

IN THE MATTER OF:

**LIEUTENANT-GENERAL FAUSTIN KAYUMBA NYAMWASA'S
PRESENCE IN SOUTH AFRICA**

BRIEFING PAPER

Prepared on behalf of:

Consortium for Refugees and Migrants in South Africa (CoRMSA)

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Introduction

1. The Consortium for Refugees and Migrants in South Africa (CoRMSA), formerly known as the National Consortium for Refugee Affairs, is a registered Non Profit Organisation tasked with promoting and protecting refugee and migrant rights. It is comprised of a number of member organisations including legal practitioners, research units, and refugee and migrant communities.¹
2. The Consortium's mandate involves strengthening the partnerships between refugee and migrant service providers to provide improved co-ordination of activities. This includes developing working relationships with other concerned organisations to provide an effective forum for advocacy and action.
3. The Consortium liaises with government and other stakeholders to keep them informed of the views of our members. The Consortium also provides a centralised referral system for the media and other practitioners through which it can refer those dealing with specific aspects of the sector to the organisations and individuals most qualified to assist.
4. Lieutenant-General Faustin Kayumba Nyamwasa (Nyamwasa), a Rwandese national, is reported recently to have been granted refugee status in South Africa.² Nyamwasa faces criminal charges in Rwanda relating to corruption, embezzlement and terrorism and is the subject of a Rwandan extradition request to South Africa. Nyamwasa is additionally the subject of indictments in France and Spain, relating to charges of murder of French and

¹ Amnesty International; Centre for the Study of Violence and Reconciliation; Christians for Peace in Africa; Coordinating Body of Refugee Communities; Durban Refugee Service Providers Network; Lawyers for Human Rights; Refugee Pastoral Care; Refugee Social Services; Union of Refugee Women; Forced Migration Studies Programme, University of Witwatersrand; Jesuit Refugee Services; Lawyers for Human Rights; Musina Legal Advice Centre; Refugee Children's Project; Refugee Ministries Centre; Refugee Pastoral Care; South African Red Cross Society; Tutumike (African Disabled Refugee Organisation; Agency of Refugee Education, Skills, Training and Advocacy; Alliance for Refugees in South Africa; Bonne Esperance; Cape Town Refugee Centre Excelsior Empowerment Centre; Scalabrini Sonke; Gender Justice Network; The Trauma Centre; UCT Law Clinic; Vicki Igglesden); Southern African Centre for the Survivors of Torture; The Black Sash; University of Cape Town Law Clinic; University of the Witwatersrand Law Clinic.

² The Department of Home Affairs deputy director-general responsible for immigration, Jackson McKay, confirmed on Thursday, 24 June 2010 that Nyamwasa had been granted asylum, as reported in *'War crimes suspect' has asylum in SA*, Business Day, Friday 25 June 2010.

Spanish nationals respectively and war crimes and crimes against humanity. In addition to the indictments, credible reports exist implicating Nyamwasa in the commission of grave human rights violations in north-west Rwanda and the Democratic Republic of Congo (DRC) in the period 1994-1998. At present, Nyamwasa is recuperating in South Africa, having survived what is suspected to have been an attempted assassination attempt of him on Saturday, 19 June 2010.

5. Consideration of the political situation in Rwanda, the specific circumstances of the recent treatment of Nyamwasa by Rwandan authorities, and the attack on Nyamwasa raising suspicion that he is targeted for assassination, suggests that he cannot be returned to Rwanda because to do so would expose him to political persecution and offend South Africa's domestic and international legal obligations. And yet the implication of Nyamwasa in the commission of grave human rights violations, as indicated in judicial indictments and credible human rights reports, demonstrates not only that the grant of asylum by South Africa may be inappropriate but that it may also be unlawful under South African and international law.
6. In recognition of the complexities surrounding the situation of Nyamwasa and the difficulties presented the South African government, CoRMSA submits this legal briefing setting out the countervailing international and domestic legal considerations involved and the respective options available to the government, in line with South Africa's legal commitments.

Legal issues

7. This briefing will attempt to answer the following questions:
 - 7.1. Is Nyamwasa eligible for refugee status?
 - 7.2. Is the decision to grant Nyamwasa refugee status susceptible to a legal challenge, and if so, on what grounds?
 - 7.3. Should Nyamwasa's refugee status be withdrawn?

- 7.4. Should the South African government accede to the Rwandan government's extradition request?
- 7.5. In the event that his refugee status is withdrawn, can Nyamwasa legally remain in South Africa?
- 7.6. What are South Africa's obligations to exercise jurisdiction over Nyamwasa on account of his alleged involvement in international crimes?
- 7.7. What are South Africa's obligations in respect of the French and Spanish indictments of Nyamwasa?

Facts

8. Of relevance to consideration of Nyamwasa's status in South Africa and treatment by South African authorities are two factual contexts:
 - 8.1. The prevailing political situation in Rwanda, giving rise to the apprehension that Nyamwasa would face persecution were he to be returned;
 - 8.2. The international crimes in respect of which there exists "reason to believe" that Nyamwasa bears responsibility, so requiring the exclusion of refugee status to him and giving rise to obligations for South Africa to either prosecute Nyamwasa for the crimes or extradite him to a state that will do so.

The current political situation in Rwanda

9. Faustin Kayumba Nyamwasa has long been active in Rwandese politics. A Tutsi, he spent much of his early life in Uganda as a refugee and joined the newly formed and then clandestine Rwandese Patriotic Front (RPF), based in Uganda, in the late nineteen eighties –

a movement opposed to the pro-Hutu government then in power in Kigali.³ During the period 1990-1994, he held the position of Director of Military Intelligence in the RPF.⁴ In 1990, the RPF launched military attacks into Rwanda, leading to the Arusha Accords of 1992-1993 and an attempted power sharing arrangement between the Rwandan government and the RPF.⁵ However, after the killing in April 1994 of then Rwandan President Habyarimana in a plane crash and the ensuing genocide of Tutsis and moderate Hutus, hostilities resumed resulting in the defeat of government forces.⁶

10. After the RPF took power in 1994, Nyamwasa assumed a senior position of authority within the Rwandan Patriotic Army (RPA). Responsible for RPA troops stationed in north-west Rwanda during the period 1994-1998,⁷ it is alleged that Nyamwasa commanded RPA troops staging incursions into Zaire, in pursuit of former Armed Forces of Rwanda (FAR) and the civilian militia, the Interahamwe, soldiers.⁸ During this period, Nyamwasa was very much part of the new Rwandan government and military elite and enjoyed close relationships with the country's senior leadership, including Vice President and Minister of Defence, Paul Kagame.⁹

11. In 2001, Nyamwasa received training in the United Kingdom, before returning to Rwanda in 2002 and assuming the position of Secretary-General in Rwanda's National Security Services. In 2005, Nyamwasa was appointed Rwanda's ambassador to India, a position he

³ *Kayumba Nyamwasa: Rwanda's sadistic general* Uganda Record, 3 March 2010, available at ugandarecord.co.ug/print.php?issue=63&print&article=799.

⁴ *Who is General Kayumba Nyamwasa?* New Vision Online (Uganda), 21 June 2010 available at <http://www.newvision.co.ug/D/8/25/723401>.

⁵ *Rwanda: The Rwandan Patriotic Front's Offensive* report prepared by the American Defense Intelligence Agency, 9 May 1994 available at www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB53/rw050994.pdf.

⁶ Id.

⁷ *The dead can no longer be counted* BBC News, 16 January 1998, available at <http://news.bbc.co.uk/2/hi/47807.stm>.

⁸ Id.

⁹ *Cracks in the Mirror as Rwanda Prepares for Elections*, 21 March 2010, available <http://www.eurac-network.org/>

maintained until 2010, when he returned briefly to Rwanda.¹⁰ He fled Rwanda in February 2010, having been accused of corruption, embezzlement and terrorism.¹¹ The accusations of terrorism relate to instances of grenade attacks in Rwanda in early 2010 which the government maintains were orchestrated by Nyamwasa and Colonel Patrick Karegeya, a former Rwandan intelligence chief, currently resident in South Africa.¹²

12. Shortly after fleeing Rwanda, Nyamwasa entered South Africa. On 19 June 2010, in Johannesburg, Nyamwasa was shot in the stomach.¹³ Although several arrests were made, South African police initially refused to confirm the identities of those arrested. Several media reports claim, however, that one of the six people arrested in connection with the shooting is a former Rwandan soldier.¹⁴ Only days after the shooting of Nyamwasa, a Rwandan journalist, Jean Leonard Rugabage, believed to be investigating links between Nyamwasa's shooting and the Rwandan government, was himself shot dead in Rwanda in mysterious circumstances.¹⁵

13. These developments in themselves raise a well-founded apprehension that were Nyamwasa to be returned to Rwanda, he would face serious threat to his life or freedom. Set against the backdrop of the current political situation in Rwanda and President Kagame's treatment of

¹⁰ *Exiled Rwanda General Kayumba* Sunday Vision (Uganda), 19 June 2010, available at <http://www.sundayvision.co.ug/detail.php?mainNewsCategoryId=7&newsCategoryId=123&newsId=723274>; See also *Who is General Kayumbe Nyamwasa* above n 4.

¹¹ *Who is out to kill the dissidents?* The Economist, 24 June 2010, available at http://www.economist.com/node/16439016?story_id=16439016&source=hptextfeature.

¹² *Two Nyamwasa shooting suspects freed* The Monitor (Uganda), 25 June 2010, available at <http://allafrica.com/stories/201006250799.html>; *SA drops two over Rwanda shootings* BBC News, 24 June 2010, available at <http://news.bbc.co.uk/2/hi/world/africa/10401085.stm>; *Arrest warrants issued for Kayumba and Kareyega* Rwanda Times, 29 June 2010, available at <http://www.newtimes.co.rw/index.php?issue=14209&article=27290>.

¹³ *Exiled Rwandan general wounded in shooting*, Mail and Guardian (South Africa) newspaper, 20 June 2010, available at www.mg.co.za/.../2010-06-20-exiled-rwanda-general-wounded-in-sa-shooting.

¹⁴ See *Six arrested over Kayumbe shooting* New Vision Online (Uganda), 21 June 2010, available at <http://www.newvision.co.ug/detail.php?newsCategoryId=12&newsId=723431>; *Soldier arrested for Nyamwasa shooting* The Times (South Africa), 20 June 2010 available at <http://www.timeslive.co.za/local/article512060.ece/Soldier-arrested-for-Nyamwasa-shooting>; *SA arrests six in attempt on exiled Rwandan* Associated Press, 21 June 2010, available at www.google.com/.../ALeqM5jBVhid8VpZaKM67qkM3KwXmMY8CgD9GFJSHO2.

¹⁵ *Rwanda: Stop Attacks on Journalists, Opponents* article published by Human Rights Watch, 26 June 2010, available at www.hrw.org/en/news/2010/06/.../rwanda-stop-attacks-journalists-opponents.

those perceived to be political opponents or dissidents, the threat becomes that much more appreciable.

14. As Human Rights Watch and Amnesty International have documented, political opponents and those perceived to be opponents face increasing intimidation, attack and harassment in advance of Rwanda's August 2010 presidential election. The president of the opposition party FDU-Inkingi, Victoire Ingabire, was arrested on charges of "genocide ideology", "minimizing the genocide", "divisionism" and "collaboration with a 'terrorist' group", the Democratic Forces for the Liberation of Rwanda (FDLR).¹⁶ She has been released on bail but is not allowed to leave the capital. Green Party president, Frank Habineza, has also reported intimidation and harassment by individuals thought to be state agents.¹⁷
15. Deogratias Mushayidi, chairman of the Pact for the People's Defence (PDP), an opposition group in exile, was detained in Burundi in March 2010 and handed to Rwandan authorities in circumstances that are legally suspect. Before any formal charges were put to him, Rwandan authorities told the national broadcaster that he was wanted in connection with recent grenade attacks in Kigali – the same attacks said to have been planned by Nyamwasa and Karegeya. Currently remanded in Kigali Central Prison, Mushayidi has been charged with threatening state security and collaborating with a "terrorist" group, the FDLR.¹⁸
16. On 24 June 2010, Bernard Ntaganda, leader of the opposition party PS-Imberakuri was taken into police custody. He remains in detention in Kigali. Although charges have not been confirmed, he is said to be wanted in connection with an alleged attempted arson attack and inciting ethnic tensions – a staple of government accusation against political opponents. The Senate has previously accused him of "genocide ideology". Several other members of PS-Imberakuri were also detained shortly after Ntaganda's arrest after gathering outside the US

¹⁶ *Rwanda urged to ensure opposition leader receives fair trial* article published by Amnesty International, 28 April 2010, available at www.amnesty.org/.../rwanda-urged-ensure-opposition-leader-receives-fair-trial-2010-04-28.

¹⁷ *Rwanda: End Attacks on Opposition Parties* above n 16.

¹⁸ *Rwanda: Politician arrested, risks ill-treatment: Deogratias Mushayidi* (AFR 47/001/2010 Rwanda) call for assistance by Amnesty International, 10 March 2010 available at:

www.amnesty.org/en/library/asset/AFR47/001/.../afr470012010en.html.

embassy and appealing for help. Also on 24 June 2010, members of the FDU-Inkingi opposition party were arrested after protesting the case against party president, Victoire Ingabire. Some members of PS-Imberakuri and FDU-Inkingi have been released while several remain in detention. Members of both political parties report having been beaten by the police.¹⁹

17. Intimidation of political opposition parties is not limited to attacks directed at party officials. Only two months ahead of the scheduled August 2010 presidential elections and the Green Party and FDU-Inkingi have still not been permitted to officially register – a requirement of political parties if they are to field candidates in an election. In the past year, several meetings of the Green Party and PS-Imberakuri have been broken up by police, in some cases violently.²⁰ This environment together with documented targeting of independent media and journalists, suggested in the recent killing of journalist Jean Leonard Rugambage, has elicited grave concern from international human rights groups.²¹ Reporters Without Borders, has said of the Rwandan government: “As the August presidential election approaches, the government is organising a tightly controlled and monolithic electoral campaign in which all sources of criticism are being suppressed”.²²

18. Although Nyamwasa has made no official declaration of party ambitions outside the RPF, local Rwandan media have linked him to opposition parties.²³ The allegations that he, together with Karegeya, were responsible for the series of grenade attacks in Rwanda – charges that have been made by Rwandan authorities of exiled opponent, Deogratias Mushayidi²⁴ – and that are said to be linked to DRC-based militia, the FDLR, with whom

¹⁹ *Rwanda: Stop Attacks on Journalists, Opponents* above n 15.

²⁰ *Rwanda: End Attacks on Opposition* above n 16.

²¹ *Id.*

²² *Two leading independent weeklies suspended for 6 months* Reporters Without Borders, 14 April 2010, available at <http://en.rsf.org/rwanda-two-leading-independent-weeklies-14-04-2010,37015>.

²³ *Rwandan envoy flees to S. Africa* New Vision Online (Uganda), 1 March 2010, available at <http://www.newvision.co.ug/D/8/13/711671>.

²⁴ *Rwanda: Politician arrested, risks ill-treatment: Deogratias Mushayidi* above n 19.

opposition party leader Victoire Ingabire is also said to be connected,²⁵ indicates that even if Nyamwasa does not have connections with the political opposition in Rwanda, he is being treated as such.

19. Nyamwasa's outspoken criticism of the Rwandan government in recent months, following his flight from Rwanda, enhances the likelihood that Nyamwasa will be viewed as a political enemy and targeted for persecution. In response to the Rwandan government's public accusations against him, Nyamwasa has given extensive interviews to several media sources, detailing alleged instances of criminal conduct within the RPF and corrupt activity on the part of Kagame. He has also publicly maintained that Kagame has betrayed the RPF's ideals of ethnic tolerance and freedom of expression and association.²⁶
20. The demonstrated systematic targeting of political opposition in Rwanda by the government, and the clear indications that Nyamwasa is viewed as a political opponent, establish the existence of a serious risk to Nyamwasa's life or freedom were he to be returned to Rwanda.
21. If there is little tolerance for political opposition by the Rwandan government, dissent within the ruling RPF appears to provoke even harsher response. Nyamwasa and Karegeya, once two of the RPF's most senior officials and trusted allies of Kagame, now stand accused of political crimes. These accusations coincide with the arrests of other senior military officials, Lieutenant General Charles Muhire, Major General Emmanuel Karezi Karake, and Brigadier General Jean-Bosco Kazura.²⁷ Nyamwasa and Karake, together with Kagame and six others, are the subject of a Spanish judicial indictment.²⁸

²⁵ *Is Rwanda's Hero Becoming Its Oppressor?* Time Magazine, 24 April 2010 available at <http://www.time.com/time/world/article/0,8599,1984315,00.html#ixzz0m3Q2YXNU>.

²⁶ See *Who is General Kayumbe Nyamwasa* above n 4; *Gen. Nyamwasa responds to Kagame* Daily Monitor, 30 May 2010, available at <http://www.monitor.co.ug/News/National/-/688334/928562/-/x09101/-/index.html>; see also transcript of an interview Nyamwasa had with Voice of America Radio, transcript published in the Daily Monitor, 5 March 2010, available at <http://www.monitor.co.ug/News/National/-/688334/873402/-/wj627s/-/index.html>.

²⁷ *The State of Democracy in Rwanda as Presidential Poll Approaches* Institute for Security Studies, 23 June 2010, available at http://www.iss.co.za/iss_today.php?ID=971.

²⁸ *Spanish Courts Issue 40 International Arrest Warrants Against Highest ranking Officials Of Rwanda's Political-Military Helm*, press release issued by Veritas Rwanda after Spanish authorities issued arrest warrants for Nyamwasa and other army officials, available at www.veritasrwandaforum.org/material/press_release_080208_eng.pdf.

22. Conspiracy theories abound as to why these senior officials, all once part of the RPF's inner circle, are being targeted. Motive aside, these actions suggest that President Kagame rules through fear and intimidation, from which not even his inner circle are exempt – the arrest and detention and subsequent immediate promotion of Major General Fred Ibingira being but one example.
23. At worst, however, this recent targeting and the shooting of Nyamwasa recall the killings in suspicious circumstances in Kenya of Colonel Theoneste Lizinde, former head of the RPA's General Headquarters, and Seth Sendashonga, former Interior Minister, both of whom fled Rwanda after becoming increasingly disenchanted with the RPF.²⁹

Nyamwasa's alleged involvement in the commission of war crimes and crimes against humanity

24. Nyamwasa held the position of Director of Military Intelligence in the Rwandan Patriotic Front (RPF), during the years 1990-1994. Thereafter he was appointed Deputy Chief of Staff, National Gendermarie,³⁰ and is widely reported to have served as commander of the Rwandan Patriotic Army's (RPA) Brigade 221, stationed in north-west Rwanda in the period 1994-1998. North-west Rwanda borders the Democratic Republic of Congo. Testimony provided to the Spanish investigating judge, Fernando Andreu Merelles, and used in support of the Spanish indictment against Nyamwasa, identifies him as having been the commanding officer of all military units of the RPA in the Democratic Republic of Congo (DRC).³¹

²⁹ *Call for an International investigation into Assassination Attempt on Rwandan General Kayumbe Nyamwasa* available at <http://www.umoya.org>.

³⁰ Available at www.outlookindia.com/article.aspx?233375

³¹ Order of Indictment issued by Judge Fernando Andreu Merelles, Fourth Central Examining Court of the National Court, Madrid, Spain (Spanish indictment) at 129, available at:

<http://www.rwandadocumentsproject.net/gsd/collect/comment/index/assoc/HASH4e91.dir/Espana-Audiencia%20nacional-English%20version.pdf>.

25. Nyamwasa, occupying positions at all times of senior military authority, is believed to be responsible, in some instances directly, and in others by virtue of his position of command, for the commission of grave human rights violations in Rwanda and in the DRC.

26. On 29 June 1998, the United Nations released a *Report of the Secretary-General's Investigative Team charged with investigating serious violations of human rights and international humanitarian law in the Democratic Republic of the Congo - S/1998/581* (the UN Report).³² The letter by the then UN Secretary-General (Kofi Annan) accompanying the report, sought to highlight the most important conclusions of the investigative team, including that the documented killings, as committed by the Alliance of Democratic Forces for the Liberation of the Congo (AFDL) and “its allies, including elements of the Rwandan Patriotic Army, constitute crimes against humanity, as does the denial of humanitarian assistance to Rwandan Hutu refugees.”³³ Annan sought also to underscore that the investigative team believed “that some of these killings may constitute genocide, depending on their intent” and that the team had made a “call for further investigation of those crimes and of their motivation.”³⁴

27. Although the report does not limit its findings to operations of the AFDL and the RPA, it makes several damning conclusions about the activities of these groups. Evidence submitted to the investigative team supports the view that the AFDL forces were “composed in part of Rwandan Army (RPA) troops, and often led by Rwandan officers.”³⁵ The report specifically implicates the RPA in the following crimes:

27.1. July 1996: Evidence suggests that the RPA attacked a Red Cross facility in Kibumba in the DRC, killing at least three.³⁶

³²Full text available at

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/177/22/IMG/N9817722.pdf?OpenElement>

³³ UN Report at 2.

³⁴ Id.

³⁵ UN Report at 41.

³⁶ UN Report at 42.

- 27.2. 18 December 1996: AFDL and RPA killed some 3200 refugees in and around Walikale (including 1800 children).³⁷
- 27.3. April 1997: A large-scale massacre of Hutu refugees occurred at Biaro and other killings were perpetrated along the route to Ubundu. The RPA is reported to have directed or participated in these killings.³⁸
- 27.4. May 1997: Several hundred unarmed Rwandan Hutus were massacred in Mbandanka and Wendji by AFDL troops under the command of the RPA. Testimony given named the officers in charge of the massacre in Mbandaka and indicated that the RPA was in effective control³⁹.
- 27.5. April/May 1997: Witnesses implicated the RPA in killings in the Boende area, eastern Equateur province. In particular, the investigating team concluded that gross violations of human rights occurred in this area and that the perpetrators of these offences included members of the RPA, often acting in conjunction with or commanding other armed forces, most often the AFDL.⁴⁰
28. While no identification of soldiers or commanding officers involved in these crimes is made in the report, Nyamwasa's known seniority within the RPA, the many reports that name him as commanding officer of the RPA's Brigade 221, then stationed in north-west Rwanda, and the identification of him as the "Commanding Officer of all military units of the RPA in the DRC"⁴¹, in testimony provided to Spanish judicial authorities, gives reason to believe that Nyamwasa, either directly or by virtue of his command authority, bears responsibility for the crimes attributed by the UN Report to the RPA. In 2009, the UN conducted a human rights mapping exercise covering the period 1993 to 2003, which investigates the most serious crimes committed in the DRC by all parties, including the RPA. That investigation may shed further light on some of these incidents. The report is currently in the final stages of approval in the UN.

³⁷ UN Report at 41.

³⁸ UN Report at 42.

³⁹ UN Report at 7 and 42.

⁴⁰ UN Report at 52.

⁴¹ Spanish Indictment at 129.

Spanish and French indictments

French indictment⁴²

29. Nyamwasa is the subject of an indictment issued in November 2006 by French Judge Jean Louise Brugiere. The indictment charges Nyamwasa with participation in the killings of former Rwandan President Juvenal Habyarimana and others on board the aircraft in which he was travelling, including the French crew, maintaining that Nyamwasa and other high ranking RPF officials orchestrated the shooting down of the aircraft. The French indictment does not go into substantial detail regarding Nyamwasa's involvement in human rights violations in Rwanda and the DRC.⁴³

Spanish indictment

30. In February 2008, Spanish Judge Fernando Andreu Merelles indicted Nyamwasa for the murder of Spanish citizens in Rwanda and the commission of war crimes. The indictment is a comprehensive analysis of witness testimonies that implicate Nyamwasa directly in the violent killings of civilians in Rwanda and in massacres that occurred in the DRC, allegedly orchestrated by RPA generals under the command of Nyamwasa.

⁴² Order to Execute, issued by the Tribunal De Grande Instance De Paris, Chambers of de Jean-Louis Brugiere, 17 November 2006 (French Indictment) available at <http://www.taylor-report.com/Documents/BrugiereReport-English.pdf>.

⁴³ Judge Brugiere concluded at 41 that:

“It emerges from all the investigations conducted to date during the courts of this enquiry and in particular the testimony of former APR soldiers and dissidents of the FPR that the attack perpetrated on 6 April 1995 against the Flacon 50 of President Habyarimana falls within a larger scheme orchestrated by the FPR under the leadership of Paul Kagame which aimed to violently seize power, a goal which they could not hope to achieve legally by compliance with institutional mechanisms implemented to further the Arusha agreements.

The decision to assassinate President Habyarimana by a spectacular attack which would necessarily result in provoking reprisals from the most extremist branch of the Hutu ethnic group was taken during at least three meetings held during 1993 and early 1994 ... the presence of a number of officers, including General Kayumbe Nyamwasa”.

31. Witness testimony, to which the indictment refers, identifies Nyamwasa as the “Commanding Officer of all military units of the RPA in the DRC”.⁴⁴ Two witness testimonies link Nyamwasa directly to the murder of four Spanish nationals.⁴⁵
32. Investigating Judge Merelles found that *prima facie* evidence exists pointing to Nyamwasa’s involvement in the following crimes:⁴⁶
- 32.1. Massacres committed by himself and/or his subordinates, Colonel Jackson Rwahama Mutabazi, Colonel Dan Munyusa and Captain Joseph Nzambamwita.
 - 32.2. The abduction and murder of Spanish priest Joaquim Vallamajo and the murder of Rwandan priests in Byumba in April 1994.
 - 32.3. The murder of three Spanish nationals, Flors Sirera Fortuny, Manuel Mdrazo Osuna and Luis Valutena Gallego.
 - 32.4. Large-scale killings in Ruhengeri, Gisenyi and Cyangugu in Rwanda.
 - 32.5. Attacks on civilian populations in Munyanza, Kiyanza, Rutongo, Kabuye and a massacre at Nyacyonga Camp.
 - 32.6. The massacre of 2500 Hutu refugees at the Byumba football stadium.
33. By virtue of the international criminal law doctrine of command responsibility, the indictment attributes to Nyamwasa responsibility for the criminal actions of his subordinates. Colonel Dan Munyusa (Munyusa), Colonel Jackson Rwahama Mutabazi (Mutabazi) and Captain Joseph Nzabamwita (Nzabamwita), are identified in the indictment as officers subject to Nyamwasa’s military command.
34. Munyusa, identified as one of the highest ranking representatives of Rwanda’s Congo Desk/External Security Office in the DRC, is accused of the following crimes:⁴⁷

⁴⁴ Spanish Indictment at 129.

⁴⁵ Spanish indictment at 132.

⁴⁶ Spanish indictment at 165.

⁴⁷ Spanish indictment at 169-168.

34.1. Massacres of Rwandan Hutu refugees and Congolese civilians throughout the DRC region, specifically **Bukayu**, Numbi, **Walikale**, Tingi-Tingi, **Ubundu**, Bokungo, **Boende** and **Mbandanka**.⁴⁸

34.2. Participation in the Byumba Stadium massacre.

35. Rwahama is accused of the following crimes:⁴⁹

35.1. Participation in the Byumba Stadium massacre.

35.2. Involvement in the murder of Spanish national, Joaquim Vallmajo.

36. Nzabamwita is accused of the following crimes:⁵⁰

36.1. Participation in the Byumba Stadium massacre.

36.2. Involved in the murder of Spanish national, Joaquim Vallmajo.

37. The indictment provides further reasonable grounds to suspect Nyamwasa of the commission of the gravest sorts of crimes – namely crimes against humanity. Together with the UN Report, it establishes, at the very least, a *prima facie* case against Nyamwasa which must be taken into account by South African authorities in exercising their immigration⁵¹ and extradition⁵² powers regarding Nyamwasa.⁵³

⁴⁸ Munyusa's involvement in massacres in the bolded villages have also been identified in the UN Report implicating RPA involvement in human rights violations in these areas

⁴⁹ Spanish Indictment at 168.

⁵⁰ Spanish Indictment at 171.

⁵¹ See the powers to be found in the Immigration Act 13 of 2002 and the Refugees Act 130 of 1998.

⁵² See the powers to be found in the Extradition Act 67 of 1962, as amended.

⁵³ See *Kaunda and others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) at para 123 where Chaskalson CJ referred to the weight and relevance the Court will place on reports of well-respected international agencies that are submitted to indicate a certain state of affairs. He held:

“Whilst this Court cannot and should not make a finding as to the present position in Equatorial Guinea on the basis only of these reports, it cannot ignore the seriousness of the allegations that have been made. They are reports of investigations conducted by reputable international organisations and a Special Rapporteur appointed by the United Nations Human Rights Committee. The fact that such investigations were made and reports given is itself relevant in the circumstances of this case”

Legal framework in which the facts must be assessed

38. It is our understanding that General Nyamwasa and his family have been granted refugee status by the relevant authorities within the Department of Home Affairs (DHA) in terms of Section 3 of the Refugees Act 130 of 1998. Section 3 provides:

“Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person—

- (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
- (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or
- (c) is a dependant of a person contemplated in paragraph (a) or (b).”

See too Justice O’Regan in *Kaunda* at para 265 where she placed reliance on reports by Amnesty International and the International Bar Association as “information originating ... from well-respected international agencies concerned with the protection and promotion of human rights” and found that such information “raises serious concerns about the criminal justice system in Equatorial Guinea and the question whether the applicants, should they be extradited to Equatorial Guinea, would face a fair trial in that country.”

And see also Murphy J in *Tantoush v the Refugees Appeal Board and Others* 2008 (1) SA 232 (T) at para 19:

“All the same, it is not unusual in human rights and refugee cases for courts to take judicial notice of various facts of an historical, political or sociological character, or to consult works of reference or reports of reputable agencies concerned with the protection and promotion of human rights”.

34. The grant of refugee status is a significant juridical fact. A number of rights are accorded to the individual who is the recipient of a grant of refugee status – the sum of which effectively amounts to the status of citizenship.⁵⁴

35. While there appears to be a well-founded fear that Nyamwasa may face persecution on a listed ground set out under section 3(a) and ill-treatment should he be returned to Rwanda, that is not a sufficient basis for granting him refugee status. We say so for the following reasons.

36. Section 3 of the Refugees Act must be read together with Section 4 of the Act. Section 4 sets out reasons for non-qualification. We are concerned with Section 4 (1) (a) which provides:

- “(1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she—
- (a) has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes”

37. It is thus incumbent on the Refugee Status Determination Officer (RSDO) to examine whether the applicant does not qualify for refugee status in terms of Section 4.

38. There is a positive duty to investigate and determine excludability and this lies in the first instance with the RSDO.

⁵⁴ See *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC), and in particular para 99 (per O’Regan and Mokgoro JJ):

“Refugees who have been granted asylum are a special category of foreign nationals. They are more closely allied to permanent residents than to those foreign nationals who have rights to remain in South Africa temporarily only. Permanent residents have a right to reside in South Africa and enjoy “all the rights, privileges, duties and obligations” of citizens save for those which a law or the Constitution explicitly ascribes to citizenship. Recognised refugees also have a right to remain in South Africa indefinitely in accordance with the provisions of the Refugees Act so their position is closer to that of permanent residents than it is to foreign nationals who have only a temporary right to be in South Africa or foreign nationals who have no right to be here at all. To understand the special position of refugees, it is important to understand how refugee status is conferred in our law, as well as South Africa’s international obligations in respect of refugees” (footnotes omitted).

39. In light of Nyamwasa's alleged involvement in the commission of war crimes and crimes against humanity, it is our view that the DHA, through its officials, failed to fulfill this duty by adequately investigating Nyamwasa's past history and his military involvement in the RPF and RPA. Had the RSDO performed such an investigation the DHA would have had reason to believe that Nyamwasa has committed a war crime or crime against humanity (as defined in a number of international legal instruments dealing with such crimes⁵⁵) and would have concluded that he is thereby excluded under South Africa's domestic asylum law and international law from being granted refugee status because he is an excluded person and therefore does not qualify for refugee status.
40. In the circumstances a strong argument can be made that the DHA's decision to grant Nyamwasa refugee status is a decision motivated by a material error of law, and is a decision furthermore vitiated on the basis that the DHA failed to take into account obviously relevant considerations and failed to comply with a mandatory condition of the empowering legislation. The decision is thus liable to be reviewed and set aside by a court of law under section 6 of the Promotion of Administrative Justice Act 3 of 2000 and the constitutional principle of legality.

⁵⁵ The most obvious of which is the Rome Statute of the International Criminal Court, 1998, to which South Africa is a treaty member. As the UK Supreme Court has held, in considering an individual's exclusion from asylum on account of his or her involvement in international crimes:

"It is convenient to go at once to the ICC Statute, ratified as it now is by more than a hundred States and standing as now surely it does as the most comprehensive and authoritative statement of international thinking on the principles that govern liability for the most serious international crimes (which alone could justify the denial of asylum to those otherwise in need of it)."

See para 9 of Lord Brown's judgment in *R (on the application of JS) (Sri Lanka) (Respondent) v Secretary of State for the Home Department (Appellant)*, [2010] UKSC 15, judgment of 17 March 2010. See also para 47 of Lord Hope's judgment:

"I have no difficulty with the formulation in para 115 of the Court of Appeal's judgment, where Toulson LJ said: 'The starting point for a decision-maker addressing the question whether there are serious reasons for considering that an asylum seeker has committed an international crime, so as to fall within article 1F(a), should now be the Rome Statute. The decision-maker will need to identify the relevant type or types of crime, as defined in articles 7 and 8; and then to address the question whether there are serious reasons for considering that the applicant has committed such a crime, applying the principles of criminal liability set out in articles 25, 28 and 30 and any other articles relevant to the particular case.'"

41. There is nevertheless under the Refugees Act an opportunity to rectify the unlawful granting of refugee status to Nyamwasa. In this regard we point to Section 36 of the Refugees Act.

42. Section 36 reads:

- “(1) if a person has been recognized as a refugee *erroneously on an application* which contains any materially incorrect or false information, or was so recognized due to fraud, forgery or *misleading representation of a material or substantial nature in relation to the application or if such a person ceases to qualify for refugee status in terms of section 5* – The Standing Committee must inform such a person of its intention of withdrawing his or her classification as a refugee and the reasons therefore, and such a person may, within the prescribed period, make a written submission with regard thereto.
- (2) After consideration of all material facts and with due regard for the rights set out in Section 33 of the Constitution, the Standing Committee may withdraw such recognition and such a person may be dealt with as a prohibited person under the Aliens Control Act.
- (3) Any refugee whose recognition as such is withdrawn in terms of subsection 10 may be arrested and detained pending being dealt with in terms of the Aliens Control Act, 1991.

43. Withdrawal of refugee status may be done in terms of regulation 17 of the Refugee Regulations,⁵⁶ which provides:

- “(1) Before refugee status may be withdrawn, the Standing Committee must provide written notice to the refugee—
 - (a) explaining that the Standing Committee intends to withdraw the status;
 - (b) identifying the reasons for the intended withdrawal; and

⁵⁶ See Regulations to the South African Refugees Act, Government Gazette, Vol 418, No. 21075, 6 April 2000, Regulation Gazette, No. 6779.

- (c) giving the refugee notice that he or she has the right to make a written submission to respond to the Standing Committee within 30 days of the date of notice.
- (2) The burden of proof is on the Standing Committee to establish that a refugee is subject to one or more of the grounds for withdrawal enumerated in sub-regulation 17 (a).
- (3) If the refugee fails to respond within the prescribed period of time or the response fails to overcome the reasons provided for the withdrawal, the refugee status may be withdrawn and the individual may be treated as a prohibited person under the Aliens Control Act and be subject to detention pursuant to section 36 (3) of the Act.”

44. If Nyamwasa did not fully disclose his activities between 1994-1998 while he was a senior official of the Rwandese Army then his application would contain materially incorrect or false information, alternatively his refugee status would have been granted on account of fraud or a *misleading representation of a material or substantial nature*. The Standing Committee would be authorised (having followed the procedural requirements contained in regulation 17, section 33 of the Constitution and the Promotion of Administrative Justice Act) to withdraw his status.

45. Not only would the South African authorities be authorised to withdraw Nyamwasa’s refugee status, they would be legally obliged to do so.

46. The Refugees Act must be interpreted with due regard to the Bill of Rights. In accordance with section 6(1) of the Refugees Act, it must be interpreted and applied with due regard to:

- “(a) the Convention Relating to the Status of Refugees (UN, 1951);
- (b) the Protocol Relating to the Status of Refugees (UN, 1967);
- (c) the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU, 1969);
- (d) the Universal Declaration of Human Rights (UN, 1948); and
- (e) any other relevant convention or international agreement to which the Republic is or becomes a party.”

47. Refugee law is a body of rules designed as a protective mechanism to protect innocent civilians who face persecution in their country of origin. It was never intended for the protection of international criminals. As the United Kingdom Supreme Court has recently had occasion to say in the decision of *R (on the application of JS) (Sri Lanka) (Respondent) v Secretary of State for the Home Department (Appellant)*:

“The Refugee Convention was drafted for a world scarred by long years of war crimes and other like atrocities. There remain, alas, all too many countries where such crimes continue. Sometimes those committing them flee abroad and claim asylum. It is not intended that the Convention will help them. However clearly in need of protection from persecution an asylum seeker may be, he is not to be recognised as a refugee where ‘there are serious reasons for considering that (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes’”.⁵⁷

48. The same intention underpins Section 4 of the Refugees Act, which is modeled on the exclusionary clauses found in the international refugee conventions referred to above. In short, the DHA should never have granted refugee status to Nyamwasa in the first place, and is now obliged to withdraw that status on account of there being reason to believe that he was involved in crimes against humanity and war crimes.

49. Article 1F of the 1951 Convention relating to the Status of Refugees and Article I(5) of the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa oblige States to deny the benefits of refugee status to certain persons who would otherwise qualify as refugees.

⁵⁷ [2010] UKSC 15, judgment of 17 March 2010, at para 1.

50. One of the key exclusions is in respect of individuals accused of international crimes. For example, Article 1F of the 1951 Convention relating to the Status of Refugees states that the provisions of that Convention “shall not apply to any person with respect to whom there are serious reasons for considering” that: “(a) he [or she] has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.”
51. The rationale for the exclusion clauses, which should be borne in mind when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts.
52. The exclusion clauses must be applied “scrupulously” to protect the integrity of the institution of asylum, as is recognised by UNHCR’s Executive Committee in Conclusion No. 82 (XLVIII), 1997.
53. We submit that the DHA has undermined the integrity of the institution of asylum in South Africa by failing “scrupulously” to apply the exclusion clause in section 4 of the Refugees Act.
54. It is therefore submitted that Nyamwasa’s refugee status should be withdrawn through reliance on section 36 of the Refugees Act. Such a withdrawal of status should occur after the DHA has followed the prescripts of regulation 17 of the Refugee Regulations, and with due regard to Nyamwasa’s administrative justice rights under section 33 of the Constitution as codified in the Promotion of Administrative Justice Act 3 of 2000.

The request for extradition to Rwanda or deportation to Rwanda after withdrawal of refugee status

55. In addition to the withdrawal of Nyamwasa's refugee status, a number of other obligations must be taken into account by the South African government in deciding how it wishes to proceed. Both the Refugees Act and international law must inform any decision made subsequent to the withdrawal of Nyamwasa's asylum status. In particular, the principle of *non-refoulement* must be respected when deciding whether it will accede to Rwanda's extradition request or to deport him.
56. It is our understanding that the Rwandan government has sent South Africa a request for Nyamwasa's extradition. Whether or not there is an extradition treaty that exists between South Africa and Rwanda does not affect South Africa's ability or authority to extradite him.⁵⁸ In determining whether or not any extradition should occur, similar criteria to that contained under the Refugees Act apply.⁵⁹

⁵⁸ See section 3(2) of the Extradition Act and the Constitutional Court's decision in *Geuking v President of the Republic of South Africa and Others* 2003 (3) SA 34 (CC).

⁵⁹ See section 11(b)(iv) of the Extradition Act and *Robinson v Minister of Justice and Constitutional Development and Another* 2006 (6) SA 214 (C), where Davis J stated at 230:

“Mr Katz conceded that, if a fugitive complained that she was tortured or that she had suffered similar violation of her human rights, this would constitute a 'flagrant denial of justice' by the requesting State. The first respondent would be required to consider the validity of such complaints. This concession was wisely made in the light of the decision in *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC) (2001 (2) SACR 66; 2001 (7) BCLR 685) at para [37]:

“The lawfulness of the conduct of South African immigration officers in handing over Mohamed to the FBI for them to take him to the United States was challenged on a further, even more fundamental and entirely different basis. The argument is derived from the obligation imposed on the South African State by the Constitution to protect the fundamental rights contained in the Bill of Rights. The rights in issue here are the right to human dignity, the right to life and the right not to be treated or punished in a cruel, inhumane or degrading way.”

Principle of Non-refoulement

57. An excluded individual may still be protected against return to a country where he or she is at risk of ill-treatment by virtue of other international instruments.⁶⁰

58. The principle of *non-refoulement* is applicable to any refugee, asylum-seeker or any alien requiring some form of shelter from the state under whose control he/she is subject. The *non-refoulement* principle means that states cannot return illegal foreigners to territories where they might be subjected to torture, inhumane or degrading treatment, or where their lives and freedoms might be at risk. In its simplest form, *non-refoulement* may be defined as the principle that no person should be expelled from or refused entry to a country if such an act would expose them to specified forms of threat or persecution.

59. South African law explicitly endorses this principle. Section 2 of the Refugees Act provides:

“General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances—

Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where—

- (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, *political opinion* or membership of a particular social group; or
- (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.” (Emphasis added)

⁶⁰ See generally: UN High Commissioner for Refugees, Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003, HCR/GIP/03/05, available at: <http://www.unhcr.org/refworld/docid/3f5857684.html> [accessed 1 July 2010], at para 9.

60. This principle is recognised in a number of international instruments. For example, article 3 of the Convention Against Torture (CAT),⁶¹ to which South Africa became a party on 10 December 1998, provides:

- “1. No State party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

61. The principle of non-refoulement is intended to encompass all transfers. As the Constitutional Court made clear in *Mohamed & another v President of the Republic of South Africa & others (Society for the Abolition of the Death Penalty & another intervening)*:⁶²

“The fact that the government claims to have deported and not to have extradited Mohamed is of no relevance. European courts draw no distinction between deportation and extradition in the application of Article 3 of the European Convention on Human Rights. Nor does the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of which South Africa is a signatory and which it ratified on 10 December 1998.”⁶³

62. The principle is, moreover, applicable even in respect of suspected international criminals and/or individuals that pose a risk to South Africa’s security or public order. In the decision

⁶¹ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force June 26, 1987, 1465 UNTS 85, 23 ILM 1027 (1984), available at

www.ohcr.org/english/law/cat/htm

⁶² 2001 (3) SA 893 (CC).

⁶³ At para 60.

of *Tantoush v the Refugee Appeal Board & Others*⁶⁴ Murphy J held in relation to a Libyan whose asylum application had been denied, that:

“Objectively there is a consistent pattern of gross, flagrant and perhaps mass violation of human rights in Libya; and subjectively the evidence establishes conclusively that the applicant has engaged in activity within and outside of Libya over the past 20 years, including his application for asylum, which makes him vulnerable to the risk of being placed in danger of torture were he to be returned to Libya. The primacy of the non refoulement obligation was underscored by the ultimate conclusion of the SIAC in *DD and AS v The Secretary of State for the Home Department* (Appeal No: SC/42 and 50/2005 dated 27 April 2007). It held that DD was not entitled to refugee status under the Refugee Convention because of his terrorist activities, but despite the risk he posed to UK national security he could not be returned because of the non refoulement obligation.”⁶⁵

63. Murphy J quoted with approval the following passage from the UK decision in *DD and AS v The Secretary of State for the Home Department* (Appeal No: SC/42 and 50/2005 dated 27 April 2007):

“We have given this decision anxious consideration in view of the risks which the Appellants could face were they returned (to Libya), and those which the UK, and individuals who can legitimately look to it for protection of their human rights, would face if they were not. We must judge the matter by considering only the risks which the Appellants could face on return, no matter how grave and violent the risks which, having chosen to come here, they pose to the UK, its interests abroad, and its wider interest. Those interests at risk include fundamental human rights.”⁶⁶

⁶⁴ 2008 (1) SA 232 (T).

⁶⁵ Id at para 157.

⁶⁶ Id at para 135.

64. And in concluding Murphy J held that, “the courts and relevant authorities here are equally if not more constrained by the wider interest of our treaty and constitutional obligations to avoid refoulement in the face of the risk of torture.”⁶⁷

65. The Court’s decision in *Tantoush* and its approval of the *DD* decision, indicate that where there is a concern about national security, authorities are justified in denying an individual asylum status. However, even in those circumstances there is no justification for refoulement.⁶⁸

66. Read with Sections 28(5) and 2 of the Refugees Act the law requires that where there is a well-founded fear of persecution on a listed ground or ill-treatment, a refugee whose status has been withdrawn must be given the opportunity to leave to any other country of his choice but may not be removed to a country where he or she would face persecution and/or ill-treatment.

67. The burden of proof rests on the individual asserting *non-refoulement*. The Court in *Tantoush* dealt with the standard of proof in the context of proving a real risk of persecution. The Court found that that the RSDO and Refugee Appeal Board (RAB) applied too strict a standard of proof in determining whether Tantoush had a well founded fear that he would face political persecution. Murphy J reasoned:⁶⁹

“The RAB’s finding that the applicant was required to prove a real risk on a balance of probabilities is not correct. *The appropriate standard is one of “a reasonable possibility of persecution”* (Emphasis added)⁷⁰

⁶⁷ Id at para 136.

⁶⁸ See also *Saadi v Italy*, ECHR, Application no 37201/06, 28 February 2008.

⁶⁹ At para 97.

⁷⁰ See also *Van Garderen NO v Refugee Appeal Board and Others* (unreported decision 30720/2006 of 19 June 2007). In that case Botha J explained the nature of the inquiry:

“In my view by simply referring to the normal civil standard, the RAB imposed too onerous a burden of proof. It is clear ... that allowance must be made for the difficulties that an expatriate applicant may have to produce proof. It is also clear that there is a duty on the examiner himself to gather evidence.

68. Whilst the burden of proof rests on the applicant, the standard of proof is lower and the RSDO in charge of a case cannot simply make a decision on what the applicant places before him/her, but must adopt an “inquisitorial” approach based on an appreciation of the circumstances asylum seekers often find themselves in.⁷¹
69. We assert that in light of the political situation in Rwanda and the jurisprudence dealing with *non-refoulement* in South Africa, to extradite or deport Nyamwasa would expose him to the well-founded fear of being persecuted as a result of his alleged political opposition to the Rwandan government and statements criticizing President Kagame, and the possibility of ill-treatment.
70. In assessing the danger to which Nyamwasa may be exposed, it is incumbent upon the South Africa government to again have consideration for the reports by respected international organisations detailing political persecution and ill-treatment in Rwanda of government opponents and dissidents.⁷² As Murphy J held in *Tantoush*: “[I]t is not unusual in human rights and refugee cases for courts to take judicial notice of various facts of an historical, political or sociological character, or to consult works of reference or reports of reputable agencies concerned with the protection and promotion of human rights”.⁷³

...

All this confirmed my view that the normal onus in civil proceedings is inappropriate in refugee cases. The inquiry has an inquisitorial element. The burden is mitigated by a lower standard of proof and a *liberal application of the benefit of doubt principle*.” (Emphasis added)

⁷¹ This is consistent with the approach advocated in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees available at www.unhcr.org/publ/PUBL/3d58e13b4.pdf (See in particular paras 196 and 197).

⁷² For example, Article 3 of CAT states that in evaluating the danger of torture in another country, “the competent authorities shall take into account ... the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.” It has long been the practice under CAT for authorities to consider country conditions by reference to official human rights reports. See for example: *Kamalthas v. INS*, 251 F.3d at 1280; see also *Farah v. Ashcroft* 114 F. App’x at 326; *Zubeda v. Ashcroft*, 333 F.3d at 477-478; and the cases cited in Katherine Hawkins, “The Promises of Torturers: Diplomatic Assurances and the Legality of ‘Rendition’” (2006) 20 Georgetown Immigration Law Journal 213 at 230.

⁷³ At para 19.

71. Having regard to those reports and the prevailing circumstances in respect of Nyamasa the relevant authorities must err on the side of caution and not extradite or surrender him.

Available Legal Options

72. The question thus remains: what course of action should the South African government authorities follow if in terms of national legislation and international law a person does not qualify for refugee status, but under the principle of refoulement cannot be sent back to his/her country of origin?

No impunity for international crimes

73. We have explained above that on the publicly available evidence the granting of asylum to Nyamwasa constituted an unlawful decision that is reviewable in a court of law. The facts demonstrate a reasonable basis for believing that Nyamwasa is an alleged war criminal and that he is additionally responsible for crimes against humanity.

74. We have also demonstrated that there are mechanisms under the Refugees Act by which the erroneous grant of refugee status to Nyamwasa may be withdrawn – and thereby a review application may be avoided.

75. Although the principle of non-refoulement suggests that Nyamwasa may contend in an inquiry in due course that he ought not to be returned to Rwanda for fear of persecution on a listed ground or ill-treatment, the fact remains that he is (and ought to have been) disqualified from refugee status to ensure that there is no impunity for those responsible for international crimes.

76. Any decision by the authorities regarding Nyamwasa should therefore have due regard for the principle of international accountability for international crimes, and to ensure that South Africa does not become a safe-haven for fugitives from international criminal justice.
77. Crimes against humanity and war crimes are crimes under customary international law. In terms of the principle of universal jurisdiction, a state may prosecute a crime against humanity and a war crime even if the act was performed beyond its borders.⁷⁴
78. The notion of a “*crime against humanity*” evolved in the aftermath of the Second World War.
79. The Nuremberg Charter established the International Military Tribunal. It defined a “*crime against humanity*” as “*murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated*”.⁷⁵
80. In 1947 the General Assembly of the United Nations requested the International Law Commission to formulate the principles of international law recognised in the Charter and the Judgment of the Nuremberg Tribunal. The International Law Commission published the Nuremberg Principles in 1950. Principle VI defined a crime against humanity as “*murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime*”.⁷⁶

⁷⁴ See Boed “The effect of a domestic amnesty on the ability of foreign states to prosecute alleged perpetrators of serious human rights violations” 33 *Cornell International Law Journal* 297 at 307 to 308.

⁷⁵ Article 6.

⁷⁶ See Mettraux “Crimes against humanity in the jurisprudence of the international criminal tribunals for the former Yugoslavia and for Rwanda” 43 *Harvard International Law Journal* 237 at 239 and 244.

81. The research conducted by the International Law Commission over several decades, culminated in the publication of their draft Code of Crimes against the Peace and Security of Mankind in 1996.
82. Similarly, under the Geneva Conventions and Additional Protocols thereto a number of war crimes have become defined, the most egregious of which are regarded as customary international law crimes.
83. The Rome Statute of the International Criminal Court (1998) established an International Criminal Court with jurisdiction to try crimes against humanity and war crimes.
84. The definitions of a “*crime against humanity*” and “*war crimes*” have been replicated in Schedule 1 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.
85. These definitions cover the crimes with which Nyamwasa is accused.
86. While Nyamwasa is accused with crimes alleged to have been committed in the 1990s, before adoption of the Rome Statute of the International Criminal Court 1998, we submit that the definition of a “*crime against humanity*” in the Rome Statute merely gave effect to what customary international law had already come to regard as a “*crime against humanity*” in the 1990s. The same is true in respect of the war crimes with which Nyamwasa is accused.
87. We submit moreover that South Africa has a duty to prosecute these offences.
88. The preamble to the Rome Statute of the International Criminal Court 1998 now recites that “it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes”.

89. In the *AZAPO* case,⁷⁷ Mohamed DP indicated that there may be a duty to prosecute violations of international human rights. We submit that such a duty does indeed exist.

90. Professor Bassiouni explains the position with regard to crimes against humanity as follows:⁷⁸

“These crimes are the concern of all states; All states therefore have power to prosecute those who commit them; For the same reasons all states are bound to assist in bringing those who commit such crimes to justice.”

91. The Constitutional Court in *S v Basson* 2005 (12) BCLR 1192 (CC), emphasised this duty:

“As was pointed out at Nuremburg, crimes against international law are committed by people, not by abstract entities, so that only by punishing individuals who commit such crimes can the provisions of international law be enforced. Given the nature of the charges, the SCA should have given appropriate weight and attention to these considerations, even in the absence of any argument on these issues by the state. Given the extreme gravity of the charges and the powerful national and international need to have these issues properly adjudicated, particularly in the light of the international consensus on the normative desirability of prosecuting war criminals, only the most compelling reasons would have justified the SCA in exercising its discretion to refuse to rule on the charges.”

92. In 1973 the General Assembly of the United Nations adopted a resolution dealing with “*Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*”.⁷⁹ The Resolution provides that persons who have committed crimes against humanity will be subject to trial in the countries in which the crimes were committed.⁸⁰ The Resolution makes it clear that every

⁷⁷ *AZAPO v President of the RSA* 1996 (4) SA 671 (CC) para 30.

⁷⁸ Bassiouni and Wise “Aut dedere aut judicare: the Duty to Extradite or Prosecute in International Law” at 50, as quoted in Andreas O’Shea “International Law and the Bill of Rights” *Bill of Rights Compendium* para 7A26.

⁷⁹ Resolution 3074 of 3 December 1973.

⁸⁰ Article 5 read with article 1.

state has the right to try its own nationals for crimes against humanity⁸¹ and imposes a duty on other states to co-operate in the discharge of that obligation.⁸²

93. For the above reasons it is submitted that in the first instance South Africa has an obligation to assert jurisdiction over Nyamwasa for the crimes he is alleged to have committed, particularly when regard is had to the international nature of these crimes (including the alleged serious violations of human rights and international humanitarian law in the Democratic Republic of the Congo).

94. Alternatively, and further to its commitment to ensure accountability for international crimes, South Africa must have regard to the fact that Nyamwasa is wanted as an international criminal by the French and Spanish authorities. It would thus be incumbent on South Africa to liaise with the French and Spanish authorities and consider action in light of their indictments against Nyamwasa.

95. Should a request be made by French or Spanish authorities for Nyamwasa's surrender or extradition, South Africa would act consistently with the principle of no impunity for international crimes by cooperating in that request.

96. South Africa has a legal obligation to do so. In the first place that obligation flows from the obligation to either investigate and prosecute international crimes or extradite to a state that is willing to do so. In the second place, in 2003 South Africa acceded to the European Convention on Extradition (1957).⁸³ Both France and Spain are parties to that Convention, and accordingly South Africa is a party to a multilateral convention with France and Spain. There would be no bar under the Convention to extraditing him to France or Spain on account his well-founded fear of persecution in a third state, namely Rwanda. What is more, South Africa would have a treaty obligation to cooperate with France and/or Spain in any

⁸¹ Article 2.

⁸² Article 3.

⁸³ See European Convention on Extradition, Paris, 13.XII.1957, which entered into force in South Africa on 14 May 2003.

request made by them for Nyamwasa's extradition. Further, as regards France, South Africa has concluded a Mutual Legal Assistance in Criminal Matters Treaty with France.⁸⁴

97. South Africa would accordingly have an obligation in terms of these treaties, as read with the International Co-operation in Criminal Matters Act No 75 of 1996, to assist France and Spain in the investigation of Nyamwasa.

Truth-telling as a condition for continued status in South Africa

98. Should it be clear that either or both the French and the Spanish authorities are not interested in pursuing the case against Nyamwasa, or alternatively that the South African authorities decide that surrendering Nyamwasa to them is not feasible for rational and compelling policy reasons, then the question remains of Nyamwasa's status in South Africa as an alleged international criminal.

99. It is clear that if Nyamwasa's refugee status is withdrawn then under the Refugees Act he will not be entitled to remain in South Africa under the terms of that statute. It is furthermore the case, as we have submitted above, that South Africa would have a legal obligation to exercise jurisdiction over Nyamwasa on account of his alleged involvement in international crimes.

100. However, there is an option to regularise his presence in the Republic through reliance on the Immigration Act 13 of 2002 (as amended), while at the same time demonstrating South Africa's commitment to the principle of non-impunity for international crimes.

101. Section 31(2)(b) of the Immigration Act reads as follows:

⁸⁴ Ratified by Parliament on 11 November 2002, Entered into force on 1 March 2004, Notice in Government Gazette 27371 of 18 March 2005.

Upon application, the minister, as he or she deems fit, after consultation with the Board, may *under terms and conditions determined* by him or her –

...

- (b) Grant a foreigner or a category of foreigners the rights of permanent residence for a specified period when special circumstances exist which justify such a decision provided that the Minister may –
 - (i) Exclude one or more identified foreigners from such categories; and
 - (ii) For good cause, withdraw such a right from a foreigner or category of foreigners...”

102. On account of the Immigration Act, once Nyamwasa’s refugee status is withdrawn, Nyamwasa could apply for permanent residence in terms of section 31(2) of the Immigration Act. This section allows the minister “subject to terms and conditions” as determined by the minister, and in “special circumstances”, to grant the applicant permanent residence for a specified period of time.

103. Given South Africa’s commitment to the principle of accountability for international crimes, “terms and conditions” could include requiring the applicant to provide information if he/she is permitted to remain in the country legally, despite not qualifying for asylum status. Such information could be provided to the South African Human Rights Commission or an alternative non-governmental human rights organisation about the atrocities committed in Rwanda and the DRC.

104. It is arguable that special circumstances exist inasmuch as Nyamwasa can play a pivotal role in providing a full account about the alleged human rights violations that occurred at the hands of the RPA. If he is willing to assist it would enable South Africa to play a meaningful role in holding perpetrators of international crimes accountable, in this case through the requirement of truth-telling on Nyamwasa’s part. Such a requirement of truth-telling would have to be strictly enforced in order to pass muster as a viable form of accountability in place of a formal prosecution.

105. However, if Nyamwasa is unwilling to assist and/or the South African government is disinclined to pursue this option, then the principle of accountability for international crimes must be satisfied by other means. As we have discussed above, the only other means by which the principle can be given proper respect is through South Africa complying with its duty to either investigate and prosecute Nyamwasa in South Africa, or cooperate with Spain or France in their investigation of Nyamwasa.

Conclusion

106. On account of the facts presented and applicable law we conclude that:

- i. There is reason to believe that Nyamwasa was involved in crimes against humanity and war crimes and thus Nyamwasa is an excluded person for purposes of section 4 of the Refugees Act and is not eligible for refugee status.
- ii. The decision to grant Nyamwasa refugee status is therefore unlawful and in conflict with South Africa's domestic and international obligations.
- iii. The South African authorities ought to take steps to withdraw Nyamwasa's refugee status so as to comply with the Refugees Act and South Africa's commitment to the principle of non-impunity for international crimes. Any decision on withdrawal of such status must be taken with due regard for Nyamwasa's rights to procedural fairness under the Refugees Act and PAJA.
- iv. In light of the political climate in Rwanda, and in compliance with the principle of non-refoulement, South Africa should not extradite Nyamwasa to Rwanda if Nyamwasa is able to demonstrate that he has a well-founded fear that he faces a reasonable possibility of persecution or ill-treatment in Rwanda.
- v. In the interim, pending the outcome of any legal proceedings or enquiries in this matter, Nyamwasa must not be issued with travel documents.
- vi. In their dealings with Nyamwasa the South African authorities must take into account that South Africa is under a duty to either investigate and prosecute Nyamwasa in South

Africa, or to cooperate with Spain or France in those two states' investigation of Nyamwasa.

- vii. In terms of section 31(2) of the Immigration Act, Nyamwasa may be entitled to apply for an exemption in terms of section 31(2) of the Immigration Act, the grant of such exemption being strictly contingent on Nyamwasa's cooperation in the investigation of the most serious international crimes including but not limited to the provision of information to the Human Rights Commission, alternatively, an identified non-governmental human rights organization, about the atrocities committed in Rwanda and the DRC.

107. We are instructed to advise that CoRMSA will continue closely to monitor the decisions and steps taken by the South African authorities in respect of Nyamwasa. CoRMSA reserves its rights to take appropriate legal action in the event that the authorities fail to comply with their obligations under South African and international law.

108. In addition, CoRMSA, on behalf of itself and its affiliate organizations requests an opportunity to tender evidence and submit argument in any further proceedings relating to the status in South Africa of Nyamwasa.

Anton Katz SC
Max du Plessis

Chambers, Cape Town and Durban
2 July 2010