Mr. Rusesabagina's lawyer was absent. Mr. Rusesabagina stated that his lawyer had chosen not to attend the hearing because the defense was appealing the March 10 ruling.⁵¹ The court noted that an appeal could not justify counsel's absence and adjourned the trial to March 12, ordering all defense lawyers to appear in court.⁵²

On March 12, Mr. Rusesabagina's counsel requested that the trial be put on hold for six months to allow his client time and facilities to prepare a defense.⁵³ Among other things, counsel referenced the court's March 9 ruling that Mr. Rusesabagina lacked the means to prepare his defense and order that seized case materials be returned to him, and also stated that private exchanges between counsel and Mr. Rusesabagina had been confiscated.⁵⁴ In response, the court noted that the case was initiated in November 2020

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ See Associated Press, "Court: 'Hotel Rwanda' hero wasn't kidnapped, faces trial", March 10, 2021. Available at <https://news.yahoo.com/court-hotel-rwanda-hero-wasnt-161200516.html>.

⁵¹ Trial Monitor's Notes, March 11, 2021.

⁵² Id.

⁵³ Trial Monitor's Notes, March 12, 2021.

⁵⁴ Id.

and that “therefore the study of the file does not begin today”; that the other defendants named as accused in November 2020 had been able to adequately prepare for trial; and that in any event, Mr. Rusesabagina’s lawyer “ha[d] access to the file.”⁵⁵ Counsel for several other defendants and civil parties asserted that a delay of six months would be excessive, requesting that the trial begin.⁵⁶

Over defense objections, the court ruled against granting a postponement. In support of this ruling, the court stated that Mr. Rusesabagina had access to certain parts of the file, that the court’s decision on the prison visit should have been sufficient to allow him to prepare his case (the ruling was made only several days prior and Mr. Rusesabagina had yet to obtain a computer or all of the seized documents), that the court had to consider other defendants’ right to a trial without undue delay, and that Mr. Rusesabagina could study the case file and prepare as the trial was ongoing, with Mr. Rusesabagina pleading last.⁵⁷

Subsequently, the court resumed the trial and started to recount the evidence against one of Mr. Rusesabagina’s co-accused, Sankara, including statements Sankara had made about Mr. Rusesabagina’s role in founding and funding the National Liberation Front (FLN – an armed rebel group).⁵⁸ Mr. Rusesabagina interrupted, requesting the floor, and informed the court that he would no longer participate in the proceedings in light of what he alleged were violations of his right to defense.⁵⁹ The presiding judge returned to the charges and evidence against Sankara.⁶⁰

E. HEARINGS AFTER MR. RUSESABAGINA’S EXIT

At the next hearing on March 24, neither Mr. Rusesabagina nor his lawyer showed up to court. The judge read a report from the prison director stating:

we are notifying you that Paul is declining to come to court of his own will. He told the jail he will never again appear before the court. He will not show up to the court again because he expects no justice from this court.⁶¹

The court ruled that it was in Mr. Rusesabagina’s discretion not to attend court and that the trial could proceed.⁶²

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Trial Monitor’s Notes, March 24, 2021.

⁶² Id.

The remainder of the hearing consisted of the prosecution's questioning of its first witness, Michelle Martin, who previously served as a volunteer with the Hotel Rwanda Rusesabagina Foundation. Having gained access to the email account of one of Mr. Rusesabagina's associates, Providence Rubingisa, Ms. Martin copied and kept over 700 emails and downloaded over 1000 attachments.⁶³ Among other things, Ms. Martin testified about various email exchanges (stretching as far back as 2007) between Mr. Rubingisa and other individuals that allegedly entailed the discussion of plans to recruit and fund fighters.⁶⁴ Per Ms. Martin's testimony, some of these emails referenced Mr. Rusesabagina's direct involvement in such activities while others included Mr. Rusesabagina on cc.⁶⁵

On March 25, Mr. Rusesabagina and defense counsel were again not in attendance. The prosecution questioned its second witness, Noel Habiyaemye, who testified that in 2008 Mr. Rusesabagina told him he was trying to create an armed wing of his political party, PDR-Ihumure, and asked him to help recruit fighters.⁶⁶ Mr. Habiyaemye further testified that Mr. Rusesabagina sent him money for this purpose on several occasions.⁶⁷ Notably, the prosecution characterized Ms. Martin and Mr. Habiyaemye as "context" witnesses providing background on the formation and progression of the armed movement against the Kagame government.⁶⁸ While the court asked both witnesses various questions, it never probed the credibility of Ms. Martin or Mr. Habiyaemye. such as by asking them about their potential motivations for testifying against Mr. Rusesabagina.

On March 31, Mr. Rusesabagina and defense counsel were not in attendance. The prosecution stated that it would explain the charges against each defendant and lay out the evidence supporting such charges, beginning with Herman Nsengimana and proceeding onward to Mr. Rusesabagina.⁶⁹ With respect to Mr. Rusesabagina, the prosecution went through the charges of forming an illegal armed group, being a member of an illegal armed group, and aiding terrorism.⁷⁰ On April 1, the prosecution continued reading out the charges and evidence against Mr. Rusesabagina, concluding its discussion of Mr. Rusesabagina's alleged actions in aiding terrorism and moving on to the charges of murder as an act of terrorism, abduction as a terrorist act, and armed robbery as a terrorist act.⁷¹

⁶³ Id.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Trial Monitor's Notes, March 25, 2021.

⁶⁷ Id.

⁶⁸ Id.; Trial Monitor's Notes, March 24, 2021.

⁶⁹ Trial Monitor's Notes, March 31, 2021.

⁷⁰ Id.

⁷¹ Trial Monitor's Notes, April 1, 2021.

On April 21, Mr. Rusesabagina and defense counsel were again not in attendance. The clerk read aloud a report from the prison stating: “Paul Rusesabagina has made it known that he will not appear and that every time his case is called, he will not appear [because] he does not expect a fair trial.”⁷² The prosecution proceeded to review the evidence for the remaining three charges against Mr. Rusesabagina; arson as a terrorist act, murder as a terrorist act (a second count), and assault and battery as a terrorist act.⁷³ The prosecution then moved on to its presentation of the cases against other defendants.⁷⁴

On April 22 and April 28, Mr. Rusesabagina and defense counsel were again not in attendance. The prosecution continued with its recounting of the charges and evidence against Mr. Rusesabagina’s co-accused.⁷⁵ On April 29, co-accused Herman Nsengimana was questioned by the court and presented his defense.⁷⁶ When asked about his knowledge of Mr. Rusesabagina, Mr. Nsengimana stated that he had never had any dealings with him and knew of him only as a political leader.⁷⁷ Subsequently, co-accused Marc Nizeyimana was questioned by the court and presented his defense.⁷⁸ On May 6, Mr. Nizeyimana finished presenting his defense, followed by defense presentations from an additional two co-accused.⁷⁹ On May 7, another six co-accused presented their defenses.⁸⁰ On May 14, four co-accused presented their defenses.⁸¹ At the final hearings in May – on May 19, 20, and 21 – the remaining defendants presented their cases.

On June 16, civil parties presented testimony and arguments. After the civil party presentation concluded, the prosecution commenced its closing arguments.

F. SUBMISSION TO UN SPECIAL PROCEDURES

On May 18, 2021, Mr. Rusesabagina’s international defense team submitted an urgent appeal to the UN Special Rapporteur on Torture⁸² as well as a request for urgent action to the UN Working Group on Arbitrary Detention – both communications (henceforth referred to as “the UN appeals”) contained substantially the same information.⁸³ The UN appeals disclosed new allegations concerning the authorities’ treatment of Mr.

⁷² Trial Monitor’s Notes, April 21, 2021.

⁷³ Id.

⁷⁴ Id.

⁷⁵ Trial Monitor’s Notes, April 22, 2021; Trial Monitor’s Notes, April 28, 2021.

⁷⁶ Trial Monitor’s Notes, April 29, 2021.

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Trial Monitor’s Notes, May 6, 2021.

⁸⁰ Trial Monitor’s Notes, May 7, 2021.

⁸¹ Trial Monitor’s Notes, May 14, 2021.

⁸² Communication to the UN Special Rapporteur on Torture, Urgent Appeal on behalf of Paul Rusesabagina, May 18, 2021.

⁸³ Communication to the UN Working Group on Arbitrary Detention, Request for Urgent Action on behalf of Paul Rusesabagina, May 18, 2021.

Rusesabagina in the period immediately following his arrest: namely, between August 27 and 31, when he was held in incommunicado detention.⁸⁴ Mr. Rusesabagina reportedly relayed this information to his lawyer during prison visits.⁸⁵ Among other things, he stated that he was kept in solitary confinement in a place akin to a “slaughterhouse,” where he “could hear persons, women screaming, shouting, [and] calling for help.”⁸⁶ During this time he was blindfolded, his hands and feet were bound, a gag was put on his mouth, and he was “deprived of food and at times deprived of sleep.”⁸⁷ According to the UN appeals, at one point an agent from the Rwanda Investigation Bureau stepped on Mr. Rusesabagina’s neck with “military boots” and stated “we know how to torture you.”⁸⁸ Mr. Rusesabagina further noted that the Prosecutor General of Rwanda and the Secretary General of the Rwanda Investigation Bureau visited him in detention and attempted to pressure him into making statements: “[t]hey told Mr. Rusesabagina that ‘what we need from you is you to acknowledge that the President of Zambia gave you money for the FLN [National Liberation Front]. Other things are the matter of time, if you acknowledge that, we are going to release you.’”⁸⁹

In addition to the above claims, the UN appeals contain new allegations regarding violations of confidential communications between Mr. Rusesabagina and counsel. The UN appeals report that since April 23 Mr. Rusesabagina’s lawyers have been “subjected to searches of their possessions and persons” before prison visits and that they have been “prohibited from taking any documents, computers, or electronic devices into their meetings with Mr. Rusesabagina without first submitting them for inspection and review to the Prison Director of Nyarugenge Central Prison.”⁹⁰ According to the UN appeals, when Mr. Rusesabagina’s lawyers attempted to visit the prison on April 29, prison authorities confiscated certain documents, including documents marked privileged and confidential.⁹¹

On June 4, Mr. Rusesabagina’s international defense team filed an update to the Working Group. The update stated that the prison authorities had stopped providing Mr. Rusesabagina with food, water, or medication and that phone calls from family members had been “discontinued.”⁹² According to defense counsel, the update was based on a short phone call between Mr. Rusesabagina and his family that took place on June 4. During the call, Mr. Rusesabagina reportedly stated that he was informed by

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Id.

⁹² Communication to the UN Working Group on Arbitrary Detention, Update to the UN Working Group on Arbitrary Detention, June 4, 2021.

prison officials that the aforementioned measures would soon be implemented and that he believed they were an attempt to coerce him into returning to the trial.

The Rwandan government has denied these claims, stating that the only change to Mr. Rusesabagina's previous conditions is that he is now given the same meals and water as other detainees, not "special meals."⁹³ Mr. Rusesabagina's counsel has since confirmed that Mr. Rusesabagina is receiving food but that his treatment has shifted as described above. In particular, counsel raised concerns that the standard one meal of corn and beans and one serving of water a day (Mr. Rusesabagina was prescribed three bottles of water a day by his Rwandan doctors) was insufficient in light of Mr. Rusesabagina's health condition and again noted the possibility that the change was intended to pressure Mr. Rusesabagina to resume participation in the trial.

G. COOPERATION BETWEEN THE BELGIAN AND RWANDAN AUTHORITIES

Throughout the hearings, the prosecution has continuously referenced Belgian cooperation in Mr. Rusesabagina's case. As stated by the prosecution, the present case against Mr. Rusesabagina commenced in 2018 and, upon the Rwandan authorities' request, the Belgian authorities started providing assistance shortly thereafter.⁹⁴ According to the prosecution, Belgian officials sent case materials to Rwanda at various points, including in May 2020⁹⁵ and December 2020 – after Mr. Rusesabagina's arrest.⁹⁶ Notably, the prosecution has referenced close cooperation with the Belgian authorities on investigations into Mr. Rusesabagina's activities since at least 2011.⁹⁷ This includes an extradition request in 2012 that was refused by Belgium, which has propelled the defense claim that Mr. Rusesabagina's transfer to Rwanda was an unlawful plot to circumvent the legal bar on Belgium handing him over (the prosecution has stated that the extradition request was for a different case, not the present one).

Thus far, evidence flagged by the prosecution as stemming from the Belgian investigation has included numerous WhatsApp chats from Mr. Rusesabagina's phone – which was seized by the Belgian police – in which Mr. Rusesabagina allegedly

⁹³ The New Times, "Rights Watchdog Clears Air Over Rusesabagina", June 11, 2021. Available at <https://www.newtimes.co.rw/news/rights-watchdog-clears-air-over-rusesabagina>.

⁹⁴ Trial Monitor's Notes, February 17, 2021. The indictment states that the Rwandan authorities asked the Belgian authorities for assistance with the investigation in May 2019. Documents of Complaint, Republic of Rwanda National Prosecuting Authority, November 16, 2020, para. 101.

⁹⁵ Trial Monitor's Notes, March 25, 2021; Documents of Complaint, Republic of Rwanda National Prosecuting Authority, November 16, 2020, para. 105.

⁹⁶ Trial Monitor's Notes, February 17, 2021; Trial Monitor's Notes, April 1, 2021.

⁹⁷ Documents of Complaint, Republic of Rwanda National Prosecuting Authority, November 16, 2020, paras. 70-71.

discussed FLN activities with various individuals;⁹⁸ documentation regarding alleged wire transfers from individuals involved with the Rwandan Movement for Democratic Change (MRCD – an opposition party co-founded by Mr. Rusesabagina) to individuals involved with the FLN;⁹⁹ various documents recovered from Mr. Rusesabagina’s computer – seized by the Belgian police – such as an MRCD plan of action and an MRCD press release allegedly authored by Mr. Rusesabagina;¹⁰⁰ and statements from interviews conducted by the Belgian police with individuals such as Mr. Rusesabagina and the wife of the treasurer of the MRCD.¹⁰¹

According to a spokesperson for the Belgian Federal Prosecutor’s Office, the investigation in Belgium is ongoing.¹⁰² At a hearing on April 1, the Rwandan prosecution likewise noted that the Belgian investigation was ongoing and stated, “[i]f and when we find more evidence, we’ll share it with the court”, indicating that there might be further cooperation between Belgium and Rwanda on Mr. Rusesabagina’s case. While the Rwandan prosecution has yet to clearly specify which branch of the Belgian government purportedly sent case file materials to Rwanda in December 2020,¹⁰³ the aforementioned spokesperson for the Belgian Federal Prosecutor’s Office noted that the Office had not been in “contact with Rwandan authorities since Rusesabagina appeared in Kigali.”¹⁰⁴

⁹⁸ See Trial Monitor’s Notes, March 31, 2021; Trial Monitor’s Notes, April 1, 2021; Documents of Complaint, Republic of Rwanda National Prosecuting Authority, November 16, 2020, para. 103.

⁹⁹ See Trial Monitor’s Notes, March 31, 2021; Trial Monitor’s Notes, April 1, 2021; Documents of Complaint, Republic of Rwanda National Prosecuting Authority, November 16, 2020, para. 104.

¹⁰⁰ See Trial Monitor’s Notes, March 31, 2021; Trial Monitor’s Notes, April 1, 2021; Documents of Complaint, Republic of Rwanda National Prosecuting Authority, November 16, 2020, para. 103.

¹⁰¹ See Trial Monitor’s Notes, March 31, 2021; Documents of Complaint, Republic of Rwanda National Prosecuting Authority, November 16, 2020, para. 102.

¹⁰² ABC News, “Paul Rusesabagina Was Called a Hero After ‘Hotel Rwanda,’ Now He’s Accused of Terrorism”, April 25, 2021. Available at <https://abcnews.go.com/International/paul-rusesabagina-called-hero-hotel-rwanda-now-accused/story?id=76953569>.

¹⁰³ The Rwandan prosecution has referred to the participation of the prosecution, a judge, and the Belgian embassy.

¹⁰⁴ ABC News, “Paul Rusesabagina Was Called a Hero After ‘Hotel Rwanda,’ Now He’s Accused of Terrorism”, April 25, 2021.



A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (the “ICCPR”); jurisprudence from the United Nations Human Rights Committee, tasked with monitoring implementation of the ICCPR; the African Charter on Human and Peoples’ Rights (the “African Charter”); jurisprudence from the African Commission on Human and Peoples’ Rights (the “African Commission”), tasked with interpreting the Charter and considering individual complaints of Charter violations; jurisprudence from the African Court on Human and Peoples’ Rights (the “African Court”), which – complementing the African Commission’s work – is tasked with interpreting and applying the African Charter; and the African Commission’s Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (the “Fair Trial Guidelines”).

The African Court has jurisdiction over “all cases and disputes submitted to it in respect of the interpretation and application of the African Charter on Human and Peoples’ Rights (the Charter), the Protocol [on the Court’s establishment] and any other relevant human rights instrument ratified by the States concerned.”¹⁰⁵ Rwanda ratified the African Charter in 1983¹⁰⁶ and the Protocol in 2003.¹⁰⁷ Notably, the African Court has frequently relied on jurisprudence from both the European Court of Human Rights and the Inter-American Court of Human Rights, stating that the two bodies have analogous jurisdiction and are guided by instruments similar to the African Charter.¹⁰⁸ The Court has also stated that where the ICCPR provides for broader rights than those of the Charter, it can apply the ICCPR if the country under consideration has already acceded to or ratified it.¹⁰⁹ Rwanda acceded to the ICCPR in 1975.¹¹⁰

¹⁰⁵ African Court on Human and Peoples’ Rights, “Welcome to the African Court”. Available at <https://www.african-court.org/wpafc/welcome-to-the-african-court>.

¹⁰⁶ African Union, “List of Countries which have signed, ratified/acceded to the African Charter on Human and Peoples’ Rights”. Available at https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf.

¹⁰⁷ African Union, “List of Countries which have signed, ratified/acceded to the Protocol of the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights”. Available at https://au.int/sites/default/files/treaties/36393-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf.

¹⁰⁸ See Jamil Ddamulira Mujuzi, “The African Court on Human and Peoples’ Rights and Its Protection of the Right to a Fair Trial”, *The Law and Practice of International Courts and Tribunals*, December 5, 2017, pg. 193. Available at https://brill.com/abstract/journals/lape/16/2/article-p187_187.xml.

¹⁰⁹ African Court on Human and Peoples’ Rights, *Alex Thomas v. Tanzania*, App. No. 005/2013, November 20, 2015, para. 88; African Court on Human and Peoples’ Rights, *Wilfred Onyango Nganyani et al v. Tanzania*, App. No. 006/2013, March 18, 2016, para. 165.

¹¹⁰ United Nations Treaty Collection, “ICCPR Status as of May 5, 2021”. Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.

Additionally, the report draws on general principles concerning state responsibility for the conduct of third parties, which are summarized in the International Law Commission (ILC) Draft Articles on State Responsibility.

B. MR. RUSESABAGINA'S WITHDRAWAL FROM THE PROCEEDINGS: RIGHT TO BE PRESENT AT TRIAL AND RIGHT TO A DEFENSE

While it is within Mr. Rusesabagina's discretion to refrain from participating in the proceedings, it is more important than ever that the court protect his fair trial rights. The court's conduct since Mr. Rusesabagina's exit, however, indicates that it is more inclined to assist the prosecution in making its case against Mr. Rusesabagina than to safeguard Mr. Rusesabagina's rights.

International and Regional Standards

Article 14(3)(d) of the ICCPR provides for an accused's right to "be tried in his presence, and to defend himself in person or through legal assistance of his own choosing." Article 7 of the African Charter contains similar guarantees. These inter-related rights are waivable subject to stringent safeguards.

The African Commission, for example, has stated that "[t]he accused may voluntarily waive the right to appear at a hearing, but such a waiver shall be established in an unequivocal manner and preferably in writing."¹¹¹ The United Nations Human Rights Committee has likewise noted that proceedings "in the absence of the accused may in some circumstances be permissible."¹¹² According to the Committee, in order for such proceedings to comply with fair trial guarantees, the accused must be notified of the proceedings in a timely manner and decline to exercise his or right to be present:¹¹³ "requirements of due process enshrined in article 14 cannot be construed as invariably rendering proceedings *in absentia* inadmissible irrespective of the reasons for the accused person's absence."¹¹⁴

The Committee has considered cases where the accused has declined to exercise both his or her right to be present and his or her right to a defense. In *Benhadj v. Algeria*, the accused was prosecuted before a military tribunal for, among other things, "crimes

¹¹¹ African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle N(6)(c)(iii).

¹¹² Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2017, para. 36.

¹¹³ *Id.*

¹¹⁴ Human Rights Committee, *Mbenge v. Zaire*, U.N. Doc. CCPR/C/18/D/16/1977, March 25, 1983, para. 14.1.

against state security.”¹¹⁵ He disputed the legitimacy of the court and the case against him, deeming it politically motivated.¹¹⁶ Although he was notified sufficiently in advance of the proceedings, neither he nor his lawyer showed up to trial.¹¹⁷ He was subsequently convicted. The Committee did not find a violation of Article 14(3)(d), citing the fact that the defendant “refused to attend” the proceedings.¹¹⁸ This jurisprudence is consistent with that of the European Court of Human Rights, which has ruled that “[n]either the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial.”¹¹⁹

In contrast, some international criminal tribunals have assigned counsel to represent an accused person against his or her wishes where the accused has declined to attend hearings. In *Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze v. The Prosecutor*, for example, an Appeals Chamber at the International Criminal Tribunal for Rwanda considered a case in which one of the accused, Mr. Barayagwiza, had proclaimed that he did not believe that the tribunal would afford him a fair trial and therefore would not participate.¹²⁰ He stopped attending hearings and ultimately terminated counsel’s mandate.¹²¹ The Trial Chamber assigned new counsel.¹²² This ruling was subsequently upheld by the Appeals Chamber, which asserted that it was within the Trial Chamber’s discretion to appoint counsel in the interests of justice as well as the interests of the accused, notwithstanding whether this contravened the accused’s own wishes.¹²³

In other cases, courts have chosen to appoint amicus counsel – an independent lawyer to probe the testimony of witnesses hostile to the defendant. For the trial of Slobodan Milosevic before the International Criminal Tribunal for the former Yugoslavia, for example, a team of international lawyers was appointed as amicus curiae not to represent Mr. Milosevic but to “assist in the proper determination of the case,” including by “cross-examining witnesses as appropriate” and “acting in any other way which designated counsel considers appropriate in order to secure a fair trial.”¹²⁴

¹¹⁵ Human Rights Committee, *Benhadj v. Algeria*, U.N. Doc. CCPR/C/90/D/1173/2003, July 20, 2007, para. 2.2.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at para. 8.9.

¹¹⁸ *Id.*

¹¹⁹ European Court of Human Rights, *Sejdovic v. Italy*, App. No. 46221/99, May 12, 2005, para. 86.

¹²⁰ International Criminal Tribunal for Rwanda, *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-A, Appeals Chamber Judgment, November 28, 2007, paras. 112–14.

¹²¹ *Id.* at paras. 112-113, 120.

¹²² *Id.* at para. 122.

¹²³ *Id.* at paras. 127–28.

¹²⁴ International Criminal Tribunal for the Former Yugoslavia, “Milosevic Case: The Registrar Appoints a Team of Experienced International Lawyers as Amicus Curiae to Assist the Trial Chamber”, September 6, 2001. Available at <https://www.icty.org/en/press/milosevic-case-registrar-appoints-team-experienced-international-lawyers-amicus-curiae-assist>.

The Case Against Mr. Rusesabagina

In light of the above, it does not appear necessarily inconsistent with international and regional jurisprudence that the court has proceeded despite Mr. Rusesabagina's complete withdrawal from the proceedings.

However, whether an accused is permitted to withdraw entirely or is assigned counsel in his or her absence, it is incumbent on the court to ensure that fair trial guarantees are respected. The UN Human Rights Committee, for example, has stated that "when exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary."¹²⁵ The International Criminal Tribunal for the former Yugoslavia has likewise noted that where *in absentia* proceedings are conducted, "the fundamental rights pertaining to a fair trial would need to be safeguarded."¹²⁶

In the present case, the judges have not "safeguarded" Mr. Rusesabagina's fair trial rights since his exit. With respect to prosecution witnesses Michelle Martin and Noel Habiyaemye, for example, the judges did not ask any questions about potential motivations for their testimony, such as financial incentives or connections with the Rwandan government, and did not otherwise attempt to test their credibility. Notably, Ms. Martin, as she acknowledged in her testimony, was previously employed by the Rwandan government¹²⁷ and Mr. Habiyaemye had previously provided testimony against government opponents.¹²⁸ The court's failure to probe their credibility or to appoint an amicus to do so was an indication of its reluctance to allow any action which might challenge the government's case.

Instead, the court undertook inquiries seemingly geared towards establishing Mr. Rusesabagina's guilt. The court posed questions to Ms. Martin, for example, such as whether Mr. Rusesabagina spoke to her about the FDLR (an armed rebel group) during their interactions, whether she had in her possession particular emails about Mr. Rusesabagina, and what she had heard about weapons exchanges with respect to Mr. Rusesabagina.¹²⁹

This pattern continued throughout the proceedings. On April 29, co-accused Herman Nsengimana was testifying about his role in the FLN. Suddenly, a judge asked:

¹²⁵ Human Rights Committee, General Comment No. 13, April 13, 1984, para. 11.

¹²⁶ International Criminal Tribunal for the former Yugoslavia, Prosecutor v. Tihomir Blaskic, Case No. IT-95-14, Appeals Chamber Judgment, October 29, 1997, para. 59.

¹²⁷ Trial Monitor's Notes, March 24, 2021.

¹²⁸ Reuters, "Rwanda Rebels Admit Presidential Hopeful Link: Prosecutor", April 30, 2010. Available at <https://www.reuters.com/article/us-rwanda-rebels/rwanda-rebels-admit-presidential-hopeful-link-prosecutor-idUSTRE63T3RG20100430>. See also Human Rights Watch, "We Will Force You to Confess': Torture and Unlawful Military Detention in Rwanda", 2017, pgs. 25-26. Available at https://www.hrw.org/sites/default/files/report_pdf/rwanda1017_web_0.pdf.

¹²⁹ Trial Monitor's Notes, March 24, 2021.

Herman, in explaining, you said how you worked with Sankara from the beginning until you joined the army, but in your pleading there is nowhere where you talk about Rusesabagina, but as a president of the MRCD-FLN, *you should say something about him*, if you would have worked with him, if there would be any help which he brought to you in the function which you occupied (emphasis added).

This question was apparently designed to extract information inculcating Mr. Rusesabagina.¹³⁰ Mr. Nsengimana subsequently responded that he had never spoken to Mr. Rusesabagina and knew him only as a political leader.¹³¹ Similarly, at a hearing on May 14, the judges repeatedly asked co-accused Marcel Niyirora whether Mr. Rusesabagina's party "had soldiers" and whether Mr. Rusesabagina provided help to soldiers and asked co-accused Emmanuel Nshimiyimana, who at the time was speaking on a different topic, "[d]uring your hearing, there is where you said that you heard that it was Rusesabagina who gave funding, that even one day he sent money for the military party. How did you get to know about this?"¹³²

These actions were consistent with the court's conduct even prior to Mr. Rusesabagina's departure, such as allowing the Bishop to testify not under oath and without cross-examination by the defense about Mr. Rusesabagina's transfer to Rwanda. This contravened Article 14(3)(e) of the ICCPR and Article 7(c) of the African Charter,¹³³ which entitle defendants facing criminal charges to examine or have examined the witnesses against them. The court's refusal to follow this rule and to permit the Bishop to give evidence for the state without fear of contradiction raises serious concerns about its integrity.

Given the above, the judges have acted in a manner that suggests they are more invested in building the prosecution's case against Mr. Rusesabagina than endeavoring to protect his rights in his absence, as is their obligation. This contravenes the UN Human Rights Committee's directive that "when exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary."¹³⁴

The severe violations of Mr. Rusesabagina's right to adequate facilities, right to communication with counsel, and right to presumption of innocence, described below, further call into question the fairness of the trial.

¹³⁰ Trial Monitor's Notes, April 29, 2021.

¹³¹ *Id.*

¹³² Trial Monitor's Notes, May 14, 2021.

¹³³ See also African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle N(6)(f).

¹³⁴ Human Rights Committee, General Comment No. 13, April 13, 1984, para. 11.

C. RIGHT TO ADEQUATE FACILITIES TO PREPARE A DEFENSE

International and Regional Standards

Under Article 14(3)(b) of the ICCPR and Article 7 of the African Charter, accused persons are entitled to adequate time and facilities for the preparation of their defense. The proceedings against Mr. Rusesabagina to date disclose a violation of this guarantee.

As stated by the United Nations Human Rights Committee, “[w]hat counts as ‘adequate time’ depends on the circumstances of each case.”¹³⁵ The African Commission has similarly noted that the issue of adequate time should be considered on a case-by-case basis, with reference to the “complexity of the case, the defendant’s access to evidence, the length of time provided by rules of procedure prior to particular proceedings, and prejudice to the defence.”¹³⁶ According to the UN Human Rights Committee, there “is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed.”¹³⁷ Notably, the right to adequate time does not end with the commencement of trial: “since the course of trials cannot be fully charted in advance and may reveal elements which have not hitherto come to light and which require further preparation by the parties,” trials generally necessitate preparation throughout the proceedings.¹³⁸

The right to adequate time and right to adequate facilities are interconnected: where an accused does not have adequate facilities, he or she may require additional time both to obtain the required resources and to use said resources. The UN Human Rights Committee has stated that adequate facilities “must include access to documents and other evidence ... that the prosecution plans to offer in court against the accused.”¹³⁹ The African Commission has further noted that an accused person is entitled to “consult legal materials reasonably necessary for the preparation of his or her defence.”¹⁴⁰

¹³⁵ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2017, para. 32.

¹³⁶ African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle N(3)(c).

¹³⁷ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2017, para. 32.

¹³⁸ European Court of Human Rights, *Mattick v. Germany*, App. No. 62116/00, March 31, 2005, Inadmissibility Decision.

¹³⁹ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2017, para. 33.

¹⁴⁰ African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle N(3)(e)(v).

In terms of requirements regarding the accused's ability to examine evidence in the case file, European Court of Human Rights jurisprudence is instructive. In *Ocalan v. Turkey*, the Court ruled that the accused's right to adequate facilities had been violated where he was unable to gain access to a voluminous case file until after the proceedings had started and thereby was unable to be "involve[d] ... in its examination or analysis."¹⁴¹ As stated by the Court, "limitations on access by an accused or his lawyer to the court file must not prevent the evidence being made available to the accused before the trial and the accused being given an opportunity to comment on it through his lawyer in oral submissions."¹⁴² The Court has highlighted the importance of a defendant's ability to instruct lawyers as to strategy and arguments based on inspection of the evidence: "the defence of the accused's interests may best be served by the contribution which the accused makes to his lawyer's conduct of the case before the accused is called to give evidence."¹⁴³

The Case Against Mr. Rusesabagina

In the present case, prior to his decision not to participate in the trial, Mr. Rusesabagina did not have the opportunity to thoroughly inspect the case file, which reportedly encompasses more than 3,000 pages. The prison authorities routinely seized and read documents relayed by defense counsel to Mr. Rusesabagina and often did not return such materials to him. Further, Mr. Rusesabagina did not have access to paper or a pen with which to take notes, let alone a computer with which to efficiently examine case documents.

These facts have been corroborated by defense counsel; by Minister of Justice Busingye Johnston in the public relations preparation video accidentally sent to Al Jazeera, in which he admitted that prison authorities had been confiscating documents relayed to Mr. Rusesabagina; and by the court's oral pronouncement at the hearing on March 5 and written ruling on March 9, in which the court stated that Mr. Rusesabagina had been denied adequate facilities to prepare for trial and that certain case documents had been confiscated.

¹⁴¹ European Court of Human Rights, *Öcalan v. Turkey*, App. No. 46221/99, May 12, 2005, paras. 147-148.

¹⁴² *Id.* at para. 140.

¹⁴³ European Court of Human Rights, *Moiseyev v. Russia*, App. No. 62936/00, September 10, 2008, para. 214. See also European Court of Human Rights, *Huseyn and others v. Azerbaijan*, App. Nos. 35485/05, 45553/05, 35680/05 and 36085/05, July 26, 2011, para. 175 ("The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility of putting all relevant defence arguments before the trial court and thus of influencing the outcome of the proceedings ... The facilities which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself for the purposes of preparing his defence with the results of investigations carried out throughout the proceedings."); European Court of Human Rights, *Gregacevic v. Croatia*, App. No. 58331/09, July 10, 2012, para. 51. See Human Rights Committee, *Esergepov v. Kazakhstan*, U.N. Doc. CCPR/C/116/D/2129/2012, March 29, 2016, para. 11.4.

As detailed by the United Nations Human Rights Committee and African Commission, factors relevant to an assessment of the adequacy of time include whether the charges are severe and the case complex: the present case involves 21 defendants and an array of charges. If Mr. Rusesabagina is convicted, it is possible that he will spend the rest of his life in prison.

Taking these facts into account and in line with the UN Human Rights Committee's jurisprudence, the court was obligated to grant reasonable requests for adjournment (not necessarily the six months requested by defense counsel) so as to allow Mr. Rusesabagina adequate time and use of the recently ordered facilities to prepare his case. On March 12, however, the court rejected defense requests for an adjournment and ordered that the trial proceed immediately. At this point, Mr. Rusesabagina had yet to obtain access to the documents seized or to a computer. Even if all of these violations had been remedied, three days would not have been sufficient for him to review the voluminous case file.

Notably, the court stated that the trial could continue because Mr. Rusesabagina's lawyers had access to the documents and because the case against Mr. Rusesabagina could be reviewed last, after the cases against his 20 co-accused, meaning that Mr. Rusesabagina could prepare as the trial was in progress. The allegations against Mr. Rusesabagina's co-accused, however, are inextricably intertwined with the allegations against him. On March 12, for example, the court reviewed statements made by his co-accused Sankara about Mr. Rusesabagina's role in founding the FLN. On March 24 and 25, prosecution witnesses discussed numerous WhatsApp conversations, emails, and money transactions that allegedly inculpated Mr. Rusesabagina (ostensibly as "context" witnesses on the development of the armed movement against the Kagame government). These exchanges involved multiple parties and stretched back 15 years: only Mr. Rusesabagina himself was positioned to guide his lawyers regarding how to engage this evidence.

In light of the above, Mr. Rusesabagina's right to adequate time and facilities for a defense was violated.

D. RIGHT TO CONFIDENTIAL COMMUNICATIONS WITH COUNSEL

Mr. Rusesabagina's right to confidential communications with counsel has been violated. The nature of this violation raises concerns that his right to a defense has been irretrievably prejudiced. Further, this violation exacerbates the Rwandan authorities' continuing refusal to permit international counsel to assist Mr. Rusesabagina.¹⁴⁴

¹⁴⁴ See American Bar Association Center for Human Rights, "Background Briefing on Proceedings

International and Regional Standards

In addition to the right to adequate facilities and time for preparation of a defense, Article 14(3)(b) of the ICCPR protects the right to confidential communication with counsel.¹⁴⁵ As stated by the United Nations Human Rights Committee, “[c]ounsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.”¹⁴⁶ The Committee has thus found a violation of Article 14(3)(b) where all meetings between a detained accused and counsel were held in the presence of police.¹⁴⁷

Article 7 of the African Charter likewise entitles an accused to confidential communications with his or her lawyer.¹⁴⁸ The African Commission has deemed the “right to confer privately with one’s lawyer and exchange confidential information or instructions ... a fundamental part of the preparation of a defence,”¹⁴⁹ stating that all persons in detention must be provided the facilities to communicate with counsel without “interception or censorship and in full confidentiality.”¹⁵⁰ In *Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt*, the Commission considered a case where the accused were only able to speak to their lawyers in the courtroom in the presence of and “within earshot [of] security officials.”¹⁵¹ According to the Commission, this “restrictive access” to counsel violated Article 7.¹⁵²

The UN Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) echo the standards established by the ICCPR and African Charter. According to the Rules, “[p]risoners shall be provided with adequate opportunity, time and facilities to be visited by and to communicate and consult with a legal adviser of their own choice or a legal aid provider, without delay, interception or censorship and in full confidentiality, on any legal matter, in conformity with applicable domestic law.”¹⁵³

Against Paul Rusesabagina”, January 26, 2021. Available at https://www.americanbar.org/groups/human_rights/reports/background_briefing_rwanda_paul_rusesabagina/.

¹⁴⁵ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2017, para. 34.

¹⁴⁶ *Id.*

¹⁴⁷ Human Rights Committee, *Khomidova v. Tajikistan*, U.N. Doc. CCPR/C/81/D/1117/2002, August 25, 2004, para. 6.4.

¹⁴⁸ African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle N(3)(e)(i).

¹⁴⁹ *Id.* at Principle N(3)(e)(i).

¹⁵⁰ *Id.* at Principle N(3)(e).

¹⁵¹ African Commission on Human and Peoples’ Rights, *Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt*, Communication No. 334/2006, March 2011, para. 211.

¹⁵² *Id.*

¹⁵³ United Nations General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), U.N. Doc. A/RES/70/175, December 17, 2015, Rule 61(1).

The European Court of Human Rights has considered cases where state actors have intercepted correspondence between counsel and an accused, including case file materials and defense strategy documents. In *Moiseyev v. Russia*, for instance, authorities at the remand center where the accused was detained “routine[ly] read ... all documents exchanged between the applicant and his defence team” pursuant to legislation that “provided for censorship of all correspondence by detainees in general terms, without exception for privileged correspondence, such as that with legal counsel.”¹⁵⁴ The Court emphasized that interception of such correspondence could only be justified in exceptional circumstances, such as when “the authorities have reasonable cause to believe that the privilege is being abused, in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature.”¹⁵⁵ Given that there did not appear to be an exceptional circumstance that justified the “sweeping” review of all correspondence between the accused and his lawyer throughout the duration of the criminal proceedings, the Court found that the State had “encroached on the rights of the defence in an excessive and arbitrary fashion.”¹⁵⁶ Notably, the remand center was operated by the “same authority” that was responsible for the accused’s prosecution, meaning that the applicant was placed at “a disadvantage vis-à-vis his opponent.”¹⁵⁷

In evaluating cases concerning confidential communication, the Court has emphasized that “[i]f a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness.”¹⁵⁸ As such, where communications between counsel and an accused have already been intercepted¹⁵⁹ or where communications have not in fact been intercepted but the accused has reasonable grounds to believe that confidentiality will be violated,¹⁶⁰ the Court has indicated that an accused’s defense may be “irretrievably” compromised.¹⁶¹ In *Zagaria v. Italy*, for example, a single conversation between the accused and counsel was wiretapped.¹⁶² The State subsequently failed to discipline the official responsible for the wiretapping.¹⁶³ Consequently, the Court found that “there was

¹⁵⁴ European Court of Human Rights, *Moiseyev v. Russia*, App. No. 62396/00, October 9, 2008, paras. 210-211.

¹⁵⁵ *Id.* at para. 210. See also European Court of Human Rights, *Khodorkovskiy and Lebedev v. Russia*, App. nos. 11082/06 and 13772/05, July 25, 2013, para. 645.

¹⁵⁶ *Id.* at para. 211.

¹⁵⁷ *Id.*

¹⁵⁸ See *id.* at para. 209; European Court of Human Rights, *S. v. Switzerland*, App. Nos. 12629/87 and 13965/88, November 28, 1991, para. 48.

¹⁵⁹ European Court of Human Rights, *Brennan v. United Kingdom*, App. No. 39846/98, October 16, 2001, paras. 58-63.

¹⁶⁰ See European Court of Human Rights, *Modarca v. Moldova*, App. No. 14437/05, May 10, 2007, para. 89.

¹⁶¹ European Court of Human Rights, *Brennan v. United Kingdom*, App. No. 39846/98, October 16, 2001, para. 62.

¹⁶² European Court of Human Rights, *Zagaria v. Italy*, App. No. 58295/00, November 27, 2007, paras. 33-36.

¹⁶³ *Id.* at para. 35.

no guarantee to the applicant that the incident would not have been repeated. He could therefore reasonably fear that other conversations would be overheard, which may have given him grounds for hesitation before tackling questions which might be of importance to the prosecution.”¹⁶⁴

The Case Against Mr. Rusesabagina

In the present case, it is undisputed that materials relayed by defense counsel to Mr. Rusesabagina were confiscated and reviewed by the prison authorities. As noted in the Center’s previous background briefing, defense counsel has stated that this seizure included documents from the case file as well as defense strategy memoranda. The confiscation of materials relayed by defense counsel to Mr. Rusesabagina has been corroborated by Minister of Justice Johnston Busingye in both the public relations video accidentally sent to Al Jazeera and his follow-on interview with Al Jazeera: Minister Busingye, while proclaiming that Mr. Rusesabagina’s right to confidential communication with counsel had been preserved, stated that it was routine and consistent with international law for the prison authorities to review all correspondence sent to prisoners to ensure security.

The Ministry of Justice subsequently released a statement acknowledging that the Minister had learned of a potential violation of the right to confidential communication in December 2020 and had thus instructed the prison authorities to take greater care in distinguishing between privileged and non-privileged materials. But in a prison visit some three months later, the prison authorities stated that they were still examining materials relayed to Mr. Rusesabagina without exception. In oral rulings on March 5 and a written ruling on March 9, the court found that materials exchanged between Mr. Rusesabagina and his lawyer had been confiscated. According to the court:

The other thing that has been observed and that needs to be corrected is that there are documents from his trial, as well as other documents, that have been seized, and their return to his person is taking a long time. ... [D]ocuments which form part of the case file which Rusesabagina Paul exchanges with his lawyers should not be seized. As regards other documents which are not part of the trial file, as well as various other objects which are sent to him through his lawyers, they should make a list (inventory) and hand them over to him through the prison administration.

The ensuing UN appeals filed by the international defense team allege that violations have not only persisted but have worsened in the months since the court’s ruling.

¹⁶⁴ Id.

According to the appeals, the prison authorities have searched Mr. Rusesabagina's lawyers prior to prison visits, insisting on examining all materials that the lawyers have brought for Mr. Rusesabagina and, on one instance, confiscating documents marked privileged and confidential. The most recent update to the UN appeals reports that the authorities stopped counsel from making a preapproved visit on June 4 – violating Mr. Rusesabagina's baseline right to receive legal assistance.

As a threshold matter, the facts confirmed by multiple actors in the leadup to the court's March 9 ruling reveal a violation of the right to confidential communication: as described above, the defense, the Minister of Justice, the prison authorities, and the court all stated at various points that the prison authorities have systematically confiscated and inspected materials relayed by defense counsel to Mr. Rusesabagina. Although Minister Busingye has asserted that international law permits prison authorities to review all incoming materials for security purposes, such a sweeping review contravenes the basic guarantee of Article 14(3)(b) of the ICCPR and Article 7 of the African Charter. Only for exceptional reasons may authorities intercept correspondence between an accused and defense counsel. While Minister Busingye cited an escape plan that had allegedly been discovered within the correspondence, the plan (the existence of which the defense has vigorously contested) appeared to have been discovered after interception had already commenced and, in any event, such interception had been authorized writ large, with no limiting factors or safeguards. Mr. Rusesabagina's right to confidential communication with his lawyers was thus violated.

The facts as alleged in the UN appeals filed by Mr. Rusesabagina's international defense team constitute a further violation of Mr. Rusesabagina's right to communicate with counsel.

Given the above, Mr. Rusesabagina would have reasonable grounds to believe that his right to confidential communications will continue to be compromised and that he should desist from open discussion with his lawyers about the case. Indeed, the prison authorities have yet to be subject to disciplinary measures (a key point raised by the European Court in *Zagaria v. Italy*): the Minister of Justice, which oversees both the prison system and the public prosecutor's office – responsible for the current proceedings against Mr. Rusesabagina – has defended the prison's conduct; the court has stated that the authorities may continue reviewing certain materials relayed to Mr. Rusesabagina by counsel and has not required the prison authorities to explain how they will screen for privileged materials; and prison officials have apparently disregarded the court's instruction to take greater care in distinguishing between privileged and non-privileged materials – to the contrary, subjecting lawyers visiting the prison to searches of all documents on their persons and confiscating documents marked privileged and confidential.

As such, Mr. Rusesabagina’s defense has likely been “irreparably prejudiced.”

E. RIGHT TO THE PRESUMPTION OF INNOCENCE

International and Regional Standards

Under Article 14(2) of the ICCPR and Article 7(1)(b) of the African Charter, individuals charged with criminal offenses are entitled to the presumption of innocence. The United Nations Human Rights Committee has stated that Article 14(2) “imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.”¹⁶⁵

As specified by the Committee, the presumption can be violated where public authorities make statements pronouncing an accused’s guilt.¹⁶⁶ The Committee, for example, has found violations where high ranking police officers publicly deemed a defendant guilty,¹⁶⁷ stating that the officers “failed to exercise the restraint that article 14, paragraph 2, requires,” and where a documentary allegedly funded by the executive portrayed a defendant as guilty.¹⁶⁸ The African Commission has likewise noted of the presumption: “[p]ublic officials shall maintain a presumption of innocence. Public officials, including prosecutors, may inform the public about criminal investigations or charges, but shall not express a view as to the guilt of any suspect.”¹⁶⁹

The Case Against Mr. Rusesabagina

In the present case, President of Rwanda Paul Kagame has repeatedly made comments deeming Mr. Rusesabagina guilty, undermining the presumption of innocence and adding to the violations discussed above. Prior to Mr. Rusesabagina’s trial, in a widely publicized interview with the press, President Kagame stated that Mr. Rusesabagina: “heads a group of terrorists that have killed Rwandans. He will have to pay for these crimes. Rusesabagina has the blood of Rwandans on his hands.”¹⁷⁰

¹⁶⁵ Human Rights Committee, General Comment 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 30.

¹⁶⁶ *Id.*

¹⁶⁷ Human Rights Committee, *Gridin v. Russian Federation*, U.N. Doc. CCPR/C/69/D/770/1997, July 18, 2000, para. 8.3.

¹⁶⁸ Human Rights Committee, *Kulov v. Kyrgyzstan*, U.N. Doc. CCPR/C/99/D/1369/2005, August 19, 2010, paras. 3.7, 8.7.

¹⁶⁹ African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, Principle N(6)(e)(ii).

¹⁷⁰ Human Rights Watch, “Rwanda: Rusesabagina Was Forcibly Disappeared”, September 10, 2020. ¹⁷¹ See ABC News, “Paul Rusesabagina Was Called a Hero After ‘Hotel Rwanda’: Now He’s Accused of

In April 2021, after the trial was already underway, President Kagame spoke at a genocide commemoration ceremony, stating: “You heard the other day, when the person who was brought here, and the question is how he got here, and not that he led a group that was killing people here in Rwanda.”¹⁷¹ The reference to “the person who was brought here” and who “led a group that was killing people here in Rwanda” is most likely a reference to Mr. Rusesabagina. In a subsequent interview with France24, President Kagame asked in response to a question about Mr. Rusesabagina’s arrest: “What’s wrong with tricking a criminal?”¹⁷²

The repeated characterization of Mr. Rusesabagina as guilty by the country’s president constitutes a severe violation of the presumption of innocence.

F. STATE RESPONSIBILITY FOR THE CONDUCT OF THIRD PARTIES

Belgium’s facilitation of Mr. Rusesabagina’s prosecution raises significant questions that need to be answered. In particular, Belgium should explain what steps it took to ensure that assistance provided to Rwanda was not used to support a prosecution that violated Mr. Rusesabagina’s fair trial rights and whether the scope or nature of its assistance has changed over time as the circumstances of Mr. Rusesabagina’s transfer and treatment in Rwanda have become clear.

International Standards

General principles concerning state responsibility for the conduct of third parties are summarized by Article 16 of the International Law Commission’s (ILC) Draft Articles on State Responsibility, which the International Court of Justice has held reflects customary international law.¹⁷³ The Article provides that “[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if

Terrorism”, April 25, 2021. Available at <https://abcnews.go.com/International/paul-rusesabagina-called-hero-hotel-rwanda-now-accused/story?id=76953569>.

¹⁷¹ See ABC News, “Paul Rusesabagina Was Called a Hero After ‘Hotel Rwanda’: Now He’s Accused of Terrorism”, April 25, 2021. Available at <https://abcnews.go.com/International/paul-rusesabagina-called-hero-hotel-rwanda-now-accused/story?id=76953569>.

¹⁷² Reuters, “Rwanda’s Kagame Says Relations Are on the Mend with France”, May 17, 2021. Available at <https://www.reuters.com/world/africa/rwandas-kagame-says-relations-are-mend-with-france-2021-05-17/>.

¹⁷³ International Court of Justice, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. V. Serb. & Montenegro), Judgement, February 26, 2007, para. 420.

committed by that State.”¹⁷⁴ In sum, a state may be responsible for aiding and abetting internationally wrongful acts when four conditions are met:

- (1) the state aids or assists another state in the commission of an internationally wrongful act;
- (2) such aid or assistance contributes to the commission of that act;
- (3) the assisting state has the intention to facilitate and/or knowledge of the circumstances of the internationally wrongful act; and
- (4) the recipient state’s act would also be wrongful if committed by the assisting state.¹⁷⁵

With respect to the first condition, any method of support is likely covered by the “aids or assists” phrasing: the ILC Commentary on the Draft Articles cites financial, logistical, and technical support. With respect to the second condition – the nexus between assistance and the principal wrong – the ILC Commentary provides that “the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act.”¹⁷⁶ The ILC Commentary further notes that while aid or assistance does not have to be essential to the performance of the internationally wrongful act, it must contribute significantly.¹⁷⁷

The third prong, that of intent and knowledge, is the most debated condition. The confusion associated with this condition is due in part to the fact that the text of Article 16 refers to “knowledge of the circumstances of the internationally wrongful act,” while the ILC’s commentary specifies that no responsibility arises unless the assisting state provided support with “a view to facilitating the commission of the wrongful act.”¹⁷⁸ As detailed by experts, although these requirements may appear inconsistent on “first glance”

[t]hey can be reconciled ... if the first element is understood to require knowledge that the aid or assistance facilitated an internationally wrongful act—that is, knowledge of the wrongfulness of the action to be taken by the assisted state. The second condition then would be understood to

¹⁷⁴ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Part of Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10., 2001, Article 16 (hereinafter “ILC Draft Articles”).

¹⁷⁵ Ryan Goodman & Miles Jackson, “State Responsibility for Assistance to Foreign Forces (aka How to Assess US-UK Support for Saudi Ops in Yemen)”, Just Security, August 31, 2016.

¹⁷⁶ ILC Draft Articles at pg. 66.

¹⁷⁷ Id.

¹⁷⁸ Id.

require intent to facilitate the action taken by the state, even if the state did not specifically intend that act's wrongfulness.¹⁷⁹

Moreover, in practice there may be little difference between a knowledge and intent standard. Under well-settled principles of international law, states are "supposed" to intend the foreseeable consequences of their actions.¹⁸⁰ Therefore, if a state has actual or near certain knowledge that its assistance will result in unlawful acts, it does not matter whether it has provided assistance with the specific purpose of aiding in the wrongful act.¹⁸¹ This is consistent with examples cited by the ILC of state responsibility for passively supporting or tolerating wrongful acts of other states.¹⁸²

Notably, many experts have argued that states may not evade responsibility through "willful blindness" – defined as "a deliberate effort by the assisting state to avoid knowledge of illegality on the part of the state being assisted, in the face of credible evidence of present or future illegality."¹⁸³ Credible evidence includes evidence from sources such as "fact-finding commissions, or independent monitors on the ground."¹⁸⁴

The fourth element, that "the recipient state's act would also be wrongful if committed by the assisting state," requires that the act violate either peremptory international norms or a treaty to which both states are party.¹⁸⁵

The Case Against Mr. Rusesabagina

As described above, the Belgian authorities have been helping the Rwandan authorities investigate the present case against Mr. Rusesabagina since 2019. Among other things, this assistance has entailed a raid on Mr. Rusesabagina's home, seizure of his phone and computer, acquisition of information regarding money transactions, and interviews with witnesses. According to the prosecution, since Mr. Rusesabagina's arrival in Rwanda the Belgian authorities have provided case-related documents to the Rwandan authorities on at least one occasion: in December 2020.

¹⁷⁹ Oona Hathaway, Alexandra Francis, Alyssa Yamamoto, Srinath Reddy Kethireddy and Aaron Haviland, "State Responsibility for U.S. Support of the Saudi-led Coalition in Yemen", Just Security, April 25, 2018. Available at <https://www.justsecurity.org/55367/state-responsibility-u-s-support-saudi-led-coalition-yemen/>.

¹⁸⁰ Ryan Goodman & Miles Jackson, "State Responsibility for Assistance to Foreign Forces (aka How to Assess US-UK Support for Saudi Ops in Yemen)", Just Security, August 31, 2016. See also Harriet Moynihan, "Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism", Chatham House, November 2016, para. 74.

¹⁸¹ Harriet Moynihan, "Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism", Chatham House, November 2016, para. 70.

¹⁸² Id. at para. 69

¹⁸³ Id. at para. 43.

¹⁸⁴ Id. at para. 45.

¹⁸⁵ Id. at paras. 28-29.

The proceedings against Mr. Rusesabagina have entailed both fair trial violations, as discussed above, and violations of his pretrial rights: among other things, an undisputed three days of incommunicado detention.

This raises the question of whether Belgium may bear any responsibility for wrongful acts committed by the Rwandan authorities. In particular, it would be important for Belgium to clarify whether it indeed provided materials to the Rwandan authorities in December 2020; if so, what was the nature of the materials provided; what other assistance if any has been provided since Mr. Rusesabagina's transfer to Rwanda; and how and whether Belgium addressed the potential that its support might facilitate international wrongful acts, including in light of documented patterns of unfair trials against government opponents in Rwanda.¹⁸⁶

Further, it appears that the Belgian investigation is ongoing, with the corresponding possibility that cooperation between Belgium and Rwanda on Mr. Rusesabagina's case might continue. Given the violations that have come to light since the commencement of trial, such as the breach of Mr. Rusesabagina's right to confidential communication with counsel, it is all the more important that Belgium clarify the scope of its support and its assessment of this support's compatibility with international norms.

¹⁸⁶ See Amnesty International, "Rwanda: Paul Rusesabagina Must be Guaranteed a Fair Trial", September 14, 2020. Available at <https://www.amnesty.org/en/latest/news/2020/09/rwanda-paul-rusesabagina-must-be-guaranteed-a-fair-trial/#:~:text=Paul%20Rusesabagina%20was%20allowed%20a,and%20critics%20of%20the%20government> ("Amnesty has documented numerous violations of fair trial rights in previous cases involving opponents and critics of the government").

CONCLUSION



TrialWatch Expert Geoffrey Robertson's Findings:

Whatever the merits of the charges against Mr. Rusesabagina (and this report takes no position on those), it is clear that Mr. Rusesabagina's fair trial rights – in particular his right to confidential communication, his right to the presumption of innocence, and his right to prepare his defense – have been violated, potentially to the irreparable prejudice of the defense, calling into question the fairness of any potential convicting verdict. Further, by relying on the Bishop's untested statement to find that it had jurisdiction, by permitting two prosecution witnesses to present their allegations unchallenged, and by asking prosecution witnesses questions geared towards inculpating Mr. Rusesabagina, the court has evinced more concern for ensuring the prosecution's case is established than protecting Mr. Rusesabagina's rights.

Belgium, whose diplomats have been present for this trial, should explain how and why it has cooperated with Rwanda in the prosecution of a man to whom it had given asylum and citizenship. As described above, it appears that Belgium continued to provide assistance to the Rwandan investigation even after the proceedings' serious defects came to light. Complicity in an unfair trial should be a matter of international concern. Moreover, if the deception operation that brought Mr. Rusesabagina to Rwanda indeed amounts to circumvention of Belgian extradition law, Belgium should in fairness provide evidence to support Mr. Rusesabagina's argument to this effect.

Can the court regain credibility at this late stage? The court could sever Mr. Rusesabagina's trial from that of the co-defendants, and provide the adjournment that is necessary for him to prepare his defense. It could permit international counsel, representing him or invited as amici, to more fully make their case that the circumstances of Mr. Rusesabagina's transfer to Rwanda amount to an abuse of process, and rule upon it properly so that an adverse decision could be made the subject of appeal. It could recall the Bishop and the two vital witnesses and have their testimony subjected to cross examination.

Based on the course of the proceedings thus far, however, it may be doubted that the guarantees of fairness that these proceedings would require in order to be credible will be afforded Mr. Rusesabagina – especially if they are to result, as seems to be predetermined, in a conviction which may carry a sentence of life imprisonment.