Neutral Citation Number: [2009] EWHC 770 (Admin)

Case No: CO/8862/2008

IN THE HIGH COURT OF JUSTICE
DIVISIONAL COURT
ON APPEAL FROM THE CITY OF
WESTMINSTER MAGISTRATES COURT
(District Judge Evans)
(AND IN THE MATTER FOR JUDCIAL REVIEW

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/04/2009

Before :

LORD JUSTICE LAWS
and
LORD JUSTICE SULLIVAN

- -

Between :

Vincent Brown aka Vincent Bajinja	**Appellants**
Charles Munyaneza	
Emmanuel Nteziryayo	
Celestin Ugirashebuja	
- and -	
The Government of Rwanda	**Respondents**

The Secretary of State for the Home Department

(Transcript of the Handed Down Judgment of
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Mr Alun Jones QC and Mr David Hooper (instructed by Frank Brazell Solicitors) for Bajinja
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Diana Ellis QC and Ms Joanna Evans (instructed by Robert Lizar Solicitors) for Nteziryayo
Mr Edward Fitzgerald QC and Mr Ben Watson (instructed by Hallinan Blackburn Gittings and Nott Solicitors) for Ugirashebuja
Mr James Lewis QC, Mr Hugo Keith and Ms Gemma Lindfield (instructed by the Crown Prosecution Service) for the Government of Rwanda.
Ms Clair Dobbin (instructed by Treasury Solicitors) for the Secretary of State for the Home Department.

Hearing dates: 1-5 December 2008 & 16-19 December 2008

- -

Judgment

LORD JUSTICE LAWS:

This is the judgment of the court, to which both members have contributed.

INTRODUCTORY

1. On 1 August 2008, pursuant to s.93(4) of the Extradition Act 2003 ("the 2003 Act"), the Secretary of State signed orders to the effect, that these four appellants be extradited to Rwanda to face trial in that country for crimes of genocide. The case had been sent to the Secretary of State by District Judge Evans ("the judge") on 6 June 2008 under s.87(3) of the 2003 Act following an extradition hearing (which is a statutory term of art) which took place at the City of Westminster Magistrates Court at intermittent intervals between 23 September 2007 and 9 May 2008, including eighteen days of oral evidence.

2. Before this court are (1) appeals by all four appellants, brought under s.103 of the 2003 Act, against the judge's decision to send the case to the Secretary of State; (2) their appeals under s.108 against the Secretary of State's orders for extradition; and (3) in the case of Mr Ugirashebuja only, an application for judicial review of the Secretary of State's order. That application is brought in order to challenge the order on grounds outwith the 2003 Act which we will explain in due course. For convenience we will refer to the individual appellants by their initials, thus VB is Mr Bajinya (Dr Brown as he now is), CM is Mr Munyaneza, EN is Mr Nteziryayo, and CU is Mr Ugirashebuja. We intend no discourtesy.

3. The appeals range widely over many areas. Some complaints are common to all the appellants; some specific to this or that individual. A major common theme, and the principal focus of this judgment, is the claim that the appellants would not receive a fair trial in Rwanda.

4. There are no general treaty arrangements between the United Kingdom and the Government of Rwanda ("the GoR"). These extraditions were ordered on the basis of a Memorandum of Understanding ("MoU") entered into by Rwanda and the United Kingdom in respect of each appellant on 14 September 2006. (A second MoU dated 22 December 2006 extended the period for the production of certain papers in the extradition proceedings.) Such an MoU engages the statutory extradition machinery contained in Part II of the 2003 Act by force of s.194 which provides in part:

> "(1) This section applies if the Secretary of State believes that—
>
> (a) arrangements have been made between the United Kingdom and another territory for the extradition of a person to the territory, and
>
> (b) the territory is not a category 1 territory or a category 2 territory.
>
> (2) The Secretary of State may certify that the conditions in paragraphs (a) and (b) of subsection (1) are satisfied in relation to the extradition of the person.

(3) If the Secretary of State issues a certificate under subsection (2) this Act applies in respect of the person's extradition to the territory as if the territory were a category 2 territory.

(4) As applied by subsection (3), this Act has effect—

(a) as if [various sub-sections] were omitted;

(b) with any other modifications specified in the certificate."

Category 2 territories are (in summary) those territories to which Part II of the 2003 Act applies. Following the conclusion of the MoU on 14 September 2006 the Secretary of State issued a certificate under s.194(2) on 11 October 2006, and an amending certificate on 22 December 2006.

5. It will be convenient to set out the other relevant provisions of Part II of the 2003 Act and then to give some account of the background to the case, before confronting the issues.

THE 2003 ACT

6. Part II of the 2003 Act contains these following provisions.

"79(1) If the judge is required to proceed under this section [sc. as was the case here] he must decide whether the person's extradition to the category 2 territory is barred by reason of—

...

(b) extraneous considerations;

(c) the passage of time;

...

(2) Sections 80 to 83 apply for the interpretation of subsection (1).

(3) If the judge decides any of the questions in subsection (1) in the affirmative he must order the person's discharge.

(4) If the judge decides those questions in the negative and the person is accused of the commission of the extradition offence but is not alleged to be unlawfully at large after conviction of it, the judge must proceed under section 84.

...

81 A person's extradition to a category 2 territory is barred by reason of extraneous considerations if (and only if) it appears that—

(a) the request for his extradition (though purporting to be made on account of the extradition offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or

(b) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions.

82 A person's extradition to a category 2 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have committed the extradition offence or since he is alleged to have become unlawfully at large (as the case may be).

...

84(1) If the judge is required to proceed under this section he must decide whether there is evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him.

(2) In deciding the question in subsection (1) the judge may treat a statement made by a person in a document as admissible evidence of a fact if—

(a) the statement is made by the person to a police officer or another person charged with the duty of investigating offences or charging offenders, and

(b) direct oral evidence by the person of the fact would be admissible.

(3) In deciding whether to treat a statement made by a person in a document as admissible evidence of a fact, the judge must in particular have regard—

(a) to the nature and source of the document;

(b) to whether or not, having regard to the nature and source of the document and to any other circumstances that appear to the judge to be relevant, it is likely that the document is authentic;

(c) to the extent to which the statement appears to supply evidence which would not be readily available if the

statement were not treated as being admissible evidence of the fact;

(d) to the relevance of the evidence that the statement appears to supply to any issue likely to have to be determined by the judge in deciding the question in subsection (1);

(e) to any risk that the admission or exclusion of the statement will result in unfairness to the person whose extradition is sought, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings.

(4) A summary in a document of a statement made by a person must be treated as a statement made by the person in the document for the purposes of subsection (2).

(5) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.

(6) If the judge decides that question in the affirmative he must proceed under section 87.

...

87(1) If the judge is required to proceed under this section... he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.

(2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.

(3) If the judge decides that question in the affirmative he must send the case to the Secretary of State for his decision whether the person is to be extradited.

...

93(1) This section applies if the appropriate judge sends a case to the Secretary of State under this Part for his decision whether a person is to be extradited.

(2) The Secretary of State must decide whether he is prohibited from ordering the person's extradition under any of these sections—

(a) section 94 (death penalty);

(b) section 95 (speciality);

(c) section 96 (earlier extradition to United Kingdom from other territory).

(3) If the Secretary of State decides any of the questions in subsection (2) in the affirmative he must order the person's discharge.

(4) If the Secretary of State decides those questions in the negative he must order the person to be extradited to the territory to which his extradition is requested...

94(1) The Secretary of State must not order a person's extradition to a category 2 territory if he could be, will be or has been sentenced to death for the offence concerned in the category 2 territory.

(2) Subsection (1) does not apply if the Secretary of State receives a written assurance which he considers adequate that a sentence of death—

(a) will not be imposed, or

(b) will not be carried out (if imposed).

95(1) The Secretary of State must not order a person's extradition to a category 2 territory if there are no speciality arrangements with the category 2 territory.

...

(3) There are speciality arrangements with a category 2 territory if (and only if) under the law of that territory or arrangements made between it and the United Kingdom a person who is extradited to the territory from the United Kingdom may be dealt with in the territory for an offence committed before his extradition only if—

(a) the offence is one falling within subsection (4), or

(b) he is first given an opportunity to leave the territory.

(4) The offences are—

(a) the offence in respect of which the person is extradited;

(b) an extradition offence disclosed by the same facts as that offence, other than one in respect of which a sentence of death could be imposed;

(c) an extradition offence in respect of which the Secretary of State consents to the person being dealt with;

(d) an offence in respect of which the person waives the right that he would have (but for this paragraph) not to be dealt with for the offence.

...

103(1) If the judge sends a case to the Secretary of State under this Part for his decision whether a person is to be extradited, the person may appeal to the High Court against the relevant decision.

...

(3) The relevant decision is the decision that resulted in the case being sent to the Secretary of State.

(4) An appeal under this section may be brought on a question of law or fact.

...

104(1) On an appeal under section 103 the High Court may—

(a) allow the appeal;

(b) direct the judge to decide again a question (or questions) which he decided at the extradition hearing;

(c) dismiss the appeal.

(2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.

(3) The conditions are that—

(a) the judge ought to have decided a question before him at the extradition hearing differently;

(b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.

(4) The conditions are that—

(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;

(b) the issue or evidence would have resulted in the judge deciding a question before him at the extradition hearing differently;

(c) if he had decided the question in that way, he would have been required to order the person's discharge.

...

108(1) If the Secretary of State orders a person's extradition under this Part, the person may appeal to the High Court against the order.

...

(3) An appeal under this section may be brought on a question of law or fact.

...

109(1) On an appeal under section 108 the High Court may—

(a) allow the appeal;

(b) dismiss the appeal.

(2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.

(3) The conditions are that—

(a) the Secretary of State ought to have decided a question before him differently;

(b) if he had decided the question in the way he ought to have done, he would not have ordered the person's extradition.

(4) The conditions are that—

(a) an issue is raised that was not raised when the case was being considered by the Secretary of State or information is available that was not available at that time;

(b) the issue or information would have resulted in the Secretary of State deciding a question before him differently;

(c) if he had decided the question in that way, he would not have ordered the person's extradition.

...

137(1) This section applies in relation to conduct of a person if—

(a) he is accused in a category 2 territory of the commission of an offence constituted by the conduct, or

(b) he is alleged to be unlawfully at large after conviction by a court in a category 2 territory of an offence constituted by the conduct and he has not been sentenced for the offence.

(2) The conduct constitutes an extradition offence in relation to the category 2 territory if these conditions are satisfied—

(a) the conduct occurs in the category 2 territory;

(b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in that part of the United Kingdom;

(c) the conduct is so punishable under the law of the category 2 territory (however it is described in that law)."

BACKGROUND

7. We should first say a little about the state of affairs in Rwanda before the genocide which took place there in 1994. As will be apparent this is nothing but the barest outline, intended only to provide some context for the events giving rise to the issues we must decide.

8. Before colonisation, Rwanda's social structure included three groups, the Hutu, the Tutsis and the Twa. The Twa, who were pygmies, formed no more than a small percentage of the population. The majority of the people were Hutu. The monarchy, and many of the chiefs, were Tutsi. Rwanda gained full independence in 1962. Before that, in 1959, political unrest led to a great deal of violence. The first victims were Hutu. Thousands of Tutsi were killed. There ensued a cyclical pattern of violence involving the two groups. An election gave an overwhelming majority to Hutu political parties. The Tutsi monarch fled abroad. In 1961, after a referendum, the Tutsi monarchy was abolished and Rwanda became a republic. In 1961 and 1962, Tutsi guerrilla groups staged attacks into Rwanda from outside the country. Hutu within Rwanda responded. Thousands were killed.

9. We may go forward to 1975, when after a political coup President Juvenal Habyarimana, a Hutu, established a one party system. His political party was the MRND. Every Rwandan became a member, like it or not. But the Tutsi population were not proportionately represented in the political and social life of the country. The Habyarimana regime was hostile not only to the Tutsi, but also to Hutu who did not originate from the north-west of Rwanda where Habyarimana was based. Habyarimana surrounded himself with persons from that region. They were popularly known as the "*Akazu*". In 1990 an attack was launched from Uganda by displaced Tutsi who had formed the Rwandan Patriotic Front ("RPF").

10. At length domestic and international pressure persuaded President Habyarimana to accept a multi-party system in principle, implemented by a new constitution promulgated on 10 June 1991 which established four further political parties. Meanwhile Tutsi exiles launched incursions into Rwanda under the banner of the

Rwandan Patriotic Army ("RPA"). Violent incidents ensued. In early 1992 the President began the training of youth members of the MRND to form militias known as the *Interahamwe.* The *Interahamwe* later massacred Tutsi, and committed other crimes which largely went unpunished. The division between Hutu and Tutsi widened. In March 1992, a group of Hutu hard-liners founded a new radical political party, the CDR, which was more extremist than Habyarimana himself.

11. We should make some reference to the office of *bourgmestre*, which was held by three of the appellants. Until the time of the genocide Rwanda was divided into eleven prefectures, each headed by a *prefet.* The prefectures were further divided into communes; and the *bourgmestre* was in effect the mayor of the commune. He had many public functions and considerable legal power and authority. A decree of 20 October 1959, originally passed by the colonial powers but still good law in 1994, gave the *bourgmestre* power to order the evacuation, removal or internment of persons in a state of emergency. He had judicial functions, and was also a trusted representative of the President; as such he had a series of unofficial powers and duties. He was a figure of great importance in the daily life of ordinary people, who would look to him for protection. The Trial Chamber of the International Criminal Tribunal for Rwanda (the ICTR: it has an important place in the arguments before us, and we will explain its provenance and jurisdiction below) found in its first judgment, in the case of *Akayesu* (delivered on 2 September 1998), that:

> "In Rwanda, the *bourgmestre* is the most powerful figure in the commune. His *de facto* authority in the area is significantly greater than that which is conferred upon him *de jure*."

12. As we have said, three of the appellants were *bourgmestres*. CM was the *bourgmestre* of the Kinyamakara commune, EN of Mudasomwa commune, and CU of the Kigoma commune. VB was based in the Rugenge prefecture in Kigali. He moved there in about 1990, having previously been based in the Gitarama prefecture. He was not a *bourgmestre*, but is said to have been a close associate of President Habyarimana and a member of the *Akazu.*

THE GENOCIDE

13. The events of the 1994 genocide were to be authoritatively described in some detail by the ICTR in *Akayesu*. We give these extracts:

> "106. … On 6 April 1994, President Habyarimana and other heads of State of the region met in Dar-es-Salaam (Tanzania) to discuss the implementation of the peace accords [sc. which had been signed earlier]. The aircraft carrying President Habyarimana and the Burundian President, Ntaryamirai, who were returning from the meeting, crashed around 8:30 pm near Kigali airport. All aboard were killed.
>
> 107. The Rwandan army and the militia immediately erected roadblocks around the city of Kigali. Before dawn on April 7 1994, in various parts of the country, the Presidential Guard and the militia started killing the Tutsi as well as Hutu known to be in favour of the Arusha Accords and power-sharing

between the Tutsi and the Hutu. Among the first victims were a number of ministers of the coalition government, including its Prime Minister, Agathe Uwilingiyimana (MDR), the president of the Supreme Court and virtually the entire leadership of the *parti social démocrate* (PSD). The constitutional vacuum thus created cleared the way for the establishment of the self-proclaimed Hutu-power interim government, mainly under the aegis of retired Colonel Théoneste Bagosora.

108. Soldiers of the Rwandan Armed Forces (FAR) executed ten Belgian blue helmets, thereby provoking the withdrawal of the Belgian contingent which formed the core of UNAMIR. On April 21 1994, the UN Security Council decided to reduce the peace-keeping force to 450 troops.

109. In the afternoon of 7 April 1994, RPF troops left their quarters in Kigali and their zone in the north, to resume open war against the Rwandan Armed Forces. Its troops from the north moved south, crossing the demilitarized zone, and entered the city of Kigali on April 12 1994, thus forcing the interim government to flee to Gitarama.

110. On April 12 1994, after public authorities announced over Radio Rwanda that 'we need to unite against the enemy, the only enemy and this is the enemy that we have always known...it's the enemy who wants to reinstate the former feudal monarchy', it became clear that the Tutsi were the primary targets. During the week of 14 to 21 April 1994, the killing campaign reached its peak. The President of the interim government, the Prime Minister and some key ministers travelled to Butare and Gikongoro, and that marked the beginning of killings in these regions which had hitherto been peaceful. Thousands of people, sometimes encouraged or directed by local administrative officials, on the promise of safety, gathered unsuspectingly in churches, schools, hospitals and local government buildings. In reality, this was a trap intended to lead to the rapid extermination of a large number of people.

111. The killing of Tutsi which henceforth spared neither women nor children, continued up to 18 July 1994, when the RPF triumphantly entered Kigali. The estimated total number of victims in the conflict varies from 500,000 to 1,000,000 or more."

14. The ICTR proceeded to consider whether the massacres which took place in Rwanda between April and July 1994 fell within the definition of genocide contained in the 1951 Convention on the Prevention and Punishment of the Crime of Genocide ("the Genocide Convention"), which had been acceded to by Rwanda in 1975. In doing so the ICTR gave further details of the facts:

"114. Even though the number of victims is yet to be known with accuracy, no one can reasonably refute the fact that widespread killings were perpetrated throughout Rwanda in 1994.

115. Indeed, this is confirmed by the many testimonies heard by this Chamber. The testimony of Dr. Zachariah who appeared before this Chamber on 16 and 17 January 1997 is enlightening in this regard. Dr. Zachariah was a physician who at the time of the events was working for a non-governmental organisation, *'Médecins sans frontières'*. In 1994 he was based in Butare and travelled over a good part of Rwanda upto its border with Burundi. He described in great detail the heaps of bodies which he saw everywhere, on the roads, on the footpaths and in rivers and, particularly, the manner in which all these people had been killed. At the church in Butare, at the Gahidi mission, he saw many wounded persons in the hospital who, according to him, were all Tutsi and who, apparently, had sustained wounds inflicted with machetes to the face, the neck, and also to the ankle, at the Achilles' tendon, to prevent them from fleeing. The testimony given by Major-General Dallaire, former Commander of the United Nations Assistance Mission for Rwanda (UNAMIR) at the time of the events alleged in the Indictment, who was called by the defence, is of a similar vein. Major-General Dallaire spoke of troops of the Rwandan Armed Forces and of the Presidential Guard going into houses in Kigali that had been previously identified in order to kill. He also talked about the terrible murders in Kabgayi, very near Gitarama, where the interim Government was based and of the reports he received from observers throughout the country which mentioned killings in Gisenyi, Cyangugu and Kibongo.

116. The British cameraman, Simon Cox, took photographs of bodies in many churches in Remera, Biambi, Shangi, between Cyangugu and Kibuye, and in Bisesero. He mentioned identity cards strewn on the ground, all of which were marked 'Tutsi'. Consequently, in view of these widespread killings the victims of which were mainly Tutsi, the Chamber is of the opinion that the first requirement for there to be genocide has been met, the killing and causing serious bodily harm to members of a group.

117. The second requirement is that these killings and serious bodily harm, as is the case in this instance, be committed with the intent to destroy, in whole or in part, a particular group targeted as such.

118. In the opinion of the Chamber, there is no doubt that considering their undeniable scale, their systematic nature and their atrociousness, the massacres were aimed at exterminating the group that was targeted. Many facts show that the intention of the perpetrators of these killings was to cause the complete

disappearance of the Tutsi. In this connection, Alison Desforges, an expert witness, in her testimony before this Chamber on 25 February 1997, stated as follows: ‘on the basis of the statements made by certain political leaders, on the basis of songs and slogans popular among the Interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that - as they said on certain occasions - their children, later on, would not know what a Tutsi looked like, unless they referred to history books’. Moreover, this testimony given by Dr. Desforges was confirmed by two prosecution witnesses, witness KK and witness OO, who testified separately before the Tribunal that one Silas Kubwimana had said during a public meeting chaired by the accused himself that all the Tutsi had to be killed so that someday Hutu children would not know what a Tutsi looked like.

119. Furthermore, as mentioned above, Dr. Zachariah also testified that the Achilles tendons of many wounded persons were cut to prevent them from fleeing. In the opinion of the Chamber, this demonstrates the resolve of the perpetrators of these massacres not to spare any Tutsi. Their plan called for doing whatever was possible to prevent any Tutsi from escaping and, thus, to destroy the whole group. Witness OO further told the Chamber that during the same meeting, a certain Ruvugama, who was then a Member of Parliament, had stated that he would rest only when no single Tutsi is left in Rwanda.

120. Dr. Alison Desforges testified that many Tutsi bodies were often systematically thrown into the Nyabarongo river, a tributary of the Nile. Indeed, this has been corroborated by several images shown to the Chamber throughout the trial. She explained that the underlying intention of this act was to ‘send the Tutsi back to their place of origin’, to ‘make them return to Abyssinia’, in keeping with the allegation that the Tutsi are foreigners in Rwanda, where they are supposed to have settled following their arrival from the Nilotic regions.

121. Other testimonies heard, especially that of Major-General Dallaire, also show that there was an intention to wipe out the Tutsi group in its entirety, since even newborn babies were not spared. Even pregnant women, including those of Hutu origin, were killed on the grounds that the foetuses in their wombs were fathered by Tutsi men, for in a patrilineal society like Rwanda, the child belongs to the father's group of origin. In this regard, it is worthwhile noting the testimony of witness PP, heard by the Chamber on 11 April 1997, who mentioned a statement made publicly by the accused to the effect that if a Hutu woman were impregnated by a Tutsi man, the Hutu

> woman had to be found in order 'for the pregnancy to be aborted'."

SINCE THE GENOCIDE: ESTABLISHMENT OF THE ICTR

15. The RPF took power in 1994 and formed a government of National Unity which subsisted until 2003, when President Kagame was elected to a seven-year term in elections which were largely peaceful but have been gravely criticized as seriously flawed. Also in 1994, in November, the ICTR was established by the United Nations Security Council in order to bring to trial those responsible for the 1994 genocide and other serious violations of international law perpetrated in Rwanda, or by Rwandan citizens in nearby States. Since 1995 it has been located in Arusha, Tanzania. Its activities are intended to be limited in time: a UN Security Council resolution of 18 July 2008 called for the completion of all its work in 2010.

16. The ICTR's jurisdiction runs to cases of genocide, crimes against humanity and war crimes. It has undertaken substantive trials, and in some cases considered (under Rule 11 *bis* of the ICTR Rules of Procedure and Evidence), on application made by the prosecutor, whether a defendant should be referred for trial within Rwanda's national jurisdiction. Its rulings in this latter class of case are of great importance for the purpose of these proceedings. Professor Schabas, of the National University of lreland, Galway, stated in his first report of 30 June 2007 submitted to the Crown Prosecution Service (acting for the GoR) that "the litmus test for the quality of the Rwandan justice system is the willingness of [the ICTR] to transfer cases [for trial in Rwanda]". Professor Schabas was to tell the Magistrates Court that "until mid 2007, the chief prosecutor at the ICTR did not consider Rwanda ready to try transfer cases" (transcript, 22 April 2008). The ICTR has never, in fact, ordered such a transfer.

THE COURSE OF THE PROCEEDINGS

17. On 24 August 2006 arrest warrants were issued in respect of all four appellants by the Prosecutor General of the GoR. There followed the first MoU, dated 14 September 2006 as we have said, and the Secretary of State's certificate under s.194(2) of the 2003 Act on 11 October 2006. On 27 December 2006 at the City of Westminster Magistrates Court District Judge Tubbs signed a warrant under s.73 of the 2003 Act (which we need not read) in respect of each of the appellants, and the next day all four were arrested by officers of the Metropolitan Police Force extradition squad. There followed unsuccessful *habeas corpus* proceedings on which it is unnecessary to dwell. On 12 April 2007 a case management hearing was conducted by District Judge Tubbs. The extradition hearing before the judge – District Judge Evans – was as we have indicated very protracted, leading ultimately to the case being sent to the Secretary of State under s.87(3) of the 2003 Act on 6 June 2008, and the Secretary of State's order for extradition on 1 August 2008, pursuant to s.93(4).

18. S.84(1) applied to the proceedings, so that the judge was required to decide whether there was a *prima facie* case on the evidence against each appellant. We do not at this stage propose to give an account of the factual case; we shall have to consider in due course whether s.84(1) was satisfied. It is enough to say that the evidence produced by the GoR, consisting largely in witness statements (allowed in under the provisions of s.84(2) and (3)), in many cases made by alleged eye-witnesses, on its face implicated all the appellants in killings and other acts associated with the genocide of

1994. The judge gave a careful summary of the evidence (including that deployed by the defence – among the appellants, only CM gave live testimony) at paragraphs 250 – 356 of his judgment.

19. We now proceed to consider the issues in the case.

FAIR TRIAL

20. We have stated (paragraph 3) that the principal focus of this judgment is the appellants' claim that they would not receive a fair trial in Rwanda. The GoR proposes that they be tried for genocide in the High Court of Rwanda, a court of criminal jurisdiction established in 2004. It is to be contrasted with the local *gacaca* courts, and also, of course, with the ICTR. The appellants submit that if they are returned to Rwanda for trial before the High Court, they will not receive a fair trial. Before entering into any of the detail, we should state the law material to this part of the case.

Fair Trial – the Law: the 2003 Act and ECHR Article 6

21. The 2003 Act contains two provisions which in effect impose fair trial requirements in the courts of the requesting State (being a category 2 territory) in extradition cases. We repeat them for convenience. First, s.81:

> "81 A person's extradition to a category 2 territory is barred by reason of extraneous considerations if (and only if) it appears that—
>
> ...
>
> (b) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions."

Secondly, s.87:

> "87(1) ... [The judge]... must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.
>
> (2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge."

22. Article 6 of the European Convention on Human Rights ("ECHR") provides:

> "1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....
>
> 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

> 3 Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and the facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

23. Clearly the kind of bias contemplated by s.81(b), at least so far as it affects the trial process, might readily also constitute a denial of the right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal" pursuant to Article 6; and to that extent there is a potential overlap between the provisions. We find it convenient to concentrate on Article 6.

Fair Trial – the Law: the Test for Article 6

24. Under Article 6, the question for the court is whether, if they are returned to Rwanda for trial before the High Court, the appellants would suffer a real risk of a flagrant denial of justice – "flagrant" because in such a case the ECHR rights apply exceptionally and by extension, to protect the individual from being consigned by a State Party to the ECHR to another territory where he might suffer ill-treatment in violation of the Convention standards. In *R v Special Adjudicator ex parte Ullah* [2004] 2 AC 323 Lord Bingham said at paragraph 24:

> "While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment [references given]... Where reliance is placed on article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state: *Soering*, paragraph 113 (see paragraph 10 above)..."

We should also cite the cross-reference at paragraph 10 of Lord Bingham's opinion (and, for the context, we will set out paragraph 9):

> "9. Domestic cases as I have defined them are to be distinguished from cases in which it is not claimed that the state complained of has violated or will violate the applicant's Convention rights within its own territory but in which it is claimed that the conduct of the state in removing a person from its territory (whether by expulsion or extradition) to another territory will lead to a violation of the person's Convention rights in that other territory. I call these 'foreign cases', acknowledging that the description is imperfect, since even a foreign case assumes an exercise of power by the state affecting a person physically present within its territory. The question was bound to arise whether the Convention could be relied on to resist expulsion or extradition in a foreign case. It is a question of obvious relevance to these appeals, since the appellants do not complain of any actual or apprehended interference with their article 9 rights in the United Kingdom.
>
> 10. A clear, although partial, answer to this question was given in *Soering v United Kingdom* (1989) 11 EHRR 439, a case in which the applicant resisted extradition to the United States to stand trial in Virginia, contending that trial there would infringe his right to a fair trial under article 6 of the European Convention and that his detention on death row, if convicted and sentenced to death, would infringe his rights under article 3. Neither the conduct of the trial nor the conditions of detention would, of course, be within the control or responsibility of the United Kingdom. The Court did not reject the applicant's complaint under article 6 as ill-founded in principle, but dismissed it on the facts in paragraph 113 of its judgment:
>
> > '113. The right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk.'"

25. The "flagrant denial" test has been visited by the courts (here and in Strasbourg) more than once. We shall give one further reference, from Lord Bingham's opinion in *EM (Lebanon) v Secretary of State* [2008] 3 WLR 931:

> "34. It was not submitted in argument that the threshold test laid down in *Ullah* misrepresented or understated the effect of the Strasbourg authority as it stood then or stands now. It is true, as Carnwath LJ pointed out in the Court of Appeal (para

38), that different expressions have at different times been used to describe the test, but these have been used to describe the same test, not to lay down a different test. Nor, as I would understand the joint partly dissenting opinion of Judges Bratza, Bonello and Hedigan in *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25, 537, para OIII 14, did they envisage a different test when they said, with reference to article 6 (omitting footnotes):

> 'While the court has not to date found that the expulsion or extradition of an individual violated, or would if carried out violate, article 6 of the Convention, it has on frequent occasions held that such a possibility cannot be excluded where the person being expelled has suffered or risks suffering a flagrant denial of a fair trial in the receiving country. What constitutes a "flagrant" denial of justice has not been fully explained in the court's jurisprudence but the use of the adjective is clearly intended to impose a stringent test of unfairness going beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of article 6 if occurring within the Contracting State itself. As the court has emphasised, article 1 cannot be read as justifying a general principle to the effect that a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. In our view, what the word "flagrant" is intended to convey is a breach of the principles of fair trial guaranteed by article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article.'

35. In adopting and endorsing the test formulated by the AIT in *Devaseelan* I did not in para 24 of my opinion in *Ullah* [2004] 2 AC 323 understand that tribunal to be distinguishing a 'flagrant denial or gross violation' of a right from a complete denial or nullification of it but rather to be assimilating those expressions. This was how the point had been put to the House by the Attorney General for the Secretary of State, as is evidenced from the report of his argument (p 337D):

> 'If other articles can be engaged the threshold test will require a flagrant breach of the relevant right, such as will completely deny or nullify the right in the destination country: see *Devaseelan v Secretary of State for the Home Department* [2003] Imm AR 1. A serious or discriminatory interference with the right protected would be insufficient.'

It is difficult, with respect, to see how the point could be put more clearly, and any attempt at paraphrase runs the risk of causing confusion."

Fair Trial – the Law: a Different Approach under the MoU?

26. Notwithstanding this jurisprudence Mr Fitzgerald QC for CU submitted that by reason of the terms of the MoU a different, and lower, test than that of flagrant denial of a fair trial applies in these cases. He points to paragraph 4(d) of the MoU:

> "Extradition will not be granted in any of the following circumstances:
>
> ...
>
> (d) if [CU]... would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights [ICCPR], article 14…"

Article 14 of the ICCPR bears a close resemblance to ECHR Article 6. It includes this provision:

> "In the determination of any criminal charge against him,... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

27. Accordingly, submits Mr Fitzgerald, the MoU imports a straightforward fair trial requirement into the conditions precedent to his client's extradition. There is no bar or test of "flagrant denial". The appellants enjoy a legitimate expectation, which this court should enforce, to the effect that they will not be extradited unless the Article 14 standard is assured. The judge, however, applied the flagrancy test: see in particular paragraphs 479 and 536 of his judgment.

28. It is this argument which has given rise to the judicial review application brought by CU, although if there is anything in it, it must apply to all the appellants. A judicial review claim is required because the submission cannot be brought within any of the heads of statutory appeal allowed for by the 2003 Act.

29. The first difficulty in Mr Fitzgerald's way is that the Secretary of State (whose decision to extradite is the subject of the judicial review challenge) was obliged by s.93(4) of the 2003 Act to order extradition unless she concluded that she was prohibited from doing so under any of the provisions mentioned in s.93(2), none of which refers to anything in the nature of a legitimate expectation such as might be generated by the terms of a MoU which constitutes extradition arrangements under s.194(1)(a). The obligation is unqualified. It is elementary that a concrete statutory duty of this kind cannot be overridden by any claim based on legitimate expectation. Faced with this obstacle, Mr Fitzgerald indicated that he would seek the court's permission to amend the judicial review claim form in order to apply for a mandatory order requiring the Secretary of State to modify the statute under s.194(4)(b) so as, presumably, to conform s.93 with the fulfilment of the claimed legitimate expectation.

30. There is in our view a distinct air of unreality in all this. Miss Dobbin for the Secretary of State submitted that the MoU constitutes a treaty between sovereign

States, regulated by international law, which would not ordinarily give rise to rights enforceable in the domestic courts. However that may be (and given that the MoU, or more accurately these four MoUs, are specifically directed at these appellants, a different rule might apply), the international law context tends in our judgment to support Miss Dobbin's further submission that the ICCPR is referred to in paragraph 4(d) of the MoU because it is an international measure to which both States Parties to the MoU are signatories. In those circumstances it is not to be supposed that the Secretary of State intended that the MoU would require a different test or standard for the fair trial guarantee than, advisedly, the appellants would enjoy under ECHR Article 6 mediated in this context by s.87 of the 2003 Act. Had he done so, he would have introduced an appropriate modification pursuant to s.194(4)(b).

31. In any event it is of the first importance to notice the concession made – plainly rightly – by Mr Lewis QC for the GoR to the effect that if the appellants were brought to trial before a tribunal that was not impartial and independent, that would indeed constitute a flagrant breach of their rights under Article 6; and this is a large dimension in the case the appellants seek to make. In our judgment nothing turns on the epithet "flagrant" in these appeals' particular context if the appellants' whole case on fair trial, or the want of it, is substantially established; for if it is, a flagrant violation will be made out.

Fair Trial – the Law: s.81(b) of the 2003 Act

32. For like reasons we do not consider that anything is added by the distinct submission of prejudice at the appellants' trial within the meaning of s.81(b) of the 2003 Act. We have already referred to the potential overlap between the scope of s.81(b) and that of Article 6. The appellants' contention that, being Hutu, they will suffer prejudice if they are consigned to the High Court of Rwanda is in reality a theme of their general case that they will not be fairly tried.

Fair Trial – the Law: Did the Judge Apply the Wrong Test?

33. As we have stated, the legal test by which the fair trial issue has to be judged is whether the appellants would suffer a real risk of a flagrant denial of justice if they were extradited for trial in Rwanda. It is contended on their behalf that the judge misunderstood or misapplied the test. It is with respect unnecessary to dwell on this at any length, since we are obliged by ss.103 and 104 of the 2003 Act to determine for ourselves whether on the evidence the judge was right to send the case to the Secretary of State.

34. We should, however, record our concern at certain passages in the judge's judgment. At paragraphs 369 – 372 the judge cited *Ullah* at some length. Accordingly one would ordinarily suppose that he had the correct test well in mind. However at paragraph 373 this appears:

> "It is clear, therefore, from these judgements that the test is a very high one and that the burden of proof lies on the defence on a balance of probabilities."

And at paragraph 536:

> "The burden is on the defence to satisfy the court that there is a real risk of a flagrant denial of justice or fair trial. On the evidence produced they have failed to satisfy on a balance of probabilities the high test which has been set. Reliance was placed on the amicus brief of HRW, but the conclusions reached do not justify the reliance placed on it when seeking to cross the high hurdle which the defence have to. In its conclusions, when dealing with the question of fair trial the brief states on seven occasions that the matters in question… may lead to a violation. It is put no higher than that and does not come near the higher Article 6 test."

The test is correctly stated in the opening sentence of paragraph 536. Notwithstanding that, the judge appears to have directed himself that the appellants carried the burden of proving on the balance of probabilities that there would be a flagrant denial of justice if they were extradited. But "real risk" does not mean proof on the balance of probabilities. It means a risk which is substantial and not merely fanciful; and it may be established by something less than proof of a 51% probability. The approach is the same as that taken in refugee cases, where the asylum seeker has to show a real risk that if he is returned to his home State he will be persecuted on any of the grounds set out in the 1951 United Nations Refugee Convention (see *Sivakumaran* [1988] 1 AC 958). We think that despite his citation of the correct test the judge fell into error here. He may have been distracted by the second part of the test – "flagrant denial": so much is suggested by his repeated references to the "high" or "very high" test.

Fair Trial – the Law: the Organic Law of 2007

35. Finally, before turning to the merits of the case on fair trial, we should cite the provisions of Rwandan national law which it is said will secure rights of fair trial to the appellants in the High Court of Rwanda. Whether they would do so or not is hotly contested. The judge effectively accepted that they would: judgment paragraphs 539 – 540, 543. We shall address the issue in due course. The relevant provisions are to be found in the Organic Law "Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States", passed into law on 16 March 2007. In some of the papers in the case it is referred to as the "Transfer Law".

36. Article 1 of the Organic Law is cross-headed "Scope of application" and provides:

> "This Organic Law shall regulate the transfer of cases and other related matters, from the International Criminal Tribunal for Rwanda and from other States to the Republic of Rwanda.
>
> This Organic Law shall also determine the procedures of admissibility of evidence in Rwanda collected by the ICTR in proceedings before a competent court."

Article 2 provides that the Rwandan High Court is the competent court to try transferred cases, and at first instance the court shall be constituted by a single judge. Article 3 provides that a transferred defendant shall be "prosecuted only for crimes

falling within the jurisdiction of the ICTR". Article 7, "General Principles in evidentiary matters":

> "Evidence collected in accordance with the Statute and the Rules of Procedure and production of evidence of ICTR may be used in proceedings before the High Court of the Republic.
>
> The High Court of the Republic shall not convict a person solely on written statements of witnesses who did not give oral evidence during the trial.
>
> However, the High Court of the Republic may convict a person on the probative value of a written statement if it is corroborated by other witnesses."

Article 13 guarantees a series of rights for transferred defendants, including "a fair and public hearing", the presumption of innocence, and the right of silence. The list is very similar to that set out in ECHR Article 6. Article 14 is cross-headed "Protection and assistance to Witnesses", and indeed provides for such matters. Thus the third paragraph states in part:

> "All witnesses who travel from abroad to Rwanda to testify in the trial of cases transferred from the ICTR shall have immunity from search, seizure, arrest or detention during their testimony and during their travel to and from the trials."

The scope of Article 14 is on its face expressly limited so as to make provision only for witnesses in cases transferred from the ICTR. However it is to be noted that Article 24 provides:

> "This Organic Law applies *mutatis mutandis* in other matters where there is transfer of cases to the Republic of Rwanda from other States or where transfer of cases or extradition of suspects is sought by the Republic of Rwanda from other states."

Fair Trial – the Merits – Defence Witnesses: Decisions of the ICTR

37. A very great deal of material has been canvassed before us on the fair trial issue. It is convenient to start with the subject-matter of Professor Schabas' "litmus test": the relevant decisions of the ICTR concerning the transfer of defendants for trial in the Rwandan High Court. They bear principally on a particular dimension of the appellants' case on fair trial, namely the apprehension that witnesses who could give important evidence for the defence will be too afraid of possible reprisals to testify, or too afraid, for like reasons, to travel to Rwanda in order to do so. We will deal with this aspect of the case's merits first.

38. The first decision of the ICTR to be considered is *Munyakazi*. The defendant was charged with genocide, alternatively complicity in genocide (which we take to be a form of secondary offence), and extermination (as a crime against humanity). On 28 May 2008 the Trial Chamber gave judgment refusing the prosecutor's application to refer the defendant for trial in Rwanda pursuant to Rule 11 *bis*. It did so on three grounds. The third concerned the obstacles in the way of defence evidence, but we

should first, for completeness, mention the others. The first was that the applicable sentence in the accused's case would be life imprisonment in isolation without appropriate safeguards (paragraph 32), and this would be a breach of guaranteed rights. The second was that, having regard to the prospective composition of the court of trial (a single judge), there was a real risk that the court would be unable to withstand "direct or indirect pressure being exerted on judges to produce judgements in line with the wishes of the Rwandan Government" (paragraph 48).

39. As regards the prospective defence evidence, the Trial Chamber held that there would be a violation of the defendant's right to have witnesses on his own behalf attend court and be examined under the same conditions as the witnesses against him (paragraphs 59 – 66: we set out some of this material below). The prosecutor appealed.

40. The Appeals Chamber delivered judgment in *Munyakazi* on 8 October 2008. On the three rulings in the court below, the Appeals Chamber upheld the Trial Chamber's rulings on the first (life imprisonment in isolation – paragraph 21) and the third, relating to witnesses (paragraph 45), but allowed the prosecutor's appeal in relation to the second (pressure on the trial court – paragraph 31). On the witness issue the Appeals Chamber found (paragraph 43) that the Trial Chamber had "erred in holding that Rwanda had not taken any steps to secure the attendance or evidence of witnesses from abroad, or the cooperation of other states": in particular they were satisfied (which the Trial Chamber was not) that video-link facilities were available and "would likely be authorized in cases where witnesses residing outside Rwanda genuinely fear to testify in person" (paragraph 42). But they found in effect (also paragraph 42) that this was not good enough: "it would be a violation of the principle of equality of arms if the majority of Defence witnesses would testify by video-link while the majority of Prosecution witnesses would testify in person". As we shall see this proposition is repeated by the Appeals Chamber in later decisions.

41. Otherwise the Appeals Chamber upheld the Trial Chamber's reasoning. Accordingly we should cite these passages from the Trial Chamber's judgment:

> "*(i) Witnesses inside Rwanda*
>
> 60. The Chamber has a number of concerns regarding witnesses within Rwanda, the first and foremost being their safety. The Chamber shares the concerns of ICDAA [sc. the International Criminal Defence Attorneys Association] and HRW [sc. Human Rights Watch], as detailed above, regarding the difficulty the Accused would have in securing Defence witnesses to testify on his behalf because of their fears of harassment, arrest and detention. Specifically, the Chamber is concerned about the reports of murdered witnesses. HRW reported that at least eight genocide survivors were murdered in 2007 and in some cases, the killings were related to testimonies that the survivors provided or intended to provide in genocide prosecutions…
>
> 61. Furthermore, many witnesses fear their appearance will lead to an indictment being issued against them, as has

> happened in numerous Gacaca trials. Defence witnesses may fear being accused of 'genocidal ideology', a term mentioned in the Rwandan Constitution but undefined under Rwandan law. The term has been used by Government officials to encompass a broad spectrum of ideas, expressions and conduct, including those perceived as being in opposition to the policies of the current Government. For example, according to the 2006 Rwandan Senate report, questioning the legitimacy of the detention of a Hutu is one manifestation of 'genocidal ideology'. In several cases documented by HRW, witnesses who appeared for the defence at the Tribunal, were arrested after their return to Rwanda. The Government would appear to condone these arrests, for example, in February 2007, the Rwandan Minister of Justice, Tharcisse Karugarama, was quoted as saying:
>
> > 'We have nothing to lose [by granting immunity] if anything, we have everything to gain, by these people turning up, it will be a step toward their being captured. They will have to sign affidavits on which their current address will be shown and that would at any other time lead to their arrest.'
>
> …
>
> *(ii) Witnesses outside Rwanda*
>
> 63. The Chamber notes that most Defence witnesses reside outside Rwanda. The Chamber considers that in the context of Rwanda this places the Defence in a disadvantageous position with regard to the right to obtain the attendance and examination of witnesses. The Chamber is concerned that Defence witnesses coming from abroad would fear the intimidation and threats currently faced by witnesses residing in Rwanda, as well as the fear of arrest, as mentioned above."

42. Thus the Appeals Chamber upheld the Trial Chamber's decision to refuse the prosecutor's application under Rule 11 *bis* to refer Munyakazi for trial in Rwanda. The judge in our case was provided with the Trial Chamber's judgment on 29 May 2008. He made it clear that he had not taken it into account in framing his judgment in these proceedings.

43. The second ICTR case is *Kanyarukiga.* The defendant was charged with like offences to those in *Munyakazi*'s case, and with an additional offence of conspiracy to commit genocide. The issues were much the same as those in *Munyakazi.* The Trial Chamber gave judgment on 6 June 2008 (the same day as the judge's decision in the Magistrates Court) refusing the prosecutor's application to refer the defendant for trial in Rwanda. On 30 October 2008 the Appeals Chamber upheld their decision, and did so on the same basis as in *Munyakazi.* They said:

"26. The Appeals Chamber considers that there was sufficient information before the Trial Chamber of harassment of witnesses testifying in Rwanda and that witnesses who have given evidence before the Tribunal experienced threats, torture, arrests and detentions, and, in some instances, were killed. There was also information before the Trial Chamber of persons who refused, out of fear, to testify in defence of people they knew to be innocent. The Trial Chamber further noted that some defence witnesses feared that, if they testified, they would be indicted to face trial before the Gacaca courts, or accused of adhering to 'genocidal ideology'. The Appeals Chamber observes that the information available to the Trial Chamber demonstrates that regardless of whether their fears are well-founded, witnesses in Rwanda may be unwilling to testify for the Defence as a result of the fear that they may face serious consequences, including threats, harassment, torture, arrest, or even murder. It therefore finds that the Trial Chamber did not err in concluding that Kanyarukiga might face problems in obtaining witnesses residing in Rwanda because they would be afraid to testify.

…

31. The Appeals Chamber finds that the Trial Chamber did not err in accepting Kanyarukiga's assertion that most of his witnesses reside outside Rwanda, as this is usual for cases before the Tribunal, and is supported by information from HRW. The Appeals Chamber also finds that there was sufficient information before the Trial Chamber that, despite the protections available under Rwandan law, many witnesses residing outside Rwanda would be afraid to testify in Rwanda. It therefore finds that the Trial Chamber did not err in concluding, based on the information before it, that despite the protections available in Rwandan law, it was not satisfied that Kanyarukiga would be able to call witnesses residing outside Rwanda to the extent and in a manner which would ensure a fair trial if the case were transferred to Rwanda.

…

33. The Appeals Chamber considers that Rwanda has established that video-link facilities are available, and that video-link testimony would likely be authorized in cases where witnesses residing outside Rwanda genuinely fear to testify in person. However, the Appeals Chamber is of the opinion that the Trial Chamber did not err in finding that the availability of video-link facilities is not a completely satisfactory solution with respect to the testimony of witnesses residing outside Rwanda, given that it is preferable to hear direct witness testimony, and that it would be a violation of the principle of the equality of arms if the majority of Defence witnesses would

> testify by video-link while the majority of Prosecution witnesses would testify in person."

44. The third case is *Hategekimana*, decided by the Trial Chamber on 19 June 2008. The defendant was charged with genocide, complicity in genocide, and murder and rape as crimes against humanity. The Chamber took the same view (see Conclusion, paragraph 78) as to the attendance and examination of witnesses as had been taken in the earlier cases. The Appeals Chamber gave judgment on 4 December 2008 (after the hearing in this court had begun: we have helpfully been supplied with the text since we reserved our judgment). They overturned the Trial Chamber's conclusion on a point which does not arise for our consideration, relating to the recognition in Rwandan law of what is called "command responsibility". However they upheld the Trial Chamber's view of the issues relating to witnesses. Their reasoning was effectively identical to that set out in *Munyakazi*.

45. The next case is *Gatete*, decided by the Trial Chamber on 17 November 2008. The charges were much the same as in the other cases, including extermination, murder and rape as crimes against humanity. Again, the decision was not to refer under Rule 11 *bis* having regard to the problems concerning witnesses. It is in particular worth noting, with respect, what the Chamber had to say about "genocide ideology", which sits alongside what the Trial Chamber said in *Munyakazi* at paragraph 61 (above):

> "62. Witness protection concerns are also related to the issue of 'genocidal ideology', which has been extensively referred to in some of the submissions. The constitution refers to the fight against 'the ideology of genocide'. Article l3 does not use this concept but states that revisionism, negation and trivialisation of genocide is punishable by law, and the 2003 Genocide Law prohibits the negation of genocide. This is in itself legitimate and understandable in the Rwandan context. The Chamber recalls that many countries criminalize the denial of the Holocaust, while others prohibit hate speech in general. In the present case, it is argued that an expansive interpretation and application of the prohibition of 'genocidal ideology' will lead to Defence witnesses not being willing to testify, as they are afraid of being accused of harbouring this ideology.
>
> 63. The material indicates that in several instances, the concept has been given a wide interpretation. There are examples of persons being too afraid to appear as witnesses for persons who allegedly were innocent. On the other hand, many persons living in Rwanda have testified for the Defence in proceedings there. In addition, the Transfer Law provides specific rules and remedies in the field of witness protection… However, the Chamber cannot exclude that some potential Defence witnesses in Rwanda may refrain from testifying because of fear of being accused of harbouring 'genocidal ideology'."

We have not seen any judgment of the Appeals Chamber in *Gatete.*

46. The last case is *Kayishema*, in which the Trial Chamber delivered judgment on 16 December 2008. Again the text has been sent to us since the hearing in these appeals. The indictment was much as in the other cases. On the issue relating to witnesses, the Chamber arrived at the same conclusion as in the earlier judgments. At paragraphs 40 ff they set out the same reasoning as at paragraphs 60 ff in *Munyakazi.*

47. We can see, then, that in repeated recent decisions, the ICTR has not been satisfied that defendants charged with genocide and related offences will be fairly tried in Rwanda, having regard to the apprehension of serious difficulties as regards the availability and presentation of defence testimony. On this ground it has consistently declined to order referral to Rwanda for trial in such cases under Rule 11 *bis.* Courts in Europe have followed the ICTR. Thus on 23 October 2008 the Toulouse Court of Appeal, in declining to order extradition to Rwanda in *Bivugarabago*, explicitly followed the ICTR in *Munyakazi* and *Kanyarukiga* in relation to the safeguard and protection of defence witnesses. A like decision was arrived at on 3 November 2008 by the Appellate Court of Frankfurt am Main in *Mbarushimana.* There followed *Senyamuhara* in the Mamoudzou Court of Appeal on 14 November 2008 and *Kamali* in the Court of Appeal of Paris on 10 December 2008. Even more recently, in *Kamana*, the Lyon Court of Appeal on 9 January 2009 refused to extradite the defendant on like grounds. All these judgments relied heavily on extant decisions of the ICTR.

48. We shall explain what we draw from these judicial decisions in due course. First there is much other material to be reviewed.

Fair Trial – the Merits – Defence Witnesses: Human Rights Watch Report July 2008

49. A major piece of evidence coming into existence after the judge's decision is a report from Human Rights Watch ("HRW") entitled *Law and Reality – Progress in Judicial Reform in Rwanda*, published in July 2008. It covers a great deal of ground and we must return to it in other contexts. Within Chapter IX, "Challenges to Fair Trial Standards", there is a sub-heading "The Right to Present Witnesses". We can do no better than replicate this passage almost in full, noting that the facts stated are generally supported by footnote references which, however, we will not set out.

> ""*State Protection of Witnesses*
>
> According to the Rwandan law on evidence, Rwandan prosecutors and judges may take any measure necessary to protect witnesses needed for the prosecution. Only one of some 15 lawyers, prosecutors, and judges questioned by Human Rights Watch researchers about witness protection mentioned this provision and one judge, then president of a higher instance court, specifically said that the law on evidence provided no protection for witnesses. None of the jurists mentioned any instance of this law having been invoked to protect witnesses.
>
> Despite this general lack of recourse to legal safeguards for protecting witnesses, the government did establish a witness protection service that has offered assistance to more than 900 people since its creation in 2005. Even those engaged in

delivering this assistance said they were unaware of the article in the law on evidence providing protection for witnesses.

As presently constituted, the witness protection service is under the national prosecutor's office, making it unlikely that witnesses for the defense who encounter problems would seek its assistance. In one recent case where nine defense witnesses were harassed after testifying at the ICTR and sought assistance from the witness protection service, they were threatened with harm rather than receiving help…

They Shut their Mouths

The difficulty of presenting a defense through witness testimony remains one of the chief obstacles to the delivery of justice, particularly in cases that have attracted considerable attention. Asked about the right to defense, a former prosecutor said:

> People are scared to defend any accused. When certain people are accused, you can see the shock on others' faces, but then they shut their mouths because they're afraid. And many judges have a tendency to listen to accusations more than to arguments in defense - there is no equilibrium between the defense and the prosecution.

Several lawyers expressed the same opinion to Human Rights Watch researchers, one going so far as to say that there had been no persons willing to speak as defense witnesses in the cases in which he had defended persons accused of genocide. In cases known to Human Rights Watch, it is more typical for a small number of witnesses to appear for the defense than none at all. It also appears that the greater the public attention to the case, the greater the difficulty in securing witnesses for the defense. A lawyer summed up the problem saying that Rwandans were well aware that 'any statement can bring misfortune'.

"Official Interference with Witnesses

Police officers, security agents, and other officials have sought on occasion to influence the testimony of witnesses through the promise of rewards or through intimidation, mistreatment, detention or threat of prosecution. In several cases, officials hoped to obtain testimony for the prosecution, as in the case of Pasteur Bizimungu and his co-defendants, but in others they sought to prevent or alter testimony for the defense.

ln one bitterly contested case, a gacaca official summoned several genocide survivors and asked them to explain why they had given testimony for the defense. Local police reinforced the

impact of the intimidation by arresting three defense witnesses and holding them in jail for more than a week on unspecified charges. When one of these persons was released, he was warned that if he persisted in giving testimony, he could be charged with 'genocide ideology'.

On at least one occasion a judicial official threatened to arrest a defense witness in conventional court. In a trial for genocide in Nyamirambo, Kigali in 2002, one of two defense witnesses sought to establish the credibility of her testimony by saying that she had been present at a barrier with the defendant during the genocide. The prosecutor immediately threatened to prosecute her for that admission.

In at least two cases before the ICTR, Rwandan authorities have failed to assist the ICTR in ensuring the right of the defense to present witnesses. Counsel for Col. Bagosora were unable to obtain the presence of Gen. Marcel Gatsinzi, even after Chamber I issued a subpoena compelling his appearance. In a second case, Rwandan authorities refused for months to permit Agnes Ntamabyaliro to travel to Arusha to testify in defense of Justin Mugenzi. The order of Trial Chamber II, issued April 13, 2006 and directing the Rwandan government to permit her travel to Arusha finally resulted in her appearance, but only on August 27, 2006.

Among other cases reported to Human Rights Watch of persons who encountered problems after having testified for the defense at the ICTR, one witness disappeared, two fled Rwanda after having been threatened, at least three were arrested, and at least one was re-arrested. The arrests and re-arrest took place soon after the witnesses testified in Arusha, suggesting that the fact of having testified or the information provided during testimony was important in triggering the arrests.

'*Genocide Ideology' and the Risks of Testifying for the Defense*

Many persons who have valuable testimony to offer refuse to speak for the defense because they fear being perceived as making common cause with accused persons and thus opening themselves to accusations of harboring or propagating 'genocide ideology'. As indicated above, the 2006 Senate commission report mentioned statements about Hutu being wrongly detained as one manifestation of genocide ideology.

ln the case of Father Theunis only one person, a Human Rights Watch researcher, spoke in Theunis' defense. At least three other persons in attendance possessed information helpful to the defense but dared not speak. As crowds were departing at the conclusion of the session, they furtively expressed regret

about their silence to Human Rights Watch researchers. All had been colleagues of Theunis in the human rights movement.

General Frank Rusagara, known for his role as an ideological spokesman for the armed forces, also present that day, later published an article in the government-linked The New Times denouncing the witness who testified for Theunis as a 'negationist', guilty of 'trivializing' the genocide and 'being an apologist of the génocidaires' forces'.

Popular Pressure and Official Threats

Human Rights Watch researchers have recorded many instances where witnesses or potential witnesses for prosecution and for the defense have been harassed or threatened. Some of the saddest such cases involve survivors causing problems for other survivors who are willing to testify in defense of persons accused of genocide.

In one such case, nine defense witnesses who had testified in a genocide trial at the ICTR were expelled from Ibuka, the association of genocide survivors, as a result of their testimony. In documents filed as part of a motion by defense counsel, they said they had been harshly criticized at a local meeting of Ibuka in April 2008 and had then been expelled from the association, a decision that was transmitted in writing to the mayor of the district. They were told that they would receive no further benefits meant for survivors of the genocide, such as health care or school fees, and one person said she was threatened with expulsion from her home. Although the benefits are provided by a government fund rather than by Ibuka, a non-governmentaI association, expulsion from Ibuka might well complicate receiving the benefits. In any case, the threatened persons believed that their expulsion had cost them their benefits.

After their plight became known at the ICTR, tribunal staff referred the problem to the office of the Rwandan prosecutor, who sent a representative of the Rwandan witness protection service to talk with the witnesses. According to the defense witnesses, the representative of the witness protection service threatened them with harm rather than providing them with assistance. According to a report filed by an ICTR staff member who investigated the case, the Rwandan deputy prosecutor general promised to meet the witnesses himself to assure them that their benefits would continue and undertook to see that the representative of the Rwandan witness protection service would be made aware that her conduct had been inappropriate.

> In several cases noted by Human Rights Watch researchers, persons who chose to keep silent later apologized either to the accused or to his family. In one dramatic instance, a genocide survivor broke down in tears as he admitted how ashamed he was at having refused to testify for a man who had saved his own life and that of more than a dozen members of his family. In at least some of these cases, the accused or his relatives have excused the silence of those who might have helped mount a defense, saying they understood the fear that dictated the choice."

Fair Trial – the Merits – Defence Witnesses: the Evidence in these Proceedings

50. Scarlet Nerad is an experienced American licensed investigator. She is the co-founder of a non-profit making organisation called the Center for Capital Assistance, which exists to provide help for indigent defendants facing the death penalty. She was instructed on behalf of CM and CU to consider a number of issues including the position and attitude of defence witnesses faced with the possibility of being asked to give evidence for these appellants in Rwanda. She spent about two weeks in Rwanda taking statements. She produced two reports for the lower court. The first is the more general: "Fair Trial Issues in Rwanda". The second specifically concerns the evidence relating to CU.

51. In her first report she describes encounters with potential defence witnesses all of whom expressed fears of being denounced to the Rwandan government:

> "6. ... Some specifically mentioned the office of the public prosecutor, others mentioned community members who worked in conjunction with the office of the public prosecutor and various survivor organizations, while others feared the Rwandan National Police…
>
> 7. With one exception, all witnesses signed their declarations only under the condition that their declarations would be withdrawn if there was no assurance that their identities would be kept from the Rwandan government.
>
> 8. After we determined that witnesses were too afraid to testify openly about their experiences during the genocide, we set out to determine the basis of their fear and the reasonableness of that fear. Regarding the basis of their fear, witnesses stated that community members acting on behalf of the government would inform government officials that they were speaking with the defendant's representatives. If the government learned they had come forward to testify on behalf of individuals that the government had identified as its enemies, the witnesses would be accused of 'genocide minimization,' 'genocide ideology', or 'divisionism,' and imprisoned and/or harassed in other ways.
>
> *Conduct of Rwandan Prosecuting Authorities*

> 9. While investigating the reasonableness of their fear, we learned that the Rwandan government has implemented widespread use of charges of genocide minimization and divisionism to silence dissent. During interviews, lay witnesses, attorneys, researchers, and NGO representatives confirmed that these accusations are made with little or no evidence, and referred us to specific cases…"

52. Ms Nerad gave live evidence before the judge, in which she elaborated in considerable detail the fears which she said were plainly entertained on the part of potential defence witnesses for CM and CU whom she encountered. Giving evidence in chief in answer to questions put by Mr Fitzgerald for CU on 14 April 2008 she referred to fourteen statements, anonymised, which had been obtained during her visit to Rwanda. She said:

> "The first fear was that we would inform the Office of the Prosecutor that we were interviewing these witnesses and provide their names. Many had been incarcerated and many had been pressurized into giving evidence against other individuals. This was a huge fear. Others had been pressured by powerful individuals in the community. They were clear that the goal was to prosecute [CU]. Not to conduct an enquiry but to drum up evidence of his participation in the genocide. Witnesses who gave statements said that they would be withdrawn if their identities became known.
>
> …
>
> Their fears [sc. those of the fourteen] were that they would be harassed, possibly incarcerated, that they would lose education for their children, some of them had witnessed people killed so theirs was a real fear for their lives.
>
> …
>
> Based on my personal experiences investigating in the previous case and how it all turned out and the subsequent conduct, after I left Rwanda, of organizations working with the Rwanda government, I believe their fears to be very reasonable.
>
> …
>
> The witnesses believed that genocide minimization is used as a tool to cow people who would otherwise come forward and give accurate accounts.
>
> One of the witnesses I interviewed had been charged with genocide minimization for coming to the defence of someone who assisted her during the genocide, she was detained for a certain period of time and then released."

Mr Fitzgerald asked her whether she believed that witnesses with exculpatory evidence would be prepared to come forward. She answered:

> "No. During the time I was in Rwanda and since that time I have been unable to find witnesses who would be reliable who would come forward."

Ms Nerad gave further evidence in chief in answer to questions from Lord Gifford QC for CM. Her organization had been involved in speaking to frightened witnesses in a number of different jurisdictions. She said:

> "Without question Rwanda is a place where the fear is greatest of any country where my organization has been involved."

Ms Nerad was extensively cross-examined by Clare Montgomery QC for the GoR. Ms Montgomery established that there were some omissions from statements which Ms Nerad had taken from defence witnesses, but did not, as we read the transcript substantially undermine her testimony. The judge (paragraph 350) observed that "she could only come to her conclusions by accepting that what had been said by the defence witnesses was entirely truthful". Obviously Ms Nerad's testimony relied on what the witnesses had said to her. But the judge's comment gave no weight to the multiplicity of consistent accounts, their consistency with other evidence (though in fairness to the judge this point speaks loudest in relation to the HRW Report of July 2008 which of course post-dates his judgment), or Ms Nerad's experience as an investigator.

53. There was other evidence before the judge relating to the fears of witnesses. Thus Mr Lake, an investigator instructed for EN, gave a statement in the court below. As the judge put it (paragraph 490), he "encountered similar difficulties to those found by Ms Nerad with regard to people willing to be witnesses". However the judge took rather a poor view of his working methods: paragraph 493. Professor Schabas, called for the GoR, was the only expert prepared to say that the appellants would be fairly tried in Rwanda (and there are very weighty criticisms directed at his testimony, which we must address in due course); but when it came to the question of witness intimidation he had this to say:

> "In my opinion, this is the most serious concern about the ability to conduct fair trials in Rwanda. The problem here is that the difficulties appear to afflict prosecutions at all levels." (second report, 9 November 2007, paragraph 47)

It is true that in the same paragraph Professor Schabas proceeded to observe that the ICTR had succeeded in holding fair trials for over a decade, and witnesses had been brought to court "under acceptable conditions of security". He concluded:

> "I see no serious reason to doubt that the national prosecutions, carried out in the context of transfer from the International Tribunal or on the basis of extradition, cannot and will not meet the same standard."

A good deal of material has of course come to light since this was written in November 2007, not least in the shape of the ICTR decisions refusing transfer, the HRW Report of July 2008, and Ms Nerad's researches. But this airy dismissal of any qualitative difference between the treatment of witnesses at the ICTR and what might befall them in Rwanda seems extraordinary. It is to be noted that during his live evidence before the judge on 22 April 2008 Professor Schabas stated that he had not studied the transcripts of any cases in the Rwandan High Court, and had no knowledge of how the court dealt with witnesses who asked for anonymity.

54. Moreover during his testimony on 22 April 2008, this exchange took place between Professor Schabas and Mr Fitzgerald:

> "Q. The concern is that witnesses who might be called for the defence are either intimidated from giving evidence or the subject of reprisals by way of prosecution or being beaten up afterwards. That is the concern?
>
> A. It is obvious to me that that is a major concern and that could interfere in a very serious way with the ability to deliver a fair trial."

In addition there was some evidence about difficulties concerning witnesses from Professor Sands QC, who was instructed for EN (see paragraphs 123 and 125 of his report dated 29 October 2007), but this adds no fresh dimension and with respect we need not set it out.

55. We also have statements from some prospective defence witnesses themselves – or, more accurately, persons whom the defence would wish to testify on their behalf. There are written statements made by potential witnesses for CM, EN and CU. They include requests for anonymity in the event that they were to give evidence, and expressions of fear of the consequences if it became known that they were defence witnesses. One witness stated that when he declined to make false statements against CM he was refused government assistance for his children. Another stated that he had been offered payment in exchange for false testimony against CM. Fears of reprisals are asserted and repeated.

56. The first ("AAA") of fourteen anonymised statements of potential witnesses for CU gives on paper eloquent testimony in CU's favour. Then he says this:

> "18. I have good reason based on what I have experienced, seen, and heard, to ask that my identity and the identities of those I have named in this statement be kept from the Rwandan Government. Already they have threatened and tried to bribe me on their own. If they learn that I have actively helped their opposition, even if it is the truth, they will surely seek to imprison me again."

Like statements are made by the others. Miss Ellis QC for EN drew particular attention to the position relating to witness X, who on his statement gave important exculpatory evidence for EN. She submitted that he had been subjected to threats, violence and imprisonment occasioned by his opposition to certain of the regime's

policies including the killing of Hutu by the RPF. It was proposed that he give live evidence before the judge, but on condition of anonymity. In fact the judge ruled that the statements of some defence witnesses living in Rwanda should be read on condition of anonymity and gave reasons for that conclusion at paragraph 243 of his judgment, accepting that they entertained "a subjective fear for their safety"; but he declined to grant the same facility to witness X.

57. All of this material marches with the evidence of Scarlet Nerad and the HRW Report of July 2008, and the conclusions of the ICTR.

58. It is true that some witnesses from outside Rwanda, giving statements for VB, do not ask for anonymity or speak of their fears of reprisals on return. Mr Jones QC on VB's behalf said they were not asked to deal with those matters. In many circumstances that would be a very unconvincing response. One of the witnesses in Rwanda, a houseboy still living in his home village, says he makes his statement knowing it will be used in court. But it is clear (not least from the supplementary statement of the private investigator engaged for VB, Mr Munyeshuli) that the focus of the statements, plainly advisedly, was upon the issue whether there was a *prima facie* case against VB, rather than whether he would be able to marshal his defence. Moreover there is no basis on which to conclude that the absence of such apprehensions in the VB statements begins to undermine their vigorous assertion in the others, not least given the other material (the ICTR, the HRW Report, Scarlet Nerad) which we have described. VB's Defence Case Statement (paragraphs 10, 43 and 45) asserts that it will not be possible to get witnesses to court in Rwanda. Mr Jones made it clear that he relied on the testimony of Scarlet Nerad, and submitted that the witnesses in question were members of the Hutu *diaspora* who on the general evidence would likely be afraid to return to Rwanda.

Fair Trial – the Merits – Defence Witnesses: the Government of Rwanda's Position

59. All this evidence taken together points in our view to the existence (to say the least) of a substantial risk that if they are put on trial before the High Court of Rwanda these appellants will be unable effectively to marshal and present the evidence on which they desire to rely from the mouths of defence witnesses. What is the GoR's response?

60. First and foremost, Mr Lewis relies on the conclusions of the judge at paragraphs 526 – 532 and 536 – 537 of his judgment. Put shortly the judge opines that many persons have made use of the witness protection arrangements in place in Rwanda; while some witnesses have been attacked and killed, "this applies to both prosecution and defence" (paragraph 528); it is not clear "how many of the physical threats may be described as 'officially based'" (paragraph 528); defendants have been able to find witnesses, both at the ICTR and in Rwanda, where moreover the acquittal rates indicate that defence witnesses are available (paragraphs 529 – 530); there are no reliable statistics or details about persons arrested and in some cases charged with minimizing the genocide (paragraph 532); overall no real risk of a flagrant denial of justice has been demonstrated (paragraph 536); and insufficient attention has been paid to the Organic Law (paragraph 537, see also 539).

61. Mr Lewis specifically supports (skeleton argument paragraph 144) the judge's favourable view of the witness protection scheme, notwithstanding (as he

acknowledges and as was found by the Appeals Chamber of the ICTR) that the service is presently administered by the Office of the Prosecutor General of Rwanda and threats of harassment are reported to the police.

62. In our judgment neither the judge's reasoning, nor Mr Lewis' submissions in its support, possess anything like the force that would be needed to contradict the pressing effect of all the evidence now before us which demonstrates a real risk that many potential defence witnesses – whether presently inside or outside Rwanda – would be so frightened of reprisals that they would not willingly testify. The judge's dismissal of the admitted fact that witnesses have been attacked and killed with the throwaway observation "this applies to both prosecution and defence" defies restrained comment. And the possibility of accusations of "genocide minimization" is especially troubling. It pre-empts what is acceptable and what is unacceptable speech. But that must be inimical to the giving and receiving of honest and objective evidence.

63. We apprehend that Mr Lewis' best case on the witness question rests on the alleged availability of video-link facilities. He refers (skeleton argument paragraph 193) to paragraph 33 of the Appeals Chamber decision in *Kanyarukiga*, which we have set out at paragraph 41 above. He submits (paragraph 194) that "it simply cannot be said that having to give evidence through video link amounts to a real risk of a flagrant denial of justice". Now we stated earlier (paragraph 31) that nothing turns on the epithet "flagrant" in these appeals' particular context if the appellants' whole case on fair trial, or the want of it, is substantially established; for if it is, a flagrant violation will be made out. The emphasis was advisedly on the "whole case". We can see some force in the submission that if the point as to witness difficulties stood alone, and was greatly softened by the assured availability of video-link facilities, while there would be a violation of Article 6 essentially because (as the ICTR said) the principle of equality of arms would not be met, it would be difficult to conclude that the very essence of the right was nullified.

64. But in our judgment the point as to witness difficulties by no means stands alone, as we shall seek to demonstrate. In any event, however, Mr Lewis' reliance on the availability of video-link facilities is very problematic. Mr Jones submitted (Reply Note, paragraphs 7 – 9) that whatever the position in relation to witnesses in cases transferred by the ICTR, it is by no means clear that video-link facilities would be available in other cases where there is no mutual legal assistance treaty between Rwanda and the State where the witness resides. Rwanda has only entered into such treaties with other African States (see footnote 111 to the Appeals Chamber decision in *Munyakazi*; compare paragraph 23 of the GoR's *amicus* brief in *Munyakazi*). The *amicus* brief (paragraph 24) also shows that the procedural law of Rwanda makes no specific provision for video-link. Paragraph 24 of the *amicus* brief also refers to paragraph 14 of the Organic Law, which we have set out in part. It states:

> "In addition, Article 14 of the [Organic] Law incorporates ICTR Rule 75, which contains a general provision that appropriate measures can be adopted to guarantee the privacy and protection of witnesses. This provision is broad enough to permit videolink in appropriate circumstances."

However, as we have noted, the scope of Article 14 is on its face expressly limited so as to make provision only for witnesses in cases transferred from the ICTR. It is true that this is apparently subject to Article 24, which makes provision *mutatis mutandis* for other cases. But we have no evidence of how these provisions or the relation between them work in practice. This is, moreover, an instance of a more general point made by the appellants. The GoR has placed much reliance on the Organic Law, as did the judge; but we have virtually no evidence of its application in real cases. In particular, in the present context, there is nothing to tell us that video-link facilities would be made available at trials of these appellants in the High Court of Rwanda to receive the evidence of witnesses in the United Kingdom or elsewhere who declined to give evidence in person out of a professed fear of reprisals.

65. In those circumstances there must at least be a substantial risk that such facilities would not be available. In that event the appellants would effectively be deprived of the opportunity of calling witnesses in their defence. It might be suggested that the court would permit the witnesses' statements to be read. That appears to be a very doubtful prospect – see Article 7 of the Organic Law (again, we have no evidence of how the provision works in practice). But even if it were done, there is a plain likelihood that little weight would be attached to them.

66. In the result we conclude that if they were extradited to face trial in the High Court of Rwanda, the appellants would suffer a real risk of a flagrant denial of justice by reason of their likely inability to adduce the evidence of supporting witnesses.

Fair Trial – the Merits – Independent and Impartial Tribunal: Introduction

67. We have stated (paragraph 61) that the point as to witness difficulties does not stand alone. A major dimension of the appellants' claim that if they were extradited their right to a fair trial would be denied them consists in the contention that the High Court of Rwanda, in the context of these prospective genocide trials, is not an independent and impartial tribunal. Although we have reached a clear conclusion on the case as to witness difficulties independently of this further contention, still those difficulties should not, in our judgment, be viewed in isolation from this more general complaint. Arrangements for the proper treatment of witnesses, especially witnesses who fear the consequences of giving evidence, can only be secure if the court is the vigorous guarantor of their security. But the court's ability and willingness to act as such will be compromised, perhaps nullified, if it is not independent and impartial.

68. Moreover the question whether a court is independent and impartial cannot be answered without considering the qualities of the political frame in which it is located. If the political regime is autocratic, betrays an intolerance of dissent, and entertains scant regard for the rule of law, the judicial arm of the State may be infected by the same vices; and even if it is not, it may be subject to political pressures at the hands of those who are, so that at the least the courts may find it difficult to deliver objective justice with even-handed procedures for every litigant whatever the nature of his background or the colour of his opinions. We must take care, of course, to avoid crude assumptions as to the quality of a State's judiciary based on the quality of the State's politics. There are, thankfully, many instances of independent judges delivering robust and balanced justice in a harsh and inimical environment; but it takes courage and steadfastness of a high order.

69. There is material before us concerning some aspects of the exercise of State power in Rwanda, and we are accordingly bound to consider what light it may throw on this question of impartiality and independence. At the outset, however, we should acknowledge the many statements we have seen, from one quarter or another, which testify to the improving quality of Rwanda's justice system. Thus the very first sentence of the HRW Report of July 2008 states:

> "The Rwandan authorities have improved the delivery of justice in the last five years, a noteworthy achievement given the problems they faced."

The ICTR Trial Chamber in *Kanyarukiga* asserted:

> "104. The Chamber concludes that the Republic of Rwanda has made notable progress in improving its judicial system. Its legal framework contains satisfactory provisions concerning jurisdiction…"

The Danish Institute for Human Rights, in a document submitted to the Magistrates Court for the purpose of taking objection to certain observations made by Professor Schabas, states as follows:

> "By way of introduction, it should be acknowledged that Rwanda has made significant achievements in the justice sector over the past 12 years, building up a system that was in ruins after the 1994 genocide. There were extremely limited numbers of qualified and experienced justice sector personnel (judges, prosecutors and lawyers and judicial police), and a legal framework that was inadequate to deal with the challenge. Those working to build up the system were working under exceptionally difficult circumstances in the attempt to bring to justice those accused of masterminding and participating in the genocide. The steps taken have led to many innovative solutions and the development of progressive laws, for example in the introduction of community service, sentence reductions for guilty pleas as well as for example in the field of inheritance, where women - and thus widows of the genocide - have been enabled to inherit land. Both state and society can feel justifiable pride in the peaceful and orderly way in which most trials have been conducted and justice carried out."

70. Other texts before us are to like effect. The importance of this material is not merely to acknowledge, for fairness' sake, the advances made in Rwanda in the delivery of justice according to law. It is also to mark the GoR's argument that the continuing improvement of the justice system must lessen the force of the appellants' case on fair trial, which is (at least to some extent) based on events taking place a significant time past.

71. In this setting, and given our remarks as to the possible importance of the State's political and constitutional stamp, there are features of the State of Rwanda to which we should pay some attention. Before us (and before the judge) Lord Gifford

identified ten points which he said, it seems rightly, were common ground. The first was that Rwanda is an authoritarian state and not a democracy. The second was that freedom of the press is not respected in Rwanda. For both propositions Lord Gifford cited the expert evidence. As for the first point the judge said this (paragraph 441(a)):

> "There was fundamental agreement on this, but the degrees were in dispute - Professor Reyntjens saying that there was increased repression whilst Professor Schabas conceded that it was not a democracy, was authoritarian and a one party state."

Professor Reyntjens is Professor of Law and Politics at the University of Antwerp, and was instructed on behalf of VB. He had rather more to say than the judge here records. This appears in his report:

> "11... Advances have not occurred in political governance in Rwanda. In 1994 the RPF voiced its commitment to the principle of power sharing found in the Arusha Accords, but from 1994 onwards developed a consistent policy of excluding Hutus from effective power and concentrating both power and wealth in the hands of a few. The International Community over those first ten years displayed a degree of tolerance for the regime's excesses - doubtless because of the history of genocide that is astutely invoked by those presently in power. Those ten years were marked by early optimism being displaced by increased repression by the regime.
>
> 12. Many persons started to flee the country… The Hutu elite were subject to persecution and prejudice. Some were physically eliminated. This affected the whole breadth of Hutu civil life - businessmen, the military, doctors, journalists, teachers, high ranking civil servants, judges and lawyers. Those who fled spoke of prejudice, discrimination and fear. The next group to flee were Tutsis who had survived the genocide. They began to flee from early 2000 claiming to have been discriminated against and threatened by the RPF, which was largely composed of Tutsis who had lived outside Rwanda for many years as refugees. Finally, some hardcore RPF supporters, including prominent members of the leadership, began to leave Rwanda.
>
> 13. There were local elections in 2001 and Presidential elections in 2003. Both were deeply flawed. The few remaining, independent voices were silenced. The principal Hutu party of opposition, the MDR, was effectively banned. Opponents were arrested or 'disappeared'. Voters were intimidated and, in reality, the vote was not secret. Paul Kagame achieved 95% of the vote - which rather indicates the point."

Mr Lewis observed that Professor Reyntjens had not been to Rwanda for over ten years (in fact not since 1994), and as it transpired knew nothing of the Organic Law.

As we shall explain a little more fully later, the judge also criticized Professor Reyntjens. However none of the criticisms appears to impugn the narrative in these paragraphs, which is more a description of objective facts and events than a contentious expression of opinion.

72. As for the freedom of the press, or rather the lack of it, the judge observed (paragraph 441(b)) that "the degree varied between the experts, but it was generally accepted to be the case". Professor Reyntjens said:

> "14. Freedom of the press has been consistently targeted by the Government. Papers were forced to close down or toe the line. Journalists were forced to flee. The rare independent papers currently existing in Rwanda are constantly threatened and intimidated, often in a violent fashion."

Professor Sands said:

> "147. Despite repeated denials from the Rwandan government that there are any restrictions on freedom of expression in the country, there are numerous reports of the curtailment of freedom of expression and of prominent journalists being brought before the courts for criticising the government or portraying it in an unfriendly light."

73. The autocratic nature of the Rwandan State, and the want of press freedom, are also addressed in a series of Tables annexed to Miss Ellis' skeleton argument. In Tables A, B and C she collates material tending to show the complicity of State actors in extra-judicial killings, disappearances, and acts of torture and other inhuman treatment. Table E elaborates instances of the denial of press freedom, and Table F deals with the use by the authorities of "genocide ideology".

74. The fifth of Lord Gifford's ten points of common ground is in the nature of a bridge between these aspects of the condition of the Rwandan State and the more particular material, directly concerning the judiciary, which we must address under this head. The point, as put by Lord Gifford, is that the GoR has frequently displayed hostility at the acquittal of alleged *génocidaires*. He cites Professor Sands, who describes in particular the plight of a Mr Bagambiki. He had been acquitted by the ICTR of orchestrating the 1994 genocide. Professor Sands continues:

> "91... Rwanda's Prosecutor general, Martin Ngoga, stated in interview that his government was not happy with the acquittal and that the accusations against him were still considered live, claiming that 'the trial was not properly conducted', on the grounds, inter alia, that additional charges of rape and complicity to rape were not leveled against Mr Bagambiki once the trial was underway. I was told that Mr Ngoga's comments were consistent with a pattern of statements made by or on behalf of the Government of Rwanda reacting negatively to acquittals at the ICTR."

Professor Sands proceeds to cite the Deputy Chief Justice, Mr Rugege, who had robustly asserted that such pronouncements did not undermine the presumption of innocence. However it appears that Mr Bagambiki was swiftly brought to trial in a Rwandan court on charges of rape and incitement to rape, convicted *in absentia* and sentenced to life imprisonment. Professor Sands continues:

> "94. The treatment of Mr Bagambiki, coupled with the Government's reaction to acquittals at the ICTR, give rise to doubts as to whether a high level defendant transferred back to Rwanda would really benefit from the presumption of innocence that is required by Article 14 [sc. this may be a mistake for Article 13 of the Organic Law]. As stated by Professor Drumbl:
>
> > 'The fact that the Rwandan Government will not accept acquittals by the ICTR might be taken as a reflection of certain presumptions as to guilt. Public pronouncements to protest acquittals at the ICTR indicates a degree of politically motivated involvement at the highest levels.'"

75. In this context we should mention another particularly striking instance of the response of the Rwandan political authorities to judicial action, not in this case an acquittal at the hands of the ICTR (nor indeed anything done by a Rwandan court), but the issue of process by a Spanish judge against officers of the RPF. The HRW Report of July 2008 has this (pp. 92 – 93):

> "In February 2008 Spanish judge Fernando Andreu Merelles issued international arrest warrants for 40 high-ranking RPA officers. In his judicial decision Judge Merelles said that he had tried without success to obtain cooperation from Rwandan authorities in investigating at least two of the crimes. Rwandan authorities have not begun any judicial action in reaction to Judge Merelles' order although some have proposed prosecuting the Spanish judge for 'genocide ideology'. High-ranking officials began denouncing the judge and his order in the press and at diplomatic gatherings, putting into effect their announced intention to deal with the Spanish order through political and diplomatic means. President Kagame reportedly told a iournalist, 'He has no moral authority in doing that. ... lf I met him, I would tell him to go to hell - they have no jurisdiction over Rwanda, over me or over anybody.' The ministry of foreign affairs called on other governments to ignore the arrest warrants. The minister of justice described the judicial order as 'racist and negationist', and asked African union ministers of justice to condemn what he characterized as a neo-colonial attempt to reassert controI over African states by a judicial coup d'etat. Showing again the link made by some Rwandan officials between discussion of RPF crimes and 'genocide ideology', Rwandan authorities said they were exploring the possibility of prosecuting the Spanish judge for 'genocide ideology'."

This case is also referred to by the ICTR Trial Chamber in *Munyakazi*, in which it will be recalled judgment was delivered on 28 May 2008:

> "45. Judge Fernando Andreu of Spain has also faced condemnation from Rwanda. During the Referral Hearing, the HRW representative stated that 'when the Spanish indictment was issued against forty high-ranking RPF officers, the national assembly passed a resolution asking for that Spanish judge to indeed be prosecuted for negating the genocide'. The Rwandan Government representative at the Referral Hearing denied this, stating that 'there is no such thing as a resolution by Rwandan Parliament to prosecute a Spanish judge'. However, the Rwandan Government's sponsored website posted an article, dated 6 March 2008, stating that the Lower House of the Rwandan Parliament asked the Rwandan Minister of Justice, Tharcisse Karugarama, to prosecute Spanish Judge Fernando Andreu Merelles for negationism of genocide."

76. All these materials provide context for our consideration of the relation between the political arm of Rwanda's one party State and the Rwandan judicial process, in particular that of the High Court. It brings us therefore to the concrete question of the Rwandan judiciary's independence and impartiality. By its nature this is a broader issue than that relating to the fears and the treatment of witnesses, and there is a wide range of material dealing with it. We shall come directly to the HRW Report of July 2008, but should first briefly consider the treatment of the subject by the ICTR and the judge below.

Fair Trial – the Merits – Independent and Impartial Tribunal: the ICTR and the Judge Below

77. As we have noted the Trial Chamber and the Appeals Chamber at the ICTR have differed on this issue. In *Munyakazi* the Trial Chamber said this:

> "40. Although Rwanda has ratified international treaties guaranteeing the right to be tried before an independent tribunal, and included this right in the Transfer Law [the reference is to Article 13 of the Organic Law], the Chamber is of the view that sufficient guarantees against outside pressures are lacking in Rwanda. The Chamber finds that, while Rwandan legislation enshrines the principle of judicial independence, which by definition includes guarantees against outside pressures, the practice has been somewhat troubling. In particular, the Chamber notes the Rwandan Government's interrupted cooperation with the Tribunal following a dismissal of an indictment and release of an Appellant, as well as its negative reaction to foreign judges for indicting former members of the [RPF] [the reference here includes the case of the Spanish judge, and other instances]. The Chamber is concerned that these actions by the Rwandan Government… show a tendency to pressure the judiciary, a pressure against which a judge sitting alone would be particularly susceptible."

The Appeals Chamber in *Munyakazi* (judgment delivered on 8 October 2008) took a different view. It stated:

> "26. While the Appeals Chamber shares the Trial Chamber's concern about the fact that politically sensitive cases, such as genocide cases, will be tried by a single judge, it is nonetheless not persuaded that the composition of the High Court by a single judge is as such incompatible with Munyakazi's right to a fair trial…
>
> 28. Further, the Appeals Chamber finds that the Trial Chamber erred in considering that there was a serious risk of government interference with the judiciary in Rwanda. The Trial Chamber primarily based its conclusion on Rwanda's reaction to Jean-Bosco Barayagwiza's successful appeal concerning the violation of his rights [the reference is to a passage in paragraph 41 of the Trial Chamber's judgment which we have not set out], and the reactions of the Rwandan government to certain indictments issued in Spain and France. However, the Appeals Chamber recalls that the *Barayagwiza* Decision was issued nine years ago. It notes that the Tribunal has since acquitted five persons, and that Rwanda has not suspended its cooperation with the Tribunal as a result of these acquittals. The Appeals Chamber also observes that the Trial Chamber did not take into account the continued cooperation of the Rwandan government with the Tribunal. The Appeals Chamber also considers that the reaction of the Rwandan government to foreign indictments does not necessarily indicate how Rwanda would react to rulings by its own courts, and thus does not constitute a sufficient reason to find that there is a significant risk of interference by the government in transfer cases before the Rwandan High Court and Supreme Court."

78. *Munyakazi* is the only case in which the Appeals Chamber has considered this aspect of the right to a fair trial. It is important to note the limited evidential basis for the Appeals Chamber's conclusion in this respect:

> "29. The only other information referred to by the Trial Chamber in support of its findings relating to the independence of the Rwandan judiciary was the 2007 United States State Department Report cited by the ICDAA in its *amicus curiae* brief. However, this report states only in very general terms that there are constraints on judicial independence, and 'that government officials had sometimes attempted to influence individual cases, primarily in *gacaca* cases'. The Trial Chamber did not cite any other information supporting its findings
> relating to the independence of the judiciary, and notably did not refer to any information demonstrating actual interference by the Rwandan government in any cases before the Rwandan courts. Moreover, other evidence submitted by the *amicus*

> *curiae* during the referral proceedings concerning interference with the judiciary primarily involved *gacaca* cases, rather than the High Court or Supreme Court, which will adjudicate the transfer cases, and failed to mention any specific incidents of judicial interference. The Appeals Chamber therefore finds that, based on the record before it, no reasonable Trial Chamber would have concluded that there was sufficient risk of government interference with the Rwandan judiciary to warrant denying the Prosecution's request to transfer Munyakazi to Rwanda."

79. In footnote 77 the Appeals Chamber said that:

> "The *amicus curiae* brief submitted by HRW [dated 17 March 2008] refers to interviews with 25 high-ranking Rwandan judicial officials stating that the courts were not independent, but provides no information about the basis for this view, or any cases of actual attempts to interfere with the judiciary."

The Appeals Chamber declined to consider the HRW Report of July 2008 (see below paragraphs 83 – 91) because it was not part of the record of the case and, as new evidence, had not been admitted under the ICTR's rules: see footnote 14 on page 2 of the Appeals Chamber's decision.

80. It should also be noted that in allowing this ground of appeal from the Trial Chamber the Appeals Chamber relied in part on the Trial Chamber's failure to take account of the fact that the African Commission on Human and People's Rights had undertaken to monitor the proceedings in transfer cases from the ICTR: see paragraph 30 of the Appeals Chamber's decision.

81. The judge's conclusion on the fair trial issue appears at paragraph 536 of his judgment, which we have already set out (paragraph 34 above) in addressing the judge's approach to the test which the court should apply in deciding whether the appellants' extradition would be compatible with their rights under ECHR Article 6. His reasoning is, effectively, entirely directed to the question whether on the fair trial issue the appellants had crossed the "high hurdle" of proof which in his view confronted them. We have already indicated our concerns as to the misapprehension of the burden of proof which this appears to involve. As for the merits, the judge refers to the amicus brief of HRW, which we understand to be material put before the ICTR. This of course antedated the HRW Report of July 2008. But the judge does not engage with the substantive points being made by HRW in the Brief except by reference to the burden of proof.

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82. The background circumstances we have described move from the general – an autocratic State which sanctions or allows violence unauthorized by law and denies press freedom, but one in which, nevertheless, standards of adjudication have been rising, to the particular – instances of an immoderate and intolerant response to

judicial action which the State, or some political organs of the State, finds objectionable. Taken with what we have already said about the fears and possible tribulations of witnesses, these factors form an important part of the setting against which we must consider the direct evidence about judicial independence and impartiality.

83. It is convenient to start with the HRW July 2008 Report, because it has been recently compiled and the material contained in it is comprehensive, systematically collated, and as we understand it contains a good deal more detail than was to be found in such HRW material as was before the judge. And some of the other evidence on this issue, to which we will come, is necessarily more anecdotal or episodic. At the outset there is perhaps a certain irony in the quotation from an unnamed Rwandan judge at the very beginning of the Report – "We have beautiful laws, among the best in the world. But they are not obeyed": the comment recalls a complaint made on behalf of all the appellants (most vociferously, perhaps, by Mr Jones for VB) to which we have already referred (paragraph 64), namely that while we have some evidence about the written laws of Rwanda including the text of the Organic Law of 2007, there is a complete absence of material coming from the GoR showing how it works in practice. The HRW Report helps repair this omission. At the beginning of Chapter II, "Methodology", this is stated:

> "This report is based on observations of conventional trials and *gacaca* proceedings and on some 100 interviews with legal professionals, of both Rwandan and other nationalities. Most of the research was done between 2005 and mid-2008, although Human Rights Watch research materials from earlier years have been used to provide background to more recent developments."

They then describe their interviewees: ministers of justice, judges, prosecutors, attorneys, court staff and others. We should say that the Report's sources, whether in the form of interviews or documents, are meticulously cross-referenced in footnotes. We have not set these out: there are limits to the utility of including such material in what is already an over-long judgment.

84. The Report starts with a summary (Chapter I) which includes some observations about the *gacaca* courts, to which we have referred but without elaboration. It is necessary to say something about this jurisdiction, not least having regard to certain last minute developments in this case which we shall describe later in this judgment. The HRW summary shows that by 2001 thousands of persons still awaited trial for offences connected with the genocide. One of the initiatives undertaken by the GoR to speed up the judicial process was to launch the *gacaca* courts, "a form of popular justice modeled on past customary conflict-resolution practices… Hundreds of thousands of elected judges, chosen for their integrity rather than for their formal education, were authorized to deliver justice in the name of the local community." Then this:

> "*Gacaca* jurisdictions and conventional courts differ from each other in law, procedure, and personnel, but the two nonetheless comprise a single judicial system with considerable interchange between them. This report focuses on the conventional sector

> and those aspects of *gacaca* jurisdictions that impinge most directly upon it."

The summary proceeds to express HRW's general view that "at this time the independence of the courts and the assurance of fair trial rights are too limited to permit… extradition or transfer [sc. of genocide suspects for trial in Rwanda]".

85. Chapter VIII of the Report is headed "Independence of the Judiciary". We have already cited extensive passages from Chapter IX, "Challenges to Fair Trial Standards", in dealing with the issue relating to witnesses. Here again we must set out considerable sections of the HRW narrative.

> "Technical improvements in the administration of justice have not changed the dynamics of the political system, where the judiciary remains largely subordinate to the executive branch and even to elite unofficial actors who enjoy both economic and partisan political power. A former police officer asked to assess the effectiveness of recent reforms said, 'You can't understand. You see what's on paper but you don't know the truth... You foreigners are easily tricked.'
>
> …
>
> In a November 2007 report [by the International Legal Assistance Consortium: *Justice in Rwanda: An Assessment*, section 6.3.7, November 2007], a delegation of international jurists who had visited Rwanda noted allegations of continuing political pressure on the judiciary and concluded that legislative reforms had yet to be accompanied by 'a corollary shift in judicial culture towards greater independence'. In supporting this conclusion, they remarked on the paucity of prosecutions against RPA soldiers accused of war crimes and crimes against humanity.
>
> …
>
> One judge, named since the reform took effect, said that loyalty to the RPF was important in winning appointment as a judge and provided a detailed account of his own experience as proof. He had been recruited for his post in several meetings with a representative of the RPF who had no link with the judicial system. According to a lawyer, interviewed by a Human Rights Watch researcher in another context, political affiliation is also important in the choice of Supreme Court judges who are elected by the Senate. He said that of the two candidates presented for the vote, one clearly was meant to be chosen while the second was there only for show. Among some in the legal profession, he said, the second candidate is known as the 'bridesmaid'.

There follow some observations under the heading "Misuse of Prosecutorial Power", which we may pass over, save to note HRW's concerns as to a recent marked increase in the bringing of rape charges, of which a possible explanation is

> "to enhance the possibility of obtaining convictions. In a number of cases there are grounds for believing that rape charges (which do not fit the facts) may be being used to undertake prosecution where other charges cannot be successfully brought or are unlikely to secure conviction."

HRW proceed to refer to the case of Mr Bagambiki, the subject of comment by Professor Sands to which we have already referred (paragraph 73).

86. Further on in Chapter VIII there is a sub-heading "Interference in Judicial Cases" below which this is stated:

> "A former minister of justice, judges and former judges, former prosecutors, and lawyers all recounted cases of interference with the judicial system that they had experienced or knew of in some detail. A former official well-acquainted with such practices said that judges in important cases were rarely bought off, but were subject to pressure from the executive as well as from powerful persons outside the government. He said that judges 'would know what to do'. Or, if there was any doubt about the decision, they would receive a call to tell them 'this is what is expected'.
>
> In several cases documented by Human Rights Watch, important persons from the executive branch seem to have pressured judges or prosecutors. In other cases, less important officials or persons who were not officials but had political or economic power may have been the ones to intervene. Their motivations may have been political, economic, or personal - such as settling scores for some past wrong, imagined or real - or a combination of these reasons. Some of the persons targeted by these abusive actions themselves had considerable stature: political, religious, economic or military. Others were less visible.
>
> In the last year the President of the Rwandan High Court Johnston Busingye has told at least two persons that judges in his court had been subjected to attempts by the executive to influence their decisions. He said that he had himself called those trying to pressure the judges in order to discourage their attempted interference.
>
> In cases where judicial personnel have been subject to pressure, they have disregarded procedure, ignored allegations that evidence was coerced through abuse, wilfully misread or distorted evidence, and substituted substantially different charges when the original charge fails. Some prosecutors and

> judges who have been subject to influence have taken decisions that fail to reflect the law and the facts of the case."

87. Then under the sub-heading "Political Cases" the Report proceeds to discuss a number of instances in which it is said that "[o]fficials have used the judicial system to punish and limit the activities of persons seen as opposed to the government and to the RPF, whether by detaining them for long periods without charge or by prosecuting them, often for 'divisionism' and 'genocide ideology'". One of the cases discussed in detail is that of the former President, Pasteur Bizimungu. We shall deal with the Bizimungu case under a separate head, because its treatment in these proceedings is closely connected with criticisms directed at the evidence of Professor Schabas, the expert who as we have said was called for the GoR. We may go forward to a further sub-heading in Chapter VIII, "Consequences of Trying to Remain Independent".

> "Some prosecutors and judges try to resist pressure, whether from politically powerful persons or from wealthy businessmen. 'Turn off your phone', was the practical counsel from one judge to colleagues less experienced in such circumstances.
>
> Those who do 'turn off the phones' pay a price for their attempt to protect the independence and integrity of the judicial process. Judges or prosecutors connected with the cases of Bizimungu and Biseruka, for example, no longer hold positions in the Rwandan judicial system and at least three of them fled Rwanda and received asylum abroad.
>
> In one case, the judge Evode Uwizeyimana was interviewed by a Voice of America journalist after Alfred Katisa had been rearrested following his brief liberation in the bank case. Uwizeyimana spoke up in defense of judicial authority and criticized the police for having taken Kalisa back into custody. Asked later by various officials to account for his statement, Uwizeyimana - who already had a reputation for expressing his opinions frankly - felt sufficiently threatened to resign his post. Although he was no longer a judge, the Superior Judicial Council summoned him for a hearing on an alleged case of corruption. They found him guilty and dismissed him from the judiciary, a punishment that was redundant considering his previous resignation but which made it impossible for him to practice law or other professions. He subsequently sought asylum abroad."

88. The next sub-heading is "Lack of Respect for Judicial Orders". The Report states:

> "The rule of law requires that judges be able to require state agents to obey lawful orders of the court. According to the 2003 Constitution and the code of penal procedure, judges have the authority to require such obedience, but in fact they are not always able to do so.

> In a landmark case in May 2005, for example, Tharcisse Karugarama, then president of the High Court, ordered police to produce a detainee who was illegally held, a first use of the habeas corpus power established by one of the 2004 judicial reforms. The police released the detainee but failed to obey the order to produce him in court. Because the new penal code that is to provide sanctions for state agents who fail to obey judges' orders had not then - and has not yet - been adopted, Judge Karugarama had no way to punish police officers for not complying with his order.
>
> Human Rights Watch researchers also documented several cases where persons acquitted by courts of law were not released from prison, or were released only to be re-arrested shortly thereafter, in violation of a court order. One person interviewed by Human Rights Watch researchers was arrested and detained three times on a single arrest warrant, and held in prison for an additional twenty months after he was declared innocent. Others remain in prison despite having been acquitted at trial, including some for as long as five years. In May 2005, a defendant ordered to be released by the court was immediately handcuffed as he left the courtroom and was returned to prison. 'The audience was shocked,' said the court clerk who witnessed the incident. 'But,' he continued 'it would seem the police still have more power than the judges."

89. As it seems to us this material as to the inefficacy of some judicial orders, apart from being intrinsically troublesome, can only add to the concerns we have expressed in relation to witness protection and video-link facilities. Such matters must ultimately be in the hands of the court; but if the habit of obedience by the State's officers to the court's orders is shaky, how firm will it be when the court makes an order which is needed because its beneficiary fears – and thus implicitly criticizes – the State itself or others of its officers?

90. Chapter IX, "Challenges to Fair Trial Standards", contains much besides the sub-heading "The Right to Present Witnesses", from which we have already cited at length. Here we will only set out part of the text under the first sub-heading, "The Presumption of Innocence".

> "In Rwanda the presumption of innocence is most at issue in cases of genocide or in cases involving expressions of ethnic hostility, such as those where 'divisionism' or 'genocide ideology' are charged. The widespread involvement of many - though certainly not all - Hutu in the genocide has led many public officials to speak as if all Hutu are guilty of this crime. When officials responsible for the administration of justice and the police make such statements they promote an atmosphere where it is difficult to assure judicial processes that are impartial and free of bias.

> In an address to legal professionals at The Hague in 2006, the President of the High Court said that 'the architects of the genocide literally made every one a direct or indirect participant'. Under Rwandan law, 'indirect participants', that is, accomplices to the crime, are equally guilty and receive the same punishment as the principal perpetrators.
>
> ln a May 2007 statement about the killings of 20 detainees by police officers, the Commissioner General of the Rwandan National Police Andrew Rwigamba (formerly chief prosecutor in the military justice system) said that the 'suspects involved in these cases were of extreme criminaI character ready to die for their genocide ideology'. The detainees, all recently arrested, had not been tried for any crimes and none had been convicted of holding 'genocide ideology'.
>
> Officials, including judicial officials, discount acquittals with which they do not agree and continue to speak of the acquitted as if they were guilty. After ICTR judges found former Cyangugu governor Emmanuel Bagambiki not guilty, Prosecutor General Jean de Dieu Mucyo said, 'There was clear evidence that the two [Bagambiki and co-defendant Andre Ntagerura] were among the leaders of the genocide and that many people are dead because of their actions."

The Report then proceeds to discuss individual cases with which we need not take time.

91. Although we have cited from it at some length, the HRW Report of July 2008 contains much else besides. We regard it as a formidable dossier, not least because of the disciplined and painstaking manner in which its authors contend with the acute and sensitive issues they set out to address.

Fair Trial – the Merits – Independent and Impartial Tribunal: Professor Reyntjens and Professor Sands QC

92. We turn to the expert witnesses. As we have said, Professor Reyntjens was instructed for VB, Professor Sands (Professor of Laws and Director of the Centre on International Courts and Tribunals at University College London and a practising member of the Bar) for EN, and Professor Schabas for the GoR. Only Professor Schabas was prepared to say that the appellants would have a fair trial in Rwanda. Because of the sustained attacks made by counsel on the value of his testimony it is convenient to consider his evidence under a separate heading.

93. Professor Reyntjens has lived in Rwanda, and his *curriculum vitae* shows an involvement with the country back to the 1970s, but as we have said he has not been there since 1994. He was declared *persona non grata* after criticizing the newly established RPF Government, and has not been allowed to revisit Rwanda. However he states that he follows the country's affairs closely and has many contacts there, including research workers. He has written very extensively on sub-Saharan African

affairs. Under the heading "Judicial Independence and Impartiality" his report includes this:

> "56. The United States Department of State's Human Rights report for 2006 expressed concern as to effective judicial independence. There is a well documented history of concern in this area and nothing I have seen leads me to have the confidence that Prof Schabas has expressed in his report. The whole structure and nature of the present regime militates against it.
>
> …
>
> 74. Given the Rwandan Govemment's Human Rights record, its participation in the killing of tens - if not hundreds - of thousands since 1994, its stifling of opposition, including by extrajudicial killings, the use made of the Genocide as the *raison d'etre* for the present Government and an excuse for its excesses, the 'Tutsisation' of Rwandan society and consequent exclusion of Hutu, there are compelling reasons to have the gravest doubts as to the undertakings made by that Government in respect of fair trial issues. This is particularly true of the independence of the judiciary. It is essential to see its functioning in a broader political context, beyond technical considerations such as e.g. the improvement of legal training.
>
> 75. In my opinion, present Rwandan society is not capable of providing the guarantees necessary in the present case. Vincent Bajinya cannot expect to receive a fair trial in Rwanda given the nature of the charges against him and the political dimension to them. There is no prospect of a Judge, operating under the current regime in Rwanda, being able to act independently of the current pervasive RPF elite. His or her decision will be subject to the will of the Kigali regime and not independent of it."

94. The judge (paragraph 438) took Professor Reyntjens to task for not having read the Organic Law: "[h]is explanation for this was that he had been instructed to reply to Professor Schabas' request and as he had not mentioned the Organic Law he had not read it. In fact, Professor Schabas' report contains a whole section on the Law… This explanation holds no water whatsoever…" This criticism clearly has some merit. Moreover Professor Reyntjens' strictures on the integrity of the Rwandan judicial process are cast in very general terms; and they possess, as it were, a somewhat breathless quality. But they march with the conclusions of the HRW Report of July 2008.

95. So does Professor Sands' evidence. Professor Sands is a public international lawyer, not a specialist in Rwandan law. He has not been to Rwanda. His report of 29 October 2007 is in the nature of a secondary source. It is not however to be dismissed on that account, for its collection and arrangement of primary materials is careful and

balanced. It contains the following (again we omit the citations in the extensive footnotes):

> "63. I have reviewed materials pertaining to genocide trials in the ordinary courts in Rwanda… [T]his information is limited insofar as there is little information publicly available on the processes and procedures of recent trials before the ordinary courts. However the literature provides historic examples of defendants having been jeered or mocked openly in court, without intervention from the presiding judge, as in the trials of Deogratias Bizitnana and Egide Gatanazi. Similarly, spectators at the trial of Froduald Karamira were not prevented by the trial judge from laughing and chanting at the defendant during trial proceedings. This would certainly not meet the guarantee of a fair hearing under international law.
>
> …
>
> 70. In an assessment of the independence of the judiciary, the 2006 United States Department of State Report… records that the judiciary had 'made significant progress during the year' by assuming more control over the judicial budget and providing continuing training for new judges and that there were no reports of direct pressure on judges. The 2006 State Department Report also records that interviewed members of the Rwandan Bar Association had reported that 'they believed that the judiciary was more independent during the year than in 2005, citing the increased willingness of judges to rule against the government and a higher standard of judicial training and education'. The report supports the views expressed by those lawyers that judges had ruled against senior political figures during the course of 2006 and that several judges had been dismissed during the year for abuse of office or corruption following investigations by the Judicial Council.
>
> 71. Despite these positive elements, the 2006 State Department Report identifies problems and concludes that 'there were constraints on judicial independence' in 2006 and that, although judges appeared to be 'more assertive' in ruling against the executive, 'problems remained'. That assessment is based *inter alia* on stated views of members of the executive that 'calling judges to discuss ongoing cases privately and to express executive preferences was appropriate.' Further, while the 2006 State Department Report states that there were no reports of direct pressure on judges, in some cases deemed to be politically sensitive, it records that 'indirect public pressure may have influenced the judiciary', although this is rejected as uncorroborated 'nonsense' by the Rwandan government."

96. At paragraph 72 Professor Sands proceeds to cite the Bertelsmann Transformation Index report on Rwanda for 2006 as follows:

> "There are severe restrictions on the separation of powers. The forum of political parties in which all legal parties are members is dominated by the RPF party, which controls government and parliament. Opposition parties are weak and their influence is nearly nonexistent as a consequence of both recent elections and their forced collaboration in the forum. If parties are seen to endanger the position of the RPF, they are dissolved (as was the case with the MDR) or not admitted (as seen with a party founded by Pasteur Bizimungu).
>
> While the judiciary is formally independent and institutionally differentiated, in reality it is significantly subordinated to the will of the executive. As such, it acts in the interest of the executive's interpretation of 'ethnic and divisive tendencies' as was the case with the censuring of Bizimungu in 2004. Here, the case of Umeso's editor is illustrative. He was acquitted on the charge of divisionism in 2004 after publishing an article accusing the influential RPF member Denis Polisi of trying to overthrow Kagame, being corrupt and sabotaging legislation against corruption. It was obvious that influential groups in the leadership had used him to attack Polisi via the newspaper. As a result, he was ordered only to pay a symbolic fine... Although fighting corruption is an important political aim, corrupt officeholders are not prosecuted adequately under the law if they are influential, as was the case with Polici."

Professor Sands continues:

> "73. Other observers have noted the existence of a deliberate 'Tutsification' of the judiciary under the leadership of Paul Kagame, leading to a politicisation of the different branches of the state and in positions of power within Rwandan society, with Hutus playing only a 'nominal' role. Rene Lemarchand, writing in 1991, claimed that 'appointed parliament is a fig leaf... the civil service, the judiciary, the economy, the schools and university are all under Tutsi control. This claim has been more recently reiterated by Filip Reyntjens who argues that the 'Tutsification' of the State began in 1996 and encompasses the Supreme Court and judges, amongst others. Amnesty International has previously reported the removal of Hutu judicial personnel and the recruitment and training by the government of predominantly Tutsi legal candidates, and stated that this has undermined the perceived impartiality of the judiciary. Amnesty International reports provide numerous historical examples of governmental interference in the judicial system since the genocide. Examples identified include the purported suspension of judges and prosecutors for failing to obey political orders or for taking decisions with which the government disagreed; the arrest on genocide charges of prosecutors and assistant prosecutors following the release of

> detainees; and the murder of members of the justice system. Also in the past there have been claims that the government has taken action against members of the legal profession for denouncing the interference of administrative and military authorities in the functioning of the judicial system or for refusing to authorise the detention of people accused of genocide against whom there was no evidence. Although these examples are historic, they concern the same government that is in power in Rwanda today.
>
> 74. There are also more recent examples of cases in which the government has apparently sought to use the courts to silence its critics. One example is the case of Professor Katabaruka, a law professor at the Catholic University of Bukavu in the Eastern Democratic Republic of Congo, who was arrested on 16 February 2007 while teaching a law course at the Adventist Lay University of Kigali. He was charged with 'threatening state security' and 'discrimination and sectarianism'. The charges related to several public documents that Professor Katabaruka was alleged to have co-authored, including an article entitled 'Alerte Rwanda' ('Rwanda warning') published in 2005… The article provided an overview of human rights concerns in Rwanda, and denounced the *gacaca* courts as places of 'intimidation, terror and injustice', devoid of 'sincerity' and biased in their sole focus on Hutu rather than Tutsi crimes. After being held for one month, charges against Professor Katabaruka were dropped, but he was declared *persona non grata* and forcibly removed to the Democratic Republic of Congo. The episode appears to reflect how the Government of Rwanda deals with certain critics. The fact that the criticisms concerned the fairness of certain genocide proceedings (before the *gacaca* court system) appears relevant to the assessment of the political conditions in which genocide proceedings before the criminal courts take place."

97. Under the heading "Competence of the Judiciary" Professor Sands describes (paragraph 79) the dismissal in 2004 of the entire judiciary and their replacement.

> "The High Court, which would try any person transferred to Rwanda by another State, now has 26 judges and 19 members of support staff, all 'trained in 1aw'. [80] All judges of the High Court and the Supreme Court must now possess a law degree, as a minimum qualification. Candidates must also possess 'adequate legal experience'."

After describing various factors *pro* and *con* judicial competence in Rwanda Professor Sands says this:

> "83. In sum, the experience with the appointment of new judges is very recent, and it appears to be too early to be able to express any firm view on the independence and impartiality of

> the judges who might hear the Defendant's case. Professor Schabas' report is silent on the question of judicial impartiality. The letter of the law and the formal requirements are capable of meeting the standards set down in Article 14 [sc. of the ICCPR] concerning the independence of the judiciary. However, in order to be able to express a clear view it would be necessary to have detailed information on the judges, including their backgrounds and experience in dealing with cases of this kind. It would also be necessary to be able to review a body of case-law and practise emanating from these judges. None of this information appears to be available. It may well be that were the Defendant to be extradited the judge in his case would show him or herself to be competent, independent and unsusceptible to political or other pressure. However, having regard to the examples cited, it is difficult to exclude the possibility of there being a real risk that the defendant would not be tried by an independent tribunal, especially given the high profile nature of the case. As stated by Professor Drumbl, following his detailed review of the case law in genocide cases:
>
> > 'If you look at the special chambers, over time there have been great improvements, with routine acquittals. The system has grown in sophistication. My review of the case law surprised me, in terms of the extent to which it complied with the spirit of Article 14. But I must make two important *caveats* to that statement. The first is that the published judgments that are available for review in the French language do not provide a snapshot of the whole. And secondly, these cases did not focus on the top highest order defendants, and I do think that the political pressures to secure convictions would be higher as you go higher up.'
>
> 84. Having regard to historical experience and some more recent examples it would seem to be difficult to exclude the possibility that there is a real risk that this aspect of Article 14 ICCPR might not be respected."

98. Although as have said Professor Sands' report is in the nature of a secondary source, it is (as, with respect, no doubt one would expect) a scholarly piece of work betraying no sign of pre-conception or unreflective assumptions. But the judge did not, as we read his judgment, confront Professor Sands' painstaking reasoning. Paragraph 430 refers to all three experts in these terms:

> "The three expert witnesses who have given evidence to the court are Professor Schabas for the Government and Professors Reyntjens and Sands for the defence. Even here, however, a note of caution must be entered as Professor Schabas and Sands hold Chairs in Public International Law and Professor Reyntjens holds one in Law and Politics."

We suppose this is intended as a reservation about these witnesses' status as experts, on the footing that their respective disciplines are not specific to Rwanda (or Africa); otherwise the comment is simply mystifying. At paragraph 432 the judge refers to Professor Sands' lack of first-hand knowledge of Rwanda, "and so had to get in touch with former students in order to be able to try to interview people and form a picture of the situation on the ground…". This seems a little curmudgeonly.

99. It seems to us that despite differences of emphasis, style, and perhaps of initial stance or position the reports of Professor Reyntjens and Professor Sands present a broadly consistent picture which (as we have indicated) marches with the conclusions of the later HRW Report of July 2008.

Fair Trial – the Merits – Independent and Impartial Tribunal: the Bizimungu Case

100. For the sake of orderly presentation we should next have considered Professor Schabas' evidence, but as we have indicated its treatment requires an understanding of the case of Pasteur Bizimungu, to which we therefore turn first. Its importance rests in the fact that it is the only concrete instance in which we have specific and express evidence of political interference in a trial in the High Court of Rwanda.

101. Bizimungu, a Hutu, had been appointed President of Rwanda in 1994 but was forced out of the presidency in 2000. In 2001 he launched a new political party and proposed to challenge President Kagame and the RPF in national elections. In 2002, after earlier incidents of harassment, he and seven others were arrested. There was much coming and going about the allegations to be pursued, but at length in 2004 the defendants were put on trial for what might be called various forms of sedition, criminal association, and in Bizimungu's case fraud and embezzlement. The prosection rested largely upon inconsistent and uncorroborated testimony of a single witness, which was contradicted by seven witnesses for the defence. The US State Department Report for 2006 said this:

> ""The trial against Bizimungu and his seven co-defendants, which began in March, was marred by a lack of corroborating evidence against the defense and was characterized by many international observers as having fallen short of international standards of fairness and impartiality. During the course of the trial, Bizimungu's attorney was detained for 24 hours for contempt of court, the judge prevented the defense from fully cross-examining the prosecution's witnesses, and the defense was only allowed to present a limited number of witnesses."

The contempt allegedly committed by the attorney consisted in his insistence on questioning a witness. The eight defendants were convicted on some charges and acquitted on others. Bizimungu was sentenced to fifteen years imprisonment.

102. In early 2006 the Supreme Court of Rwanda confirmed the convictions of Bizimungu and one other defendant (former minister Charles Ntakirutinka) but allowed the appeals of the others. As was stated in the HRW Report of July 2008 (p. 57):

> "The verdict could not be explained by purely legal considerations since all eight had been convicted of the

> criminal association charge largely on the basis of the same faulty witness."

Bizimungu was freed by presidential pardon in 2007.

103. The judge who presided over Bizimungu's trial at first instance later fled Rwanda and is apparently now in Canada. In his oral evidence before the judge in these proceedings on 21 April 2008 Professor Schabas, prompted in cross-examination by the contents of a notebook kept by him containing a record of conversations he had conducted on a field trip to Rwanda, stated that he had been told by *Avocats sans Frontières* that the trial judge had said that "the decision in the Bizimungu case was dictated to him". Professor Schabas had given no such account in either his first or second report, or in his evidence in chief; and this is one of a number of complaints made of his reliability as a dispassionate expert witness. Pressed further in the witness-box by Miss Ellis for EN, he insisted he still did not know "what to make of the Bizimungu case", and then said this:

> "I think there probably was executive interference in the Bizimungu case. I don't know the full nature of it, but it certainly smells like a case of executive interference."

104. The judge made little of this. At paragraph 450 – 451 he stated:

> "450. lf what was reported to Professor Schabas was correct, then this is, of course, very disturbing. Paradoxically, however, the defendant was granted a Presidential pardon.
>
> 451. However, this is the only case that the defence can point to as an example of executive interference. It was mentioned countless times in the course of this case, and the very number is illustrative that there appears to be no other case which may be highlighted."

Paradoxical or not, the grant of a pardon after the event does not mitigate the fact of executive interference, if fact it was. And the suggestion that Bizimungu is not merely the only identified instance of such interference with the judiciary, but the only actual instance, seems entirely unwarranted given the consistent failure of the GoR to respond to repeated requests, made during the currency of the proceedings below, for judgments and other details of trials in Rwanda's conventional courts for genocide and linked offences (see in particular Miss Ellis' skeleton argument paragraphs 9.3 – 9.9). Given that the relevant information about the day-to-day administration of justice in those courts must primarily be in the hands of the GoR, the singularity of the Bizimungu case does not begin to imply that it is the only such case. If anything the GoR's silence tends to imply the opposite. Seeking to refute this approach Mr Lewis pointed to this observation made by Professor Schabas in relation to the High Court in his evidence in chief on 15 November 2007:

> "I couldn't give you a precise number but I know that there have been a significant number of trials, and to my knowledge there have not been serious or significant complaints about justice delivered in that court."

However his cross-examination by Mr Fitzgerald on 22 April 2008 included this:

> "Q. Now, have you yourself studied the performance of the High Court in those matters since 2004?
>
> A. No, I haven't.
>
> Q. I mean, can you tell us in relation to the High Court trying those criminal matters, what the acquittal rate is there?
>
> A. I cannot.
>
> Q. It might be nil, for all you know?
>
> A. It is possible.
>
> Q. Have you studied the transcripts of any of the cases in the High Court?
>
> No. I haven't, sir.
>
> Q. Have you any knowledge of how they actually deal with witnesses who ask for anonymity?
>
> A. No, I am not aware of that.
>
> Q. Can you give any example where they have excluded evidence on grounds of police maltreatment, or said they won't rely on it because of police maltreatment?
>
> A. I am not aware of that.
>
> Q. Can you give any example where they have even criticized the police?
>
> A. I cannot.
>
> Q. We know something about two matters which were before the High Court, Bizimungu and the Agnes case which is still there. By contrast, can you put before this judge a case and say: 'Look, there was a case decided by this new High Court which was plainly fairly decided and plainly reached a fair decision'? Can you give one example?
>
> A. I cannot."

We are left where we were. As we have said, the singularity of the Bizimungu case (assuming the alleged political pressure happened) does not begin to imply that it is the only instance of executive interference with the judiciary.

105. The account eventually given by Professor Schabas (with the assistance of his notebook) of the admission made by the trial judge in the Bizimungu case was, of

course, double hearsay. However it seems, for what it is worth, that Professor Schabas himself believed it: given his general position on the fair trial issue he would have been very blithe to advance reasons for disbelieving it if any such reasons were to hand. And *Avocats sans Frontières*, from whom Professor Schabas had the information which he reported, are as we understand it a responsible body of experts.

106. Moreover the treatment of the Bizimungu case by the HRW in the July 2008 report is instructive. As we have indicated, it contains a good deal of detail of the background, the course of the proceedings, and the outcome. In the present context we need cite only this single sentence (p. 57):

> "The president of the trial chamber that convicted Bizimungu later fled Rwanda and told journalists that there had been no substantial proof of Bizimungu's guilt and that he had been convicted as a result of political pressure."

HRW's source for this statement is given in a footnote (fn. 170) as being "Didas Gasana, 'Bizimungu: Est-ce le pardon, la pression ou un plan politique?' Umuseso, no. 280, May 19-26, 2007". It is not on the face of it clear whether this represents the same source as was available to *Avocats sans Frontières* or whether the trial judge had given his account of political pressure to more than one listener. As it happens Professor Schabas' visit to Rwanda in order to conduct interviews for the purpose of preparing his report also took place in May 2007. However Mr Lewis told us that the judge below had been informed that there were different sources.

107. In our judgment there is a substantial likelihood that the trial judge said what he is alleged to have said, whether there is one source or more. There is no reason to suppose otherwise. And if it was said, there is nothing to suggest it was false. We must assess its significance. It is of course right that the relevant events took place some time ago: the trial was in 2004. It is also right that the case must have possessed an especially high profile. Balancing the whole matter (and we should not forget that the appellants, too, would have a considerable profile as defendants in a genocide trial: three were *bourgmestres*, the fourth said to have been a close associate of President Habyarimana), we regard the Bizimungu case as being significant evidence of executive interference in the judicial process in the High Court, and thus of a want of impartiality and independence.

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108. As we have said Professor Schabas was the only one of the experts prepared to say that the appellants would have a fair trial in Rwanda. His evidence is thus of great importance for the GoR's case. Here are the relevant conclusions from his first report of 30 June 2007:

> "57. By all accounts Rwanda has made extraordinary progress in rebuilding the country since the 1994 genocide. Its justice system is unrecognizable. Compared with the sham that existed in l993 and 1994 there are functioning courts with trained professional judges. There is a vigorous defence bar, that accepts its responsibility to act on behalf of the indigent. The courthouses have appropriate physical facilities for trials.

> Although most of the detention premises are still quite disgraceful, places now exist where accused persons and convicted offenders may be detained in accordance with international standards.
>
> 58. Although Rwanda is obviously making these improvements because of its desire to develop a modern justice system, there is an important incentive in the current process of transferring accused persons from the International Criminal Tribunal for Rwanda to national justice systems. For various reasons, some related to transitional justice imperatives and some merely a question of national pride, Rwanda is eager to effect these transfers. A dynamic has been established whereby international standards that are the *sine qua non* of transfer by the International Tribunal have prompted further progress and improvement in the Rwandan justice system.
>
> 59. Even the most modern and sophisticated of justice systems, in countries with long traditions of judicial impartiality and respect [for] due process, are capable of missteps. It seems to me that the issue is not whether a miscarriage of justice might occur but rather whether it is likely, and under such a standard it is my opinion that Rwanda now passes the test. I am comforted in my opinion by the apparent willingness of the Prosecutor of the International Criminal Tribunal for Rwanda to effect the transfers to Rwanda. Rwanda cannot afford to be cavalier with respect to any of the transferred accused, whether they come from the International Tribunal or [from] other States. I am confident that fair trials will be held by the High Court in Kigali, subject to intense international scrutiny, and that the individuals charged; if convicted, will be detained in conditions that are humane and acceptable."

109. Mr Lewis urged various matters as tending to show that Professor Schabas' views could be relied on. He reminded us that Professor Reyntjens had himself described Professor Schabas' report as being "of excellent quality". He referred to Professor Schabas' impressive and copious list of publications and his very distinguished *curriculum vitae.*

110. It is clear that Professor Schabas was vigorously cross-examined before the judge. Miss Ellis for EN seems to have borne the chief burden of assault on his evidence. The principal points of criticism are summarized in her skeleton argument (paragraph 8.7) as follows (1) inaccurate citation and misleading representation of documentary source material; (2) inaccurate representation of views expressed by interviewees; (3) failure to disclose significant information contained within the notebook used during interviews conducted whilst in Kigali; and (4) application of the incorrect legal test. All of these are supported by detailed citations. We will make a selection.

111. As for (1), a joint statement made by the appellants' solicitors gives particulars of partial and to an extent misleading citations by Professor Schabas from the US Department of State Human Rights Report for 2006. Further, Miss Ellis lays special

emphasis on what Professor Schabas has to say about the views of HRW and Amnesty International on the Rwandan justice system. In his first report he had stated (paragraph 18) "I note that the two main international non-governmental organisations, Amnesty International and Human Rights Watch, have been relatively muted in their recent criticisms of the Rwandan justice system". In the second report: "…I do know that for some years Human Rights Watch had an office in Rwanda headed by an international expert, and that about a year ago it closed down the office, suggesting to me that Rwanda is not a priority for that organisation". However Professor Schabas had taken no steps to contact representatives of either organisation working in Rwanda, or indeed to ascertain the true state of their views in respect of the Rwandan justice system, as to which his remarks gave an entirely false impression. In particular as regards HRW a statement made by Dinah PoKempner on 15 November 2007 asserts:

> "…Human Rights Watch established an office in Rwanda in February 1995 and has maintained an office in Rwanda continuously since that time, to the present… [it] considers the human rights situation in Rwanda to be of great importance… and [has] considered Rwanda a high priority for our work for many years and continue to do so."

Furthermore it emerged in his oral testimony that Professor Schabas had spoken with Alison des Forges (author of "Leave None to Tell the Story"), the distinguished HRW researcher, in May 2007 and must surely have appreciated the force of her views as regards the difficulties of getting justice in Rwanda.

112. These points seem to us to be objective and substantial. It is unclear why Professor Schabas, whose past distinction is undoubted, should have taken such a cavalier approach (to say the least) in particular to the work of HRW. Perhaps there is a clue to be found in another document from his pen, a paper prepared for a conference on 1 July 2008. It is entitled "Transfer and Extradition of Genocide Suspects to Rwanda", and contains this:

> "Human Rights Watch is not a neutral investigative body. It is an advocacy organization which takes positions at a political or policy level, then marshalling the evidence, such as it exists, in order to support its views. As for the International Association of Criminal Defence Attorneys, it manifests the ambiguities of all professional bodies of lawyers around the world, defending both the public concern in fair trials but also the material interests of its members. Could a factor in the organisation's opposition to transfers have been that its members earn their living at the International Criminal Tribunal for Rwanda, rather than in the national courts of Rwanda? Might this have influenced its objectivity in fact-finding?"

Professor Schabas is not, it seems, a dispassionate observer of the affairs of HRW (or the International Association of Criminal Defence Attorneys).

113. Miss Ellis' point (2) alleged inaccurate representation by Professor Schabas of views expressed by interviewees. In his first report (paragraphs 15 – 17) he refers to the

content of conversations he had with representatives of Penal Reform International and the Danish Institute of Human Rights, and refers to an example of unfairness in the justice system given by each organisation as "flimsy". He said this demonstrated the need for

> "a strong dose of caution with respect to the more general analyses presented by these organisations and, I dare say, by similar groups".

He concluded that

> "(t)here is a negativism from some observers that simply does not correspond to the reality".

114. Penal Reform International and the Danish Institute of Human Rights, together with *Avocats sans Frontières* (who also complained of having been misrepresented by Professor Schabas) compiled a "joint position" letter dated 18 September 2007, expressing their strong concerns at what Professor Schabas had said. It was sent to the British Ambassador to Rwanda and copied to the Foreign and Commonwealth Office and the Crown Prosecution Service. The three bodies' main concerns were expressed thus:

> "The references to the interviews and information given by *Avocats sans Frontières*, the Danish Institute for Human Rights and Penal Reform International are an inaccurate representation of what each of our 3 organisations said. The statements referred to in the report are taken out of context and the interpretation and quotation of the examples given, incorrect and incomplete;
>
> All three organisations understood that Professor Schabas was writing a report in his independent capacity as an academic. It was not clearly stated that he was writing a report for the Crown Prosecution Service nor did Professor Schabas request permission to quote us as organisations or individuals."

There followed correspondence in which some details of the inaccuracies complained of were given. Thus Alison Hannah, Executive Director of Penal Reform International, wrote a further letter dated 25 September 2007 in which she states *inter alia*:

> "Our mission in Rwanda is far from 'predictable grumbling' but involves detailed monitoring and research of an ongoing justice process that is taking place in a highly charged and sensitive political environment. It is not clear whether Professor Schabas has seen PRI's reports... They refer to a number of issues that may well be relevant for the trial of category 1 cases – for example, the speed with which the process was introduced; the lack of adequate training for those responsible for trying cases in the *gacaca* courts; the absence of a presumption of innocence; pressure on suspects to confess; the

> risk of false evidence being given as a means of obtaining revenge and poor prison facilities.
>
> Professor Schabas' interview with Fatima Boulnemour, our Regional Director, lasted around 20 minutes. He described himself as an independent researcher, without informing her that he was briefed to report to the CPS, at the request of the Rwandese Government. She does not accept his account of her comments, and believes he has distorted her views. It is true that he asked her if she could give an example of political influence on the justice system, and she mentioned the case of Agnes Ntamadyariror. She did not express an opinion as to whether she should have been released or not. She did express her concerns over interference by the local authorities and the speed of bringing cases before the courts posing a risk for the justice system…"

And there are other instances, including an unequivocally worded statement from the Danish Institute for Human Rights.

115. Miss Ellis' point (3) was that Professor Schabas had failed to disclose a number of significant matters from the content of interviews he had held in Kigali, until he was reminded of what he had himself recorded in his notebook. The most significant instance is that relating to Bizimungu, which we have already described. The notebook was not disclosed until November 2007. Professor Schabas was cross-examined on it in November 2007 and again in April 2008. There has been much complaint that the GoR failed to respond to requests that they provide the original or clean copies for these appeals. The appellants have not been stopped from making their points, working on the text or copy they have.

116. The Bizimungu case was not the only area in which the notebook provided unlooked for enlightenment as to what Professor Schabas had been told in Kigali. It also showed that *Avocats sans Frontières* had expressed concerns to him about fair trial guarantees which he had not relayed to the court before he was cross-examined. Then there was the plight of Agnes Ntamabyariro, or Madame Agnes (referred to in passing above). She had served as Minister of Justice during the period of the genocide. Professor Schabas had stated in writing that she had only "rather recently" been apprehended. But after meeting *Avocats sans Frontières* he noted that she had been in custody for many, many years; she had in fact been arrested in 1994 and incarcerated, without trial as we understand it, ever since. Next, concerns had been expressed to Professor Schabas by the human rights organisations about extra-judicial killings; none of that had surfaced in his reports. Last, there was a point about legal aid with which we need not take time.

117. Miss Ellis' point (4) was that for the purpose of his opinion both in writing and orally Professor Schabas applied the wrong test to the fair trial issue. There is force in this. We have seen that at paragraph 59 of his first report he stated: "It seems to me that the issue is not whether a miscarriage of justice might occur but rather whether it is likely, and under such a standard it is my opinion that Rwanda now passes the test". Clearly this is some distance from the "real risk of a flagrant denial of justice" test. Not only

is likelihood quite different from real risk; miscarriage of justice, which denotes a wrong result rather than a failure of process, is not the same as denial of justice. Cross-examined in April 2008 Professor Schabas said – feebly – "I think I said in November that I wasn't up to speed with all of the tests and the case law in the United Kingdom".

118. In his second report, of 9 November 2007, Professor Schabas sought to refute some of these criticisms, and others levelled by Professor Reyntjens and Professor Sands. Some of the broader points might be said to be matters of nuance or emphasis; but Miss Ellis' arguments are hard-edged, telling points. There is really no answer to her submission that Professor Schabas' reports and evidence in chief failed to deal with matters of great significance to the appellants' case on fair trial, yet he knew of them to the extent that they were in his notebook and he was able to address them when cross-examined. In our judgment this change of ground substantially undermines his reliability as a dispassionate expert.

Fair Trial: Conclusions

119. As will be apparent from this judgment, we accord great respect to the ICTR's decisions. However, the Appeals Chamber's finding that no reasonable Trial Chamber would have concluded that there was sufficient risk of government interference with the Rwandan judiciary to warrant denying the prosecution's transfer request was based only on the record before it, and in particular on the failure to mention any specific incidents of judicial interference (paragraph 78 above). We have had the advantage of being able to consider not only the HRW Report of July 2008, including its treatment of the Bizimungu case (paragraph 104 above), but also the evidence of Professor Reyntjens, Professor Sands and Professor Schabas, and in particular the acceptance by Professor Schabas in cross-examination on 21 April 2008 that there probably was executive interference in the Bizimungu case (see paragraph 101 above). Thus we have the evidence of a specific incident of judicial interference that the Appeals Chamber lacked.

120. More generally, we have not forgotten the scale of the dreadful tribulations suffered in Rwanda in 1994. Nor have we ignored the real and substantial measures taken to establish a judicial system capable of delivering criminal justice to acceptable standards. But our duty is to apply an objective test – real risk of flagrant denial of justice. We certainly cannot sanction extradition as a means of encouraging the Rwandan authorities to redouble their efforts to achieve a justice system that guarantees due process. That might serve a political aspiration, but would amount to denial of legal principle.

121. We stated earlier (paragraph 68) that the question whether a court is independent and impartial cannot be answered without considering the qualities of the political frame in which it is located. We have had no day-by-day details from the GoR of the conduct of the Rwandan High Court's business. No details of trials; of defences run, successfully or unsuccessfully; no details of any of the myriad events that show a court is working justly. We have reached a firm conclusion as to the gravity of the problems that would face these appellants as regards witnesses if they were returned for trial in Rwanda. Those very problems do not promise well for the judiciary's impartiality and independence. The general evidence as to the nature of the Rwandan polity offers no better promise. When one adds all the particular evidence we have

described touching the justice system, we are driven to conclude that if these appellants were returned there would be a real risk that they would suffer a flagrant denial of justice. It follows that the appeals of all four appellants under s.103 of the 2003 Act, against the decision of the judge to send the case to the Secretary of State must be allowed. They are accordingly entitled to be discharged, and the Secretary of State's order for extradition must automatically fall. There is nothing in CU's judicial review application, which will be dismissed.

OTHER GROUNDS OF APPEAL

122. For the sake of completeness we must refer, however briefly, to the remaining grounds of appeal. In summary, these were that the judge erred in concluding that:

(1) any of the appellants had a case to answer under section 84(1);
(2) there had been no lack of candour or failure of disclosure by the GoR;
(3) the extradition of VB, EN and CU was not barred by reason of the passage of time under section 79(1)(c);
(4) the extradition of VB would not infringe his rights under Article 8 of ECHR; and
(5) in respect of EN, the offences alleged against him were extradition offences as defined by section 137(2).

123. As regards the Secretary of State, we have already dealt with the appellants' submission that she erred in concluding that the MoU did not confer any additional rights above and beyond those to which they were entitled under the 2003 Act: see paragraphs 26-30 above. In addition, it was contended that the Secretary of State had erred in determining under s.93 that the MoU was a sufficient assurance that:

(1) the appellants would not be subject to the death penalty; and

(2) the GoR would uphold the rule of specialty.

We address these various arguments in turn.

No Case to Answer

124. The question for the judge under s.84(1) was whether the GoR had produced "evidence which would be sufficient to make a case requiring an answer by [each appellant] if the proceedings were the summary trial of an information against him". In answering that question the judge was obliged to reject any evidence which he considered to be "worthless"; but if he concluded that the strength or weakness of the evidence against the appellants depended on "the view to be taken of its reliability" he was entitled to take it into account: see *R v Governor of Pentonville Prison ex p. Alves* [1993] AC 284 per Lord Goff at p.292 B-D.

125. The GoR's evidence against each of the appellants was contained in a large number of written witness statements. The judge summarised the allegations against the appellants, and the evidence in the witness statements in support of those allegations, in the following paragraphs of his judgment: 250-259 (VB), 278-285 (CM), 303-322 (EN), and 353-343 (CU). Taken at face value there can be no doubt that the material in these statements was sufficient to make a case requiring an answer from each of the appellants.

126. Apart from the expert evidence given by Professor Reyntjens and Professor Sands, the evidence for the appellants consisted of numerous written statements, many of them anonymised for reasons which are set out in the judge's judgment, and oral evidence given by the two investigators, Ms Nerad and Mr Lake: see paragraphs 50-53 above. Ms Nerad and Mr Lake had not merely obtained many of the witness statements produced by the appellants. They had also investigated the reliability of the written statements relied upon by the GoR. CM gave oral evidence to the judge. The other appellants did not.

127. In summary, the appellants submitted before the judge, and this court, that the GoR's written statements were so unreliable that they were worthless and should not be admitted under s.84(3) and/or should be excluded under s.78 of the Police and Criminal Evidence Act 1984 (PACE). It was contended that many of the GoR's witnesses had a motive to lie because they had been languishing in custody for many years, often in deplorable conditions, had been vulnerable to torture or ill treatment, and in some cases were under sentence of death. Others had lost Tutsi family members in the massacres in 1994. Some were believed to be members of the Rwandan Intelligence Services (the "DMI"). There was evidence that some had been bribed to give evidence against the appellants. The statements were contradictory, uncorroborated or simply too vague to provide any proper basis for a criminal conviction, and the GoR had not sought and/or had failed to disclose, any exculpatory material.

128. The judge recorded all of these submissions, and summarised the evidence called on behalf of the appellants in the following paragraphs of his judgment: 260-277 (VB), 286-302 (CM) 323-334 (EN) and 345-356 (CU). Having considered the whole of the evidence in each case the judge concluded that each appellant had a case to answer and that the requirements of s.84(1) were met: see paragraphs 277, 302, 334 and 356 of his judgment.

129. In challenging these conclusions of the judge the appellants face two particular difficulties. Firstly, s.84 clearly anticipates that in extradition proceedings it is likely that the requesting State will seek to establish that there is a case to answer on the basis of written material, which may include summaries of witness statements: s.84(4). Insofar as the witnesses for the GoR and the appellants were able to give first hand evidence of events in Rwanda in 1994 and the appellants' involvement, or non-involvement, in the genocide at that time, the judge was considering whether there was a case to answer on the basis of their written statements alone. He pointed out that there were matters in the written evidence on both sides which would need to be carefully examined by the trial court in order to evaluate its reliability. Any court considering whether there was an arguable case under s.84(1) would be slow to dismiss written evidence as to events in Rwanda in 1994 as "worthless" simply on the basis of conflicting written evidence. As the judge pointed out, the GoR could not investigate the anonymous statements of the defence witnesses (paragraph 301 of the judgment).

130. Secondly, insofar as the appellants' written evidence was supported by the oral evidence called on their behalf, which cast doubt on the reliability of the GoR's witness statements, the judge had the advantage of hearing Ms Nerad and Mr Lake; he also heard CM giving his evidence and being cross examined upon it. We have dealt with the manner in which the judge considered the appellants' case that they would not be able to have a fair trial if returned to Rwanda, including his consideration of Ms Nerad and Mr Lake's evidence as to the difficulty of persuading witnesses to give

evidence on behalf of the appellants. We have pointed out (see paragraph 52 above) that he did not have the opportunity to consider the extent to which, in this respect, Ms Nerad and Mr Lake's evidence was consistent with the HRW Report of July 2008 and the latest decisions of the ICTR Appeals Chamber.

131. While this court is not bound by the judge's factual conclusions, particularly in respect of those aspects of the case where it has had the advantage of considering new material such as the HRW Report of July 2008, as an appellate court looking at the papers alone it will be slow to disagree with the judge's assessment of the weight to be attributed to the oral evidence insofar as it was directed to the question: was there a case to answer against each appellant? The judge considered this evidence in a number of passages, see eg paragraphs 295 (CM's evidence), 300 and 350 (Ms Nerad's evidence), and 490-493 (Mr Lake's evidence).

132. While the appellants' evidence certainly casts doubt, and in some respects substantial doubt, upon the reliability of the witness statements relied upon by the GoR, whether that doubt is justified is a matter for the trial court, not the extradition judge. As he put it in paragraph 350 of his judgment:

> "A fact finding exercise as to where the truth lies is for any court of trial in the future."

The appellants' submissions that the GoR's witness statements were so unreliable that they should not be admitted under s.84(3), or should have been excluded under s.78 of PACE, were to a substantial extent a reformulation of the points made as to why the written material relied upon by the GoR against the appellants did not amount to a case to answer. The judge dealt with these submissions in paragraphs 204-215 of his judgment. We can see no error in his conclusion that in all the circumstances, including the appellants' ability to adduce written and oral evidence to controvert the written evidence against them it was not unfair to admit under s.84(1) the witness statements relied on by the GoR.

133. We have mentioned the fact that the judge permitted the makers of the written witness statements produced on behalf of the appellants to remain anonymous if they wished. He refused to allow a witness who lived in Europe and who wished to give oral evidence on behalf of EN, witness X, to give his evidence anonymously. The judge explained his reasons for that refusal in paragraphs 243-247 of his judgment. Although Miss Ellis QC on behalf of EN criticised this decision, the judge's reasoning discloses no error of law, and his decision was well within the broad discretion conferred upon him in this respect. For these reasons we are not persuaded that the judge should have answered the question posed by s.84(1) differently in respect of any of the appellants.

Lack of Candour/Disclosure

134. We can deal very briefly with this complaint. The judge cited the relevant authorities in paragraphs 5-13 of his judgment and concluded in paragraph 23 that there was no general duty of disclosure on the GoR but

> "there nevertheless remains their duty of good faith and candour which requires them to disclose matters which destroy or severely undermine their case."

135. Having reviewed the evidence he concluded that there was no evidence that the GoR had in its possession material which would destroy or seriously undermine its case: see paragraph 36 of his judgment.

136. There were two aspects to the appellants' complaints about lack of disclosure: the lack of disclosure of potentially extenuating material in their individual cases and, more generally, the lack of any information as to how the Organic Law of 2007 worked in practice. We have dealt with the second aspect of this complaint when considering the fair trial issue (see paragraphs 64 and 83 above). While the appellants' complaints about the lack of disclosure in their individual cases might well be relevant at a trial of the allegations against them, the judge had to consider whether their complaints went so far as to demonstrate that there was a lack of candour or good faith on the part of the GoR in the extradition proceedings. He was entitled to conclude that the appellants had not discharged that burden.

Passage of Time

137. The judge dealt with this issue in paragraphs 128-168 of his judgment. While it is true that the offences which the appellants are alleged to have committed occurred many years ago during the genocide in 1994, the judge correctly concluded that there was nothing in the material before him to support the contention that it would be unjust or oppressive to extradite VB, EN or CU to Rwanda by reason of the passage of time. We have concluded that if the appellants were returned there is a real risk that they would suffer a flagrant injustice (paragraph 121 above); but that injustice would not be caused by the passage of time. As the written witness statements produced on behalf of the GoR and the appellants demonstrate, despite the passage of time, there is no shortage of potential witnesses. The difficulty is in persuading them to come forward, and in the case of those outside Rwanda, to travel to Rwanda to give evidence on the appellants' behalf. It is common ground that the ICTR is still able to conduct fair trials of those accused of involvement in the genocide despite the passage of time since 1994. The passage of time would not be an obstacle to a fair trial in Rwanda if that trial would be held before an independent and impartial tribunal and witnesses would feel able to testify on behalf of the appellants.

138. The judge summarised each of the appellants' personal circumstances and rightly concluded that they were not such as to make it oppressive by reason of the passage of time to return them to Rwanda. We are, however, troubled by his conclusion that the appellants had "taken steps to avoid possible detection" (paragraph 150) or "fled Rwanda in order to avoid prosecution" (paragraphs 159 and 168). The appellants certainly fled from Rwanda, but whether they did so to avoid prosecution because they were in some way responsible for the killings, or to avoid persecution because they feared that they and their families would be killed, is the very issue that is in dispute between them and the GoR. However the judge's questionable findings on this aspect do not generate or support a basis of appeal on passage of time grounds or otherwise.

Article 8

139. It was submitted on behalf of VB that to extradite him to Rwanda would be a disproportionate interference with his rights under Article 8(2) of the ECHR. There were two limbs to this argument: the deficiencies in the legal system under which VB

would be tried in Rwanda, and the proposition that there was jurisdiction to try him in the UK. The judge did not find it necessary to resolve the latter point (paragraph 546 of the judgment). Nor do we. Since we have found that the deficiencies in the legal system under which VB would be tried in Rwanda are such that there is a real risk that he would suffer a flagrant denial of justice, the question of the proportionality of extraditing him to face trial there does not arise. If the legal system of Rwanda had offered VB the prospect of a fair trial it would have been not merely proportionate, but plainly the most sensible course to extradite him to the country where the alleged offences were committed and where most of the potential witnesses still live whether or not there was also jurisdiction to try him in the UK.

Extradition Offences

140. Notwithstanding the fact that Rwanda had acceded to the Genocide Convention and was a signatory to the Geneva Convention (IV) relating to the Protection of Civilian Persons in time of War, it was submitted on behalf of EN that genocide, conspiracy to commit genocide and complicity in genocide (charges 1-3 in the request for extradition of EN) and crimes against humanity (charge 4) were not offences punishable under Rwandan Law in 1994. The judge dealt with this submission in paragraphs 80-93 of his judgment. Putting the point at its lowest, there does appear to be a real doubt as to whether mere accession to the two Conventions, without further domestic legislation to prescribe any punishment for the offences described in them, would suffice for the purposes of s.137(2). Professor Schabas said in his book "Genocide in International Law" that Rwanda had ratified the Genocide Convention:

> "But because of the non-self-executing character of the convention, it could not readily be invoked in prosecutions. Rwandan legislation later admitted this in the preamble to legislation enacted in 1996 to facilitate prosecutions for genocide."

141. In the *Kamali* decision (see paragraph 47 above) the Court of Appeal in Paris noted, apparently without demur, the appellants' contention that one of the reasons why the extradition request was not lawful was:

> "that it results in effect from the legislation applicable in Rwanda, more specifically law No 33bis/2003 of 6 September 2003, that repression of acts qualified as genocide or crimes against humanity were up till then absent from the criminal apparatus of this country."

142. Given our conclusion on the "fair trial" issue (above) we do not need to resolve this question, and would be reluctant to do so without cogent expert evidence as to what was the position under the domestic law of Rwanda in 1994. The judge did his best to resolve the issue on the very limited material before him. We do not think that it would be safe to reach any firm conclusion, which might well be of importance in other extradition requests by the GoR, without more information on this topic.

The Appeal against the Secretary of State

143. The contention that the Secretary of State had erred in concluding that the appellants would not be sentenced to death was not pursued in oral submissions. The ICTR was satisfied in the *Munyakazi, Kanyarukiga, Hategekimana and Gatete* cases (above) that the death penalty had been abolished in Rwanda. There was ample material to justify the Secretary of State's conclusion that there was no bar to extradition under s.94(1).

144. The Secretary of State accepted that for the purposes of s.95 "speciality arrangements with Rwanda should not just exist but also be effective". In summary, she concluded that while there was no track record of extradition arrangements with the GoR its willingness to accept and abide by the obligations in the MoU could not be divorced from the fact that it was actively seeking the transfer of cases from the ICTR. In these circumstances the Secretary of State saw

> "no reason why Rwanda would compromise its relations with the UK and its future ability to seek the surrender of other individuals from the United Kingdom, and indeed from other states, by not upholding the rule of speciality and by not giving effect to Paragraph 8 of the MOU."

145. The likelihood of the GoR upholding the rule of speciality cannot be considered in isolation from the fair trial issues (above). If we had concluded that there was no real risk of executive interference with the judiciary we would also have been satisfied that the GoR would uphold the rule of speciality. Since we do consider that there is such a risk we are unable to share the Secretary of State's confidence that the GoR would uphold the rule of speciality. The rule of speciality is but one aspect of the rule of law and there can be no rule of law unless there is an independent judiciary free from executive interference. In these circumstances the s.108 appeals against the Secretary of State's orders for extradition must also be allowed.

Later Developments

146. Towards the end of the hearing evidence emerged that CU and EN had been tried in their absence before *gacaca* courts. In the case of CU an acquittal was declared by the relevant Gacaca Appeal Court to be a nullity on the ground of lack of jurisdiction. In the case of EN there had been a conviction of certain offences at one Gacaca Court, and an acquittal of other apparently similar offences in another Gacaca Court. The evidence was still emerging as the hearing before us concluded. Professor Schabas told the judge that there was no possibility whatsoever that the appellants could be tried by the *gacaca* courts. It is not clear whether this surprising turn of events was simply a case of the left hand not knowing what the right was doing, or an indication of something more sinister. Had we been minded to reach a different conclusion on the fair trial issue it would have been necessary to explore the implications of these *gacaca* proceedings in more detail.

147. Further material relating to the *gacaca* proceedings and also to a number of other issues that had been raised during the hearing was supplied to us after the hearing had concluded. It is unnecessary to refer to that material since none of it casts any doubt on our conclusions in paragraphs 119-121 (above) in respect of the principal issue in the appeals.

CONCLUSION

148. In the result, as we have indicated, the appeals of all four appellants against both the judge's decision and the Secretary of State's orders are allowed and CU's application for judicial review of the Secretary of State's order in his case is dismissed.