IN THE WESTMINSTER MAGISTRATES' COURT

BETWEEN

THE GOVERNMENT OF THE REPUBLIC OF RWANDA

Requesting State

- V -

VINCENT BROWN (AKA VINCENT BAJINYA), CHARLES MUNYAZE-ZA, EMMANUEL NTEZIRYAYO, CELESTIN UGIRASHEBUJA AND CELESTIN MUTABARUKA

Requested Persons

INDEX TO JUDGMENT

Glossary

Bourgmestre	**Government representative in the communes**
KBA	**Kigali Bar Association**
NPPA	**Public Prosecution Service of Rwanda**
RBA	**Rwandan Bar Association**
WPU	**Witness Protection Unit ran by the Registrars of the High Court and Supreme Court**
WVSU	**Witness and Victims Support Unit**

Introduction

1. This is a request by the Government of the Republic of Rwanda ("GoR") for the extradition of Vincent Brown, Charles Munyaneza, Emmanuel Nteziryayo, Celestin Ugirashebuja and Celeste Mutabaruka. The request is set out in the Affidavit of Martin Ngoga in Support of Extradition Requests, who was at the date of the affidavit the Prosecutor General of the Republic of Rwanda.

2. Vincent Brown (aka Vincent Bajinya ("VB") but called Brown in this judgment), Charles Munyaneza ("CM"), Emmanuel Nteziryayo ("EN"), Celestin Ugirashebuja ("CU") and Celeste Mutabaruka ("CMU") face eight similar charges. The charges are the following: genocide; conspiracy to commit genocide; complicity in genocide; crimes against humanity; premeditated murder and conspiracy to commit murder; inciting, aiding or abetting public disorder; participation in acts of devastation, massacres and looting and finally formation, membership, leadership and participation in an association of a criminal gang whose purpose and existence was to do harm to people or their property.

Representation

3. The representation is as follows: the GoR is represented by James Lewis QC, John Jones QC, Ben Brandon and Gemma Lindfield. Dr Vincent Brown is represented by Alun Jones QC and Sam Blom-Cooper, Charles Munyaneza by Tim Moloney QC and Ian Edwards, Emmanuel Nteziryayo by Diana Ellis QC and Joanna Evans, Celestin Ugirashebuja by Edward Fitzgerald QC and Rachel Kapila then Kate O'Raghallaigh and Celestin Mutabaruka by Helen Malcolm QC and Mark Weeks. I am very grateful to all counsel in this case who have very effectively placed all arguments and relevant evidence before me.

Course of the proceedings – 2009 and 2015

4. The GoR sought the extradition of four of the five Requested Persons ("RPs"), VB, CM, EN and CU in 2008. On 6th June 2008 District Judge Anthony Evans ordered their extradition finding the relevant provisions of the Extradition Act 2003 ("EA") had been met. The RPs appealed and on 8th April 2009 the Divisional Court discharged the four men on the basis that they "*would suffer a real risk of a flagrant denial of justice by reason of their likely inability to adduce the evidence of supporting witnesses*". (Paragraph 66, *Brown and others v The Government of Rwanda* [2009] EWHC 770 (Admin)).

5. The Divisional Court also considered whether a court would be independent and impartial and concluded that the question could not be answered without considering the qualities of the political framework. Neither Rwanda's polity nor the problems they had found in relation to defence witnesses promised "*well for the judiciary's impartiality and independence*". They concluded that the RPs if returned would be at real risk of suffering a flagrant denial of justice (Paragraph 121 of the judgment).

6. Celestin Mutabaruka ("CMU") is a new requested person joined with the other four who were the RPs in 2008 and 2009.

Evidence and submissions

7. There is a large amount of material in the files that I have been provided with and I do not refer to all of it in this judgment. I have counted 59 files without the submissions and over 23,000 pages of evidence. I have picked out what I consider to be some of the important evidence that I have to consider to enable me to make a decision. As it is, I am conscious of the length of this judgment which has to deal with a number of detailed issues raised by the defence.

8. After preliminary applications the GoR opened their case on 3rd March 2014, evidence was heard on 63 days spread over 16 months, with an adjournment of six months in 2014 whilst first the Divisional Court, then the Supreme Court considered an interim ruling I gave in relation to anonymous witnesses. There were delays caused too because of the time it took for the legal aid agency to give advance permission for certain investigation expenses. This was understandable as the investigators instructed by the defence spent a number of weeks in Rwanda, first of all identifying witnesses and then interviewing them before in some cases marshalling them to a place from which they could give evidence, usually confidentially, to this court. Finally it was difficult to find dates when counsel and the court were available. The final day of evidence was 30th July 2015.

9. Written submissions subsequently were received in this order: from the RPs on or about 19th August 2015, from the GoR on 15th September 2015, on 5th October 2015, the GoR at my invitation provided further written submissions in relation to issues that they had failed to deal with in their original submissions and the RPs replied to the GoR's further submissions on various dates ending 15th October 2015. On 22nd October the ICTR MICT Trial Chamber brought out an important decision in the transfer case of Uwinkindi. I was sent at my request the Rwandan Chief Justice's new practice direction in relation to defence applications for funds for investigation. I requested and was sent a response to the decision of the MICT in Uwinkindi from all RPs on 11th November 2015 and then adjourned for judgment. The submissions totalled about 1500 pages.

10. The advantage of the time that this case has taken in the magistrates' court is that it has been possible to see how some transferred defendants are being tried in the Specialised Chamber of the High Court in Kigali, the Court where these accused, if extradited, would be tried. I have had the advantage too of reading the ICTR monitoring reports in relation to the transfer cases of Uwinkindi and Munyagishari and of hearing the GoR's expert, Judge Witteveen's, view of the trials of the transferred defendants. None of that important evidence would have been available if these proceedings had been completed in 2014.

The GoR's case in the current proceedings 'sea change'

11. The GoR in these current proceedings rely on what they have called a sea change in the international courts' approach to Rwandan cases from 2009 onwards. The GoR points out that since 2009 no court has refused to extradite, transfer or deport to Rwanda those accused of genocide related charges.

12. There is an exception to this approach, on 27th November 2015, as I was completing this judgment, a Dutch court in the Hague refused to extradite a Rwandan, Mr Iyamiremye, accused of genocide related offences, on the grounds that to return him to Rwanda would be a flagrant breach of his Article 6 rights. I received the English translation of the judgment on 10th December 2015 which made it clear the Dutch court was relying on the evidence Mr Witteveen gave in these extradition proceedings. I am told the judgment is subject to appeal. Because of the stage these extradition proceedings had reached I have not asked for further submissions from the parties and I am not going to rely on the judgment of the Dutch court.

13. The cases of five defendants transferred or extradited to Rwanda since 2009 are relied on by the GoR in relation to Article 6, those of Jean Uwinkindi, Bernard Munyagishari, Leon Mugesera, Emmanuel Mbarushimana and Charles Bandora. For ease of reference I will refer to them by their family names, no disrespect is intended. There is also the case of Ahorugeze in which the ECtHR makes it clear that ICTR decisions to transfer use a higher threshold than the test for Article 6. Rule 11 *bis* of the Rules of Procedure and Evidence of the ICTR stipulates that the referring chamber has to find that the RP will receive a fair trial in the requesting State.

14. These five defendants are now in Rwanda. One, Bandora, has been convicted and was sentenced to 30 years' imprisonment on 15th May 2015 and the others are either being tried or awaiting trial. I will look at these cases in more detail later in the judgment at Paragraph 285 onwards.

15. The GoR argues that the 'sea change' in the international courts' approach is due to a number of changes to Rwandan law which have taken place in the last few years which will ensure any returned accused will have a fair trial.

16. The changes relied on by the GoR are set out by Mr Ngoga in his affidavit in section VI under Fair Trial developments at Page 70, Paragraph 222 onwards. The changes he identifies were in response to criticisms made by the ICTR and the High Court in *Brown and others*.

17. The original Transfer Law of 2007 was amended by the 2009 Transfer Amendment Law. The changes include a new provision providing for the President of the High Court to designate a quorum of three or more Judges to try the case. Mr Ngoga deals with the Transfer Laws at Section VI A at Page 68 of the bundle.

18. Article 2 ensures that any witness who gives evidence in a transfer case cannot be prosecuted for anything said or done in the course of a trial, which would

protect witnesses from being prosecuted for contravening Rwandan laws on genocide ideology.

19. Article 3 allows for the taking of evidence from witnesses who are unable or for good reason unwilling to appear before the High Court to give evidence. Evidence can be heard by video-link or by deposition in Rwanda or abroad or by a judge sitting in a foreign jurisdiction. The request for taking evidence in this way must include the name and whereabouts of the witness and the reason why this has to be done.

20. Mr Ngoga also relies on developments in representation. He says as of 2nd April 2013 there are 686 attorneys admitted to the Rwandan Bar and over a third of these have over five years' experience including in the defence of genocide cases. He compares this to only 280 attorneys in 2008. He points out that foreign lawyers can come and work in Rwanda.

21. Mr Ngoga deals with legal aid briefly at Paragraph 229 onwards. It is a right within the system and all members of the Bar, including foreign attorneys working in Rwanda, are obliged to provide pro bono legal services. Article 13(6) of the Transfer Law provides for indigent accused to have free representation. The Rwandan Bar Association ("RBA" later the Kigali Bar Association ("KBA") has to provide legal assistance to those who have insufficient resources. Finally the Ministry of Justice ("MiniJust") pays a monthly stipend to the lawyers to provide legal services and has allocated specific funds for transferred and extradited defendants.

22. His section D from Paragraph 232 onwards deals with facilitating defence investigations. He explains that the judicial police conduct investigations for and against the accused and the defence is on the same footing as the prosecution. If the defence is of the view that there are defence witnesses who have not been interviewed then the defence may ask for that to happen. At Paragraph 235 "*the defence, of course, is free to conduct their own investigations independent from the police investigation to develop new leads or information*". In section E, Mr Ngoga outlines the way Rwanda facilitates defence travel to and from Rwanda. The assistance offered which includes providing immigration documents, personal security etc does not include financial assistance.

23. Section F of the affidavit deals with the witness protection programme. There are two witness protection bodies in Rwanda. The first is the Witness and Victim Support Unit ("WVSU") housed with the prosecutor's office. The WVSU was set up in 2006 with advice from external experts and financial support from bodies including DFID and the UN. As Mr Ngoga says in his affidavit at Page 75, Paragraph 247 onwards, it was designed to be neutral and to assist both prosecution and defence witnesses before, during and after a trial. Mr Ngoga explains how the unit deals with threats to witnesses.

24. In response to concerns that some defence witnesses might be reluctant to use the WVSU, a second body, the Witness Protection Unit ("WPU"), was set up more recently under the direction of the judiciary. Mr Ngoga explained at

Paragraph 260 that the Registrars of both the High Court and the Supreme Court are charged with providing security to witnesses once a request has been made to the court.

25. In relation to video-link evidence, Mr Ngoga explains at section H, Paragraph 263 onwards that the Supreme Court and two High Court centres have the equipment. Two intermediate courts can also be used for video-link evidence. The video-link facility has been used to hear witnesses giving evidence for prosecutions taking place in Finland and Canada. In the trial of Mr Munyaneza in Canada, 14 prosecution witnesses and seven defence witnesses gave evidence in Rwanda via the video-link.

26. In terms of the judiciary, Mr Ngoga states in Section I of the affidavit that they are impartial and independent. They now have qualifications. In 2008 there was a change to the judges' tenure which used to be for life, after an amendment to the law in 2003, but has now been changed to tenure for a determinate term of office "*that may be renewable by the High Council of the Judiciary in accordance with the provision of the law relating to their status, following their evaluation*". They may be removed for bad conduct, incompetence or serious professional misconduct. The High Council of the Judiciary decides whether the grounds exist. I have no evidence about how that is working in practice other than the evidence about the number of judges who have been dismissed since 2004.

27. Hearings are conducted in public and reasons for decisions have to be given. In terms of the rate of convictions and acquittals, in 2008 there were 283 criminal trials in the High Court, 80 of which (about 30%) resulted in acquittals. In 2009, 238 High Court judgments were appealed to the Supreme Court, only 19 were reversed. Mr Ngoga explains that between 2006 and 2010, the High Court heard 36 genocide cases but does not say whether there were any acquittals.

28. Another change relied upon is set out in Section J. On 28th November 2011 the Parliament passed Article 13 allowing the President of the Supreme Court on his own initiative, or at the request of the accused or his or her lawyer, or of the prosecution, to request international judicial cooperation asking judges from other countries to come and work with judges from Rwanda on cases of international crimes (such as the current case). Mr Ngoga says he cannot see why such an application, if made, would not be granted.

29. Finally at Section VIII Paragraph 280 onwards, Mr Ngoga relies on what he describes as litmus or touchstone decisions on transfer. He relies, firstly, on the case of Uwinkindi at the ICTR which was the first case that court transferred when on 28th June 2011 it ordered the accused to stand trial in Rwanda. I will deal with Uwinkindi in more detail later.

30. At the ICTR, the case of Uwinkindi considered issues of fair trial; availability and protection of witnesses; effective defence; judicial independence and impartiality amongst others. An appeal against that decision to transfer him was dismissed. Since then Mr Uwinkindi has attempted to revoke the decision, to

no avail. At Section IX Mr Ngoga relies on the case of *Ahorugeze v Sweden*, in which an order for extradition in Sweden made on 6th May 2009 was upheld by the European Court of Human Rights ("ECHR") on 27th October 2011. It was the first order for extradition to Rwanda from a European country.

31. After the close of evidence in this extradition case there was a change in Rwandan law in August 2015 to allow for an application to be made to the registrar of the Specialised Chamber of the High Court hearing international crimes and cross-border crimes, for the funding of defence investigations. If the correct information is provided which indicates who is going, the means of travel and the purpose, the High Court will determine whether the investigation is reasonable. If the High Court finds it reasonable, then it will be funded by MiniJust. Unfortunately it has not been possible to see whether and how this crucial change to the law will apply in practice.

32. I noted one other relevant change since the decision in *Brown and others* relied on by the ECtHR in *Ahorugeze v Sweden.* In May 2009 there was an amendment to Article 13 of the Transfer Law which introduced witnesses' immunity from prosecution for statements made or actions taken during the trial. This, I expect, would make it easier for witnesses to give evidence.

The defence case

33. The following issues are raised by the RPs:

- **Double jeopardy** under section 79(1)(a) and section 80 of the EA. Ntezilyayo and Mutabaruka rely on this bar to extradition on the basis of the verdicts obtained in Gacaca proceedings in relation to the offences for which their extradition is sought.

- **Extraneous considerations** under section 79(1)(b) and 81 of the EA. All five RPs rely on this bar. VB contends that the GoR approach is that all 1994 Hutu officials were involved in the genocide and the prosecution has been made against him because of his high profile in the diaspora. CM, EN and CU do so on the basis they would be prejudiced if returned to Rwanda to stand trial on account of their actual or imputed political opinions as former *bourgmestres* under the Habyarimana regime coupled with their Hutu ethnicity. CMU was a politician in 1994 and says he is an opponent of the current regime in Kigali. He contends he would be prejudiced at any trial because of his political opinions.

- **Passage of time** under section 79(1)(c) and section 82 of the EA. This bar is relied upon by VB and EN. They contend that extradition would be unjust and oppressive by reason of the passage of time and the conduct of the Rwandan authorities in the intervening years.

- **No sufficient evidence** to make a case requiring the RP to make an answer as required by section 84(1) of the 2003 Act. VB, CM, EN

and CU contend there is insufficient evidence against them or the evidence is so undermined that the evidence relied upon by the GoR is worthless. CU accepts the High Court in 2009 upheld the District Judge's ruling that there was a prima facie case but this court is invited to consider whether further evidence from Scarlet Nerad and the evidence of CU1 casts such doubt that it can no longer be said there is a prima facie case.

- Extradition would be incompatible with their Convention rights, so they should be discharged under section 87(2) of the EA:

  i. **Article 3** - CM and CU adopt VB's arguments at Page 25, Paragraphs 110 to 142 inclusive of the Closing Submissions. EN also argues that extradition would breach his Article 3 rights.
  ii. **Article 6** – All the RPs. The defence rely on a number of witnesses who say they are too frightened to give evidence for the defence and evidence which they say indicates that prosecution ones have been bribed or threatened into giving evidence; furthermore they contend the judges are not independent and impartial. Finally, the RPs rely on the evidence of Judge Witteveen, the GoR expert, who says the defence fraternity in Rwanda is not sufficiently able or experienced to defend in these difficult cases. The defence argue that after *Brown and others* in 2009 all these issues must be considered in the light of the current political situation in Rwanda.
  iii. **Article 8** – VB and EN raise this right as a reason for not extraditing them.

- **Abuse of Process** - VB, EN and CU argue they should be discharged because the proceedings against them are an abuse. EN argues abuse as an alternative to his submissions under sections 80, 81, 82 and Article 8. CU argues that in the light of his acquittal by the Gacaca court in 2008 it is an abuse to pursue the extradition in relation to these allegations which overlap substantially with the matters tried in the Gacaca court.

- **Forum** – Alun Jones QC argues on behalf of Dr Brown that the allegations should be investigated and, if appropriate, tried in this jurisdiction and the GoR has unreasonably failed to agree to an investigation and trial here.

34. In terms of the evidence of change, the GoR and the defence have focussed their attentions on the proceedings of alleged *genocidaires* returned to Rwanda since the Uwinkindi decision of 28th June 2011. The defence argue there has been no evidence that any of the accused returned to Rwanda have used video-link facilities in their proceedings nor has the provision to allow international judges to try such cases yet been invoked. There is no evidence from the returned defendants' proceedings that they have enquired about or used the added facility for the protection of witnesses but then only one case has been completed (Bandora) and the others are still proceeding.

35. To this day the approach of the GoR to criticism from the courts and the international community is to adopt new laws to counter what is being said. The most recent example is the change in August 2015 to allow funding for defence investigations. This change was made after criticism about the failure to fund defence investigations so that applications can be made for defence investigations to be publicly funded.

36. Generally this approach to criticism is admirable but the issue for this court is whether these changes are applied or whether they are laws made but not put into practice. As was said by an unnamed Rwandan judge to Human Rights Watch ("HRW") for their July 2008 Report "*We have beautiful laws, among the best in the world. But they are not obeyed*" (*Brown and others* Paragraph 83).

Background

37. All the matters charged are alleged to have taken place in Rwanda during the genocide of April to July 1994.

38. Some of the background is set out by Laws LJ in *Brown and others* at Paragraph 8 in the judgment. I quote:

> "*8. Before colonization, 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 Tutsis 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 guerilla 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 from 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 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 International Criminal Tribunal for Rwanda (ICTR) … 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."

39. The story is taken up by Martin Ngoga, the Prosecutor General of the Republic of Rwanda, in the Affidavit in Support of the Extradition Requests at Annex A, Bundle 1, Page 11 at Paragraph 34. As he explains it:

Between 6 April 1994 and 17 July 1994, genocide against the Tutsi ethnic group occurred in Rwanda;

Between 1 January 1994 and 17 July 1994, the Twa, Tutsi and Hutu existed as protected groups falling under the Genocide Convention;

Between 6 April 1994 and 17 July 1994, throughout Rwanda, there were widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused serious bodily or mental harm to persons perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity and

Between 6 April 1994 and 17 July 1994, there was an armed conflict in Rwanda that was not of an international character".

40. Mr Ngoga goes on to set out the Tribunal of the ICTR's findings regarding significant events of the genocide in his Paragraphs 36 to 40:

> *"36 On 6th April 1994, President Habyarimana and other heads of State in the Region met in Dar es Salaam to discuss the implementation of the Arusha Accords. On returning to Kigali airport, the plane carrying the President Habyarimana and the Burundian President was shot down. All on board were killed.*
>
> *37 Immediately after the shooting down of the plane, the Rwandan army and militia erected road blocks around Kigali. Before dawn on 7th April, in various parts of the country, the Presidential Guard and the militia started to kill Tutsi and moderate Hutu known to be in favour of the Arusha Accords. The Ministers of the coalition government were amongst the first victims.*
>
> *38 A radio announcement on 7th April 1994 regarding the death of the President ordered people to remain at home. The purpose of this was to facilitate the movement of soldiers and gendarmes to move from house to house in order to kill real and perceived enemies of the Hutu authorities and militia with reference to those on execution lists.*
>
> *39 On 12th April RPF troops entered Kigali, forcing the interim government to retreat north to the prefecture of Gitarama.*
>
> *40 Between 14th and 21st April, the killing campaign reached its peak. The President of the interim government, the Prime Minister and key ministers travelled to the prefectures Butare and Gikongoro. This marked the commencement of killings in these areas, which spread throughout Rwanda. The killings continued up until 18th July 1994".*

Anonymous evidence

41. In December 2013 the defence argued that this court had the power to hear evidence from certain witnesses of fact in the absence of the GoR. I found I did not. As a result of my ruling in January 2014 the RPs appealed to the Divisional Court then the Supreme Court which considered the position in a judgment *VB and others v Westminster Magistrates' Court* [2014] UKSC 59 given on 5th November 2014. This court gave a ruling in relation to anonymous defence witnesses on 30th July 2015 based on Lord Hughes' consideration of anonymous witnesses in Paragraph 73 of *VB and others*. The defence were to provide the court with the "*fullest information of identity*" of the various anonymous witnesses.

42. As a result of the ruling I received three notes, two in August 2015, from Diana Ellis QC and Miss Evans for Mr Ntezilayayo and the other from Sam Blom-Cooper for Dr Brown and a third in December 2015 from counsel for Ugirashebuja. These notes were not copied to the GoR. They enclosed material giving the court "*the fullest information of identity*" (Paragraph 73) in relation to certain witnesses. In Dr Brown's case this related to the witnesses

BRO/A to D. This included the name, date of birth, profession and address of the witnesses and in one case further information was given which I accept comes under the description "*fullest information as to identity*". In relation to Mr Ntezilyayo I received a new table BB which was based on tables B i) and B ii) produced by EN's defence team. BB is entitled "Defence Statements from Anonymous Witnesses – Confidential" and contains two additional columns headed 'Name' and 'Key Details Pertaining to Identity'. The table BB gives the "*fullest information*" in relation to 25 anonymous witnesses whose evidence is summarised in tables B i) and B ii). Ugirashebuja's note included the full details of CU/1 to 3 and all the other anonymous witnesses. The notes from counsel are stored securely.

The allegations made against each RP

43. None of the allegations made against the requested persons ("RPs") is related to the others. Indeed most of the RPs were living in different parts of Rwanda during the genocide. The allegations made against each RP are to be found in the GoR's Annex Bundle 1 and Bundle 2 and are the following:

44. **Vincent Brown**, it is said (and I take the five categories from Alun Jones QC's Closing Submissions, Appendix D, Paragraph 35): 1. That VB was a close associate of President Habyarimana, a member of the Akazu (the President's inner circle), he participated in MRND party meetings prior to April 1994 and was a member of MRND until 1993 when CDR was founded. In 1993 he attended a meeting in Myamirambo Stadium in Kigali where Hutus were called to disassociate themselves from the Tutsi who were said to be the enemy, at this meeting VB was said to be in charge of protocol. Finally in 1. he attended the swearing in ceremony for the interim government on 4th July 1994 at Kibehehank where he collected financial contributions. 2. He established and supervised the manning of roadblocks in Rugenge (Kigali) and near to Kibihekane School in the North-West of Rwanda where killings took place. He is said to have participated in the killings of 3. Dominique, 4. Leandre in Rugenge, 5. Charlotte Kamugaja and baby in Rugenge.

45. In the case of **Charles Munyaneza,** it is alleged that as the *bourgmestre* of Kinyamakara in Gikongoro province he encouraged others to kill Tutsis, chaired meetings and organised roadblocks. CM took part in the looting of a property and he punished those who looted without killing the owners first; he also led a number of attacks over some days on Ruhashya over the Mwogo River which killed thousands of Tutsis.

46. **Emmanuel Nteziryayo** was the *bourgmestre* in Mudasomwa commune and therefore was another *bourgmestre* of the Gikongoro province (see Munyaneza above), it is alleged against him that as a bourgmestre he held meetings with *conseillers* and gave them guns, he told them to set up roadblocks and to kill Tutsis, he told people that Tutsi bodies should be hidden by being buried, he was present at the same meetings that CM was at on 13th April and on 26th April 1994 when the *bourgmestres* reported on the numbers of Tutsis that had been killed in their areas. In May 1994 he did nothing to prevent some people

being beaten at a roadblock. He later fled to the Congo and was a leader in a refugee camp.

47. The allegations against **Celestin Ugirashebuja** is that he was the *bourgmestre* of Kigoma commune and a long standing member of the MRND. CU would pass by the road blocks and find out how many had been killed. He held a meeting of the *conseillers* and *responsables* at the commune office and instructed them to set up roadblocks and bring any "*inyenzi*" (cockroaches) to him. The commune policemen who were under his direct control played an important part in the killings. CU urged people attending meetings to kill Tutsis. He gave instructions that certain Tutsis were to be tricked to come out of hiding so they could be killed, he ordered that Tutsi bodies should be moved so they would not be seen by foreigners. He is also alleged to have distributed guns. In May 1994 he addressed about 300 people and urged them to destroy property belonging to Tutsis.

48. The evidence against **Celestin Mutabaruka** are that he took over the running of a forest management company in Musebeya, Gikongoro called Crete Zaire Nil ("CZN") in January 1992. When he took over he brought in ethnic segregation and by June 1992 it is alleged he was persecuting and discriminating against Tutsis. In November or December 1993 there was an attempt to remove him from his post when he was to be replaced by a Tutsi. CMU refused to go and claimed that his removal was a political issue between two parties, the MRND and PSD. There is documentary evidence which confirms his writing to the President of Rwanda saying he had set up a political party and asking the President to intervene in his removal from CZN.

49. The evidence shows he set up a political party on 20th October 1993 and called it "UNISODEC". It had 50 members (see Page 464 of Annex Bundle 2 – Page 522 for the statutes; Page 537). He describes himself as the President of UNISODEC in a letter dated 4th January 1994. Mr Ngoga describes the party as being an ally of MRND formed as a satellite party in order to strengthen opposition to the RPF (Paragraph 182 Page 53 GoR Annex A). CMU was said to enjoy the support of the top leadership of the MRND.

50. Importantly as far as the prima facie case is concerned, it is alleged that during the genocide he played an important role along with his close friend and colleague Jonas Kanyarutoki in the killings which took place at Gatare when people who had taken shelter in the Presbyterian Church were persuaded to leave and then killed on 17th April 1994. He was an organiser and is mentioned by a number of those involved. Once the killing had finished he checked on where the bodies had been dumped.

51. In mid May 1994, CMU led a gang of killers that murdered many people on Muyira hill in Bisesero. Using CZN vehicles, he led Interahamwe and fired into the crowd killing one person through the eye. He returned the following day and finished off any survivors. He was said to be one of the leaders who would stand with the Interahamwe and give them briefings. About 40,000 Tutsis are said to have died in those attacks.

52. CMU fled to Congo with his wife in July 1994. One witness who replaced him as director of CZN found several of his documents in his former office. Various letters are exhibits including his asking the President, Prime Minister and Commanding Officer of the Gikongoro gendarmerie for a firearm, another a letter from a CZN employee complaining that he had sacked a number of Tutsis unfairly and a letter from Oswald Rugema complaining of unfair dismissal and of being arrested at the behest of the CMU on what he says is a trumped up charge. In one of the letters which is undated CMU denies the accusations of ethnic segregation at CZN (GoR Annex Bundle 2, Page 505). These letters continue into 1994.

Preliminary and uncontested matters

53. There are no treaty arrangements between the United Kingdom and the GoR but there is a Memorandum of Understanding ("MOU") entered into by GoR and the UK in relation to the four first RPs dated 14th September 2006 and a second one dated 22nd December 2006. The MOU engages section 194 of the EA. Under that section the application must be treated as if it were a request for extradition to a designated Part 2 territory.

54. I turn to section 70 of the EA. The first requirement is that a valid request must be received from the requesting State. There is a certificate issued by the Secretary of State stating that the request is valid and made in the approved way.

55. The initial stages of the extradition hearing are governed by section 78 of the EA. The judge must decide whether the documents sent to him or her by the Secretary of State include the request and certificate, the particulars of the person requested and particulars of the offences alleged. There is no suggestion by the defence that the requirements of section 78(2) are not met and I find that they are.

56. I turn next to section 78(4). The court must decide whether the defendant appearing in court is the person requested; whether the offence is an extradition crime and whether copies of the documents sent to the judge by the Secretary of State have been served on the person. No issues are taken in relation to any of these requirements and I am satisfied on the balance of probabilities that section 78(4) is satisfied and therefore I must then proceed under section 79 (section 78(7)).

Contested issues

57. The relevant provisions of section 79 are the following:

> *"(1) if the judge is required to proceed under this section he must decide whether the person's extradition to the category 2 territory is barred by reason of –*
>
> *i. the rule against double jeopardy*
> *ii. extraneous considerations*
> *iii. the passage of time*

iv. …
v. …

Double jeopardy raised by EN and CMU

58. The interpretation of double jeopardy is found in section 80 of the EA.

80 A person's extradition to a category 2 territory is barred by reason of the rule against double jeopardy if (and only if) it appears that he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction if he were charged with the extradition offence in the part of the United Kingdom where the judge exercises his jurisdiction.

59. There are four relevant decisions made by the Gacaca courts, not three as the GoR states in their submissions at Page 76, Paragraph 303, two in relation to CMU and two in relation to EN. A separate Gacaca acquittal which was quashed on appeal in relation to CU is argued by Mr Fitzgerald to be an abuse of process and will be dealt with later in this judgment.

60. The Gacaca process generally is a community proceedings conducted by lay persons in the absence of lawyers, defence or prosecutors, where there are no charges, indictments, defence statements, disclosure, or even statements generally, no transcript, no judgment or full reasons given for any particular decision, indeed remarkably little information exists about any particular hearing. I say remarkably but of course, these proceedings were happening in large numbers up and down Rwanda. The judges are persons of integrity who may not be able to read or write. The Gacaca system was set up to deal with the extremely large number of prisoners awaiting trial in custody. As the GoR agrees Gacaca is not Article 6 compliant and was probably never intended to be so.

61. On 13th November 2007, CMU was acquitted in relation to events in Gatare but that acquittal was overturned by the Gacaca Court of Appeal on 22nd January 2009. At another Gacaca court in Bisesero, between the acquittal and appeal in relation to the Gatare events, CMU was convicted and sentenced to 30 years' imprisonment on 21st January 2008. Both sets of proceedings are in relation to offences for which his extradition is sought (Submissions On Behalf of Requested Person Paragraph 5).

62. For the GoR, it is said by Mr Ngoga (Paragraph 210 onwards) in the request that the relevant Gacaca court had no jurisdiction to try CMU in relation to the matters in Gatare. He says at Paragraph 211 that the Gacaca decisions (not the Bisesero Gacaca decision) have been vacated by the higher courts or higher authority. He rejects the argument that they attract the principle of *non bis in idem* and relies on the decisions of the ICTR Referral Chamber and Appeals Chamber.

63. The defence contend that the appeal took place after the witness statements in the prima facie bundle were taken. It concludes that the case must have been transferred to the jurisdiction of the National Public Prosecution Authority

("NPPA") by then. If so then "*it must have been recognised that the Gacaca system had no jurisdiction to hear the case*". The defence contends that no explanation has been given for the appeal process. The defence suggest that I can use the evidence of CU/1, 2 and 3 to draw the conclusion that the lack of explanation given is a serious omission. I noted that CU's witnesses give evidence in relation to a different Gacaca proceeding.

64. I do not agree. It is quite clear to me from the fact that Mr Ngoga had no idea that CMU had been convicted at the Bisesero Gacaca that the NPPA did not have oversight or indeed knowledge of the various Gacaca proceedings in relation to these RPs. The Bisesero conviction was discovered by accident. There is no evidence which would enable me to find that the Gacaca Court of Appeal in CMU's case was acting unlawfully. No reasons are given for the Gacaca Court of Appeal's vacating the acquittal but these community courts did not give full reasons for any of their decisions.

65. In relation to the Bisesero Gacaca conviction, the GoR has never responded to a statement served on it by the defence team for CMU. It was as a result of that conviction that the issue of double jeopardy is said to arise. Mr Rackstraw, a partner in Bindmans and solicitor for CMU exhibits an unofficial translation of the only available record of the Gacaca proceedings (CMU Bundle 3, Tab 3, MJR7 unpaginated). It consists of one page, dated 21st January 2008 where it is said CMU "*is accused of participating in attacks at Bisesero in company of a group of assailants that killed many people including …*"; two witnesses gave evidence and their evidence is summarized in a few lines. The court's ruling is short, it says that after examining the charges brought by the two witnesses, CMU is placed in category 2 and sentenced to 30 years' imprisonment and to pay back 15 cows, equivalent to 3 million RwFr. Then it is signed.

66. One of the allegations against him in the request for extradition is in relation to the Bisesero killings. Therefore he has been convicted and sentenced for an offence or offences arising out of the same acts that he is being extradited for.

67. The GoR concedes that Gacaca does not meet the requirements for Article 6 and as a result I accept that CMU could never be returned to serve the sentence imposed by Gacaca.

68. The question for this court in the light of this evidence is whether CMU is in jeopardy of being imprisoned as a result of that Gacaca conviction or whether he is requested for a trial in the High Court only. It plainly engages the principles set out in section 80. It is unfortunate that this conviction was not dealt with in any evidence from Mr Ngoga or another on behalf of the GoR.

69. I note that there are two recent cases where deportation was ordered from the United States and the persons, Mr Mudahinyuka and Mr Mukeshimana, who had been convicted and sentenced by Gacaca courts, were returned to serve those sentences. I noted Ms Ellis' point in her Reply to the GoR Submissions Page 8, Paragraph 21, that Mr Mudahinyuka arrived in Rwanda in January 2011 and as of June 2015 had not appeared before any court. He is being held

on the basis of a Gacaca conviction obtained in absence. The differences between those cases and CMU's or EN's is that they were deportation and not extradition cases, so it can be argued they have limited relevance to this extradition case.

70. In the Uwinkindi case both Chambers of the ICTR found his convictions in absentia by two Gacaca courts had been lawfully vacated, the courts found that the principle of *non bis in idem* was not violated. In Ahorugeze double jeopardy did not arise as the convictions for Gacaca were in relation to looting etc. I did note that the ICTR held at Paragraph 126 that "*Moreover according to the provisions of the Transfer Law and the statements made by the Rwandan authorities in connection with the extradition request, extradited genocide suspects – including the applicant – will have their criminal liability tried by the High Court and the Supreme Court and not by the gacaca courts*." Nevertheless I find that absent evidence of the lawful quashing or annulling of the Bisesero conviction, the case against CMU is caught by Section 80 and the rule against double jeopardy and he is entitled to be discharged in relation to this extradition request.

71. Turning to EN's case, Miss Diana Ellis QC looks at his Gacaca proceedings in her Submissions at Page 57, Paragraph 140. EN was convicted and sentenced in Tare I Gacaca proceedings on 30th October 2008. He was charged with the massacre of Tutsi at Nyamigina, setting up of roadblocks, inciting people to commit genocide and issuing identity papers on the basis of ethnicity. He was convicted of talking people into killing in different places, chairing meetings aimed at committing genocide and setting up roadblocks.

72. The Tare I decision was set aside by the Gacaca Appeal Court on 22nd December 2008 on the basis that the court "*did not have jurisdiction to hear the case*" (Ngoga's Affidavit Bundle 1 Paragraph 207).

73. A second case was heard in Tare II which ended in his acquittal on 23rd October 2008 for lack of sufficient evidence to suggest he committed the alleged crimes (Paragraph 208 ibid). This too was appealed and the acquittal was annulled on the basis that Tare II a trial "*had already commenced in another jurisdiction*" and "*the Gacaca Court of Appeal has orders that the verdict given by the Sector Gacaca Court be annulled, with the case to follow the normal process in the prosecutor's office that had started to prosecute it*".

74. In December 2008, five of the judges in Tare II were interviewed as to how they had acquitted EN and to find out who had leaked the verdict of the court. The judges were held in custody whilst they were being questioned.

75. Miss Ellis makes the point in her submissions that the records of these Gacaca hearings are incomplete and contradictory. I accept she is right. I have concerns about all Gacaca proceedings on the basis that they are clearly not Article 6 compliant, a position that the GoR also adopts. I find there is no evidence however that the conviction and acquittal have not been annulled lawfully. His extradition is not barred in relation to these proceedings.

76. As stated above this argument in relation to Gacaca findings was considered by the ICTR Referral Chamber and Appeals Chamber in the case of Uwinkindi and in Ahurogeze.

77. In relation to the three findings of the Gacaca courts that have been annulled or overturned, I accept that the decisions have been vacated by the higher courts. There is no evidence that would lead me to find that these decisions were unlawfully vacated. I find that the case against EN is not caught by the double jeopardy provisions in Section 80. Double jeopardy does not arise in relation to the overturned acquittal in relation to CMU.

Extraneous considerations – all RPs

78. The interpretation of extraneous considerations is set out in section 81 of the Act:

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

i. 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

ii. 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."

79. The first limb of the section relates to the reasons for the request whilst the second limb is in relation to what might happen if the RP concerned is extradited.

80. The burden of proof is on the defendant and the leading case has set the threshold for section 81(1)(b). In *Fernandez v Government of Singapore* [1971] 2 All ER Lord Diplock at Paragraph 691 says: "*There is no general rule of English law that when a court is required, either by statute or at common law, to take account of what may happen in the future and to base legal consequence on the likelihood of it happening, it must ignore the possibility of something happening merely because the odds of it happening are fractionally less than evens. The matter was to be judged, as a matter of common sense and common humanity, by reference to the gravity of the consequences of the decision to surrender, or not to surrender. A lesser degree of likelihood than balance of probabilities would justify discharge, whether expressed as a 'reasonable chance', 'substantial grounds for thinking', or 'a serious possibility'.*" This is clearly the test I must apply to this section.

81. VB, EN and CMU raise both limbs of section 81 whilst CM and CU raise section 81(b) only. VB argues that the case against him is presented on the basis that he had been a close associate of President Habyarimana and a member of the *Akazu* who attended meetings organized by the MRND. Alun Jones QC

argues that the test is a lower bar than the test for Article 6. The RP "*does not need to show that he is more likely than not that he will be prejudiced*" (VB Closing Submissions Page 19, Paragraph 74).

82. Mr Jones contends that the GoR approach is that all Hutu officials were involved in the genocide. He submits that the members of the GoR, judiciary and prosecution department are predominantly Tutsis. I heard evidence from Professor Reyntjens that no Tutsis have been prosecuted for their involvement in alleged crimes against humanity in the wake of the genocide. It is argued on behalf of Dr Brown that the case against him has been fabricated using bribery and threats because of his high political profile in the Rwandan diaspora.

83. Counsel for CM argue that he will be prejudiced if returned to Rwanda for trial as a former *bourgmestre* and Hutu (CM's Closing Submissions section D, Paragraphs 159 to 161). CM relies on Professor Reyntjens' evidence that these genocide cases are all high profile and conviction would be important to the regime. He argues the fact that CM was a former Hutu *bourgmestre* makes the political imperative for a conviction even more acute.

84. Counsel for EN argue that as a Hutu *bourgmestre* and a past member of the MRND who was not mentioned as a suspect in any of the list of suspected '*genocidaires*', EN has been the victim of fabricated or manipulated evidence whilst the analysis of the Gacaca proceedings conducted against him show bad faith on the part of the GoR. Ms Ellis QC relies too on the 'Tutsification' of the country and the consequent marginalization of Hutu.

85. Edward Fitzgerald QC for CU contends there is a real risk that his Hutu ethnicity and his political status as a *bourgmestre* will prejudice his prospects of fair treatment at trial and sentencing stage.

86. Miss Malcolm QC and Miss Weeks set out CMU's position in their Closing Submissions at Page 8, Paragraph 33 onwards. Miss Malcolm points out that the wording of the memorandum of understanding ("MOU") between Rwanda and the United Kingdom is slightly different to the section. I prefer the section to the wording of the MOU and find I am bound by section 81. I accept I have to decide whether CMU 'might' be prejudiced at his trial or 'might be detained' on account of his political opinions.

87. CMU was a politician in 1993 and 1994. In October 1993 he helped set up a new political party UNISODEC which was allied to President Habyarimana. The case for CMU is that he was keeping himself apart from the MRND and President Habyarimana and was advocating peace and reconciliation. One of the witnesses he called, Adalbert Rugeruza, was asked about a translated transcript of an UNISODEC meeting that took place in January 1994 (CMU Bundle 1, Tab 8, Page 42 onwards). In particular he was asked about what is said at Page 50, where CMU says at marker 37:10 "*We cannot accept standing up passively and watching Satan destabilizing our country, using its people, called in English "the minority", people who are used nowadays to destabilizing our country. According to the poll, they are few, but they have defaced the*

country". It seems to me there is no doubt that this is a reference to the Tutsi minority (the Twa do not seem ever to get a mention). If I am right then this is not language of peace and reconciliation.

88. Miss Malcolm contends that the GoR's views of CMU's role and his position of having set up recently a new party called Rise and Shine ("RAS") means that he would not get a fair trial. She considers that he would be considered a serious opponent to the GoR and worthy of eliminating from the political scene and he would never get a fair hearing under the current regime.

89. I do not doubt that CMU was an active politician from 1993 up to 1997 but there is weakness in the evidence that he is currently a political force in Rwandan politics or in the diaspora. There is little evidence that he has been active except very recently. CMU's son gave evidence that his father had set up RAS and other witnesses were called who did not appear to know much about the party or what it stood for. It is true that Rene Mugenzi, (see later, he was given an Osman warning by the police in the United Kingdom) who said he had never met CMU or was aware of RAS (his evidence of 2nd April 2014).

90. The next point in the evidence given on behalf of CMU was that the RP's brother-in-law occupies a senior position in the Tanzanian ruling party and I saw photographs which confirmed that. Miss Malcolm asserts that he is "*a particular threat for the Kigali regime, having support at the highest level from a neighbouring country*" (Page 14, Paragraph 49). After the genocide, Rwandans were scattered throughout the African continent and further afield. It seems unlikely that a member of CMU's extended family in the Tanzanian ruling party, would be of such interest to the GoR that it would lead them to falsify these allegations.

91. I had doubts about the importance of RAS. The web site seemed a little thin, there was a lack of detail, it was set up all too recently, I found the son's evidence unpersuasive and the witness Rugenza did not know when the party was formed or what the aims of the party were in practice. I did not find therefore there was sufficiently compelling evidence that the RP is a significant force in a political party which opposes President Kagame nor indeed in the diaspora. He may have a role in a fairly new small organization, probably set up in 2012, at best that has pretensions to be one day a political force but nothing that would lead to me to believe that Kagame would find CMU worthy of eliminating from the political scene. Although, to be fair to CMU, Kagame has a history of threatening a range of those who have displeased him, it did not seem to this court that that was the purpose of the request.

92. All the RPs argue that they are prejudiced by their ethnicity. I do not find there is any evidence of prejudice against Hutus in prosecutions for genocide related offences. The Gacaca courts were introduced to speed up the process of trial for the many thousands held in custody. The Gacaca laws enable those convicted to be released into the community and to complete community work, many of those were Hutu. Likewise the abolition of the death penalty in 2007 would have affected in particular Hutus charged with genocide.

93. As to whether the RPs who are *bourgmestres* and have other positions of authority, would be prejudiced by the roles they played in 1994, I rely on the evidence of Martin Witteveen, the Dutch Judge who told Diana Ellis QC that in all his observations of the trials he had not seen any sign that anyone who had a leadership role in 1994 was presumed guilty. In the many exhibited ICTR monitors' reports examining the trials of Uwinkindi and Munyagishari there is no evidence of prejudice in relation to the local positions they held in 1994.

94. I do not find that any role that VB has in the diaspora today is such that it would lead to a prosecution for alleged genocide in 1994.

95. A number of the submissions I heard I will look at in greater detail when I come to consider the Article 6 fair trial arguments as there is a considerable overlap between the two. As regards section 81 (a), I conclude that there is insufficient evidence for this court to find there is a reasonable chance, a serious possibility, that the request for the RPs' extradition (though purporting to be made on account of the extradition offence) is in fact made for other purposes including their political opinions or by reason of their ethnicity. As can be seen later in this judgment I have found there is a prima facie case and I do not find that the case has been constructed by the GoR to punish and imprison these men just because they were *bourgmestres* or had positions of power in 1994.

96. As regards section 81 (b), there is a considerable overlap with Article 6 which I look at later in the judgment. I adopt the approach of the Divisional Court in *Brown and others* at Paragraph 32 where the Court did not consider that anything was added by the distinct submissions of prejudice at the RPs trial within section 81(b); that contention is in reality a theme of their general case that they will suffer prejudice if they are consigned to the High Court of Rwanda where they will not be fairly tried. I do not find that there is a reasonable chance or a serious possibility that they might be prejudiced at their trials within the meaning of section 81(b) by reason of their political opinions or ethnicity. I find their extradition is not barred by reason of extraneous considerations.

Passage of time – Section 82

97. Dr Brown and Emmanuel Nteziryayo are the only RPs raising the issue of passage of time. Dr Brown raises a novel argument in relation to the time that has passed since 2009 when he contends that Rwanda failed to allow investigation into the allegation to be carried out by British police prior to a prosecution in this jurisdiction. He says the failure to do so makes extradition unjust and oppressive within the meaning of the section (see VB's Closing Submissions at Paragraphs 92 to 99).

98. This argument overlaps with the matters raised in relation to Article 6 and Article 8. Diana Ellis QC for Emmanuel Nteziryayo adopts Dr Brown's arguments.

99. Section 82 of the EA reads:

> *82 A person's extradition to a category two territory is barred by the passage of time if (and only if) it appears that it would be unjust or oppressive by reason of the time since he is alleged to have committed the extradition offence….*

100. The definition of "unjust" and "oppressive" in the context of extradition is to be found in *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779, at Paragraphs 782-3. "*Unjust I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, "oppressive" as directed to the hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair*."

101. The RPs have not shown on the balance of probabilities a risk of prejudice in their defence by the passage of time other than the sort of difficulties facing any defendant who is being tried in relation to allegations that are historical. The prosecution and defence witnesses are still available and subject to my findings in relation to Article 6 the RPs are able to defend themselves. The work carried out by the investigators working on their behalf means that they are probably better equipped to defend themselves than many others facing similar charges in Rwanda.

102. There was delay between 1994 and the last proceedings whilst Rwanda attempted to piece together its justice system. The failure by the GoR to allow investigation by the British police post 2009 prior to a possible prosecution here does not mean the delay between 2009 and 2015 is such that I find extradition of either VB or EN would be unjust. It is understandable that Rwanda wishes to try these allegations in their own country; the alleged offences took place in Rwanda and that is where the prosecution witnesses are.

103. As to oppression, any attempt at extradition is followed by a long and hard process which causes anxiety to not only the RP but also his family. I accept VB has lived in London openly with his family since the last proceedings. I accept that he was in custody for two years and three months between December 2006 and April 2009 and for over six weeks before he was granted bail during this set of proceedings. I do not find he would have had a sense of security after the last proceedings ended. He was never told that the GoR would not pursue another extradition request. I have taken into account too as I am required to the gravity of the allegations. I do not find any culpable delay on the part of the GoR nor do I find that the RP's circumstances have changed significantly since 2009. I do take into account that both VB and EN's family will be greatly affected if he is extradited to Rwanda. In all the circumstances I find that extradition of VB or EN is not oppressive such that it comes within section 81 of the EA.

104. <u>Prima facie case</u>

105. Section 84 of the EA provides:

> *84 Case where person has not been convicted*
> *(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.*

106. *R. v Governor of Pentonville Prison, ex parte Osman (No. 1)* [1990] 1 WLR 277 fully set out and approved the test originally set out in *R v Governor of Pentonville Prison, ex parte Alves* [1993] AC 284, 290-292:

> "*In our judgment, it was the magistrate's duty to consider the evidence as a whole and to reject any evidence which he considered worthless…He was neither entitled nor obliged to determine the amount of weight to be attached to any evidence or to compare one witness with another. That would be for the jury at trial. It follows that the magistrate was not concerned with the inconsistencies or contradictions in Jaafar's evidence, unless they were such as to justify rejecting or eliminating his evidence altogether.*"

107. This test was approved by Laws LJ in *Brown and others* at paragraph 124.

> "*The question for the judge…was whether the GoR had produced evidence which would be sufficient to make a case requiring an answer by [each RP] if the proceedings were the summary trial of an information against him…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*"

108. To meet the test the court has to ensure 1. that all the elements of the offence are present in the prosecution case and 2. as Mr Jones says at Paragraph 107 of his closing submissions, there has to be a qualitative evaluation of the evidence. If the evidence is worthless I must reject it.

109. I accept that in making the decision I must consider not only the prosecution case but also evidence produced by the defence.

Dr Brown

110. In 2009 District Judge Anthony Evans found a prima facie case against the four RPs and this finding was accepted by the Divisional Court. I accept Alun Jones QC's argument that the evidence is not entirely the same as it was in 2007-8. The JA has withdrawn some evidence and there is new evidence obtained since.

111. I have set out Mr Jones's submissions and the evidence relied on in an appendix to this judgment. In summary there are a number of witnesses relied upon by the GoR. They have given contradictory accounts which are set out

in full in the appendix. Mr Jones relied heavily and justifiably on the fact that none of these witnesses who had been witnesses for the prosecution or indeed defendants in a number of other proceedings, had ever mentioned VB. I have concluded that this is a weak case against Dr Brown, that all of the witnesses have been undermined to a lessor or greater extent but that the true weight of the case against VB cannot be judged without hearing the witnesses on both sides give evidence and be tested in cross-examination. The evidence is not worthless. I find there is evidence which would be sufficient to make a case requiring an answer from him.

Charles Munyaneza

112. The case against CM is summarised as follows (this summary is taken from the judgment of District Judge Evans and accurately reflects the GoR case against CM).

113. CM was the *bourgmestre* of Kinyamakara commune. On 7th April 1994 he chaired a meeting in the commune office and encouraged Hutus to kill Tutsi who were the enemy. He instructed the *conseillers* and *responsables* that the homes of the Tutsi should be destroyed and their property looted. Some days later he led an attack on the home of a Tutsi and ordered the looting of his shop, with the looted property to be placed in his own vehicle. He ordered the setting up of roadblocks and night patrols. Following his instructions, Tutsi were killed in the area.

114. On or around 12th April 1994 CM instructed members of the Interahamwe to go and kill members of Bwiruka family. He punished the Interahamwe who had taken the cows of Bwiruka but not killed the family. Tutsis believing that the Interahamwe had been punished for looting had sought refuge in the commune office where they were killed by the Interahamwe. CM was present and stopped others from fleeing. On about 13th April 1994 he shot dead Joel because he had looted property without killing the owners first. Later he told assembled Hutus that they should kill before looting. He instructed the *responsables* that they must track down and kill Tutsi.

115. He attended a meeting on 13th April 1994 of all the *bourgmestres* in the Gikongoro province to examine the issue of the killing of the Tutsi. On about 26th April CM attended a meeting at the prefecture when he reported that 1000 Tutsi had been killed in Kinyamakara. He led a number of attacks over some days on Ruhashya over the Mwogo river. This resulted in many thousands of Tutsi deaths.

116. Various witnesses give evidence of these events. They are Tutsi and Hutus. They are survivors and attackers.

117. On behalf of CM, Tim Moloney QC and Ian Edwards contend in their closing submissions at Page 3 onwards that there is evidence that the case against the RP has been fabricated by Mr Sibomana and Mr Munakayanza. Both are influential in *Ibuka,* which is the survivors' organisation which is by all accounts very powerful.

118. They rely on 13 anonymous witnesses whose evidence I have read in their bundle Volume 1 onwards. All of the witnesses say they are too frightened to reveal their identities, and nine of them say either they were offered money or threatened to testify falsely against CM. Those and some other anonymous witnesses give evidence of the good things CM did during the genocide. They are for the most part Tutsi survivors who were helped if not saved by CM. These statements are relied upon as Mr Moloney contends they are inconsistent with the suggestion that the RP was actively involved. They give evidence of being hidden by CM or helped and of CM's home being attacked by others trying to capture the Tutsis he was sheltering.

119. Counsel for CM argue that the prima facie case is undermined by the totality of the evidence, including witness statements which were not available in the proceedings in 2008. Unfortunately it is not clear from his submissions which statements were not available then. What he has provided though are volumes of evidence which contain statements dated 2007 and ones dated 2013 or 2014. I assume that all those dated 2007 formed part of the earlier case and were considered then. There are only a few statements from witnesses that were not seen by the earlier courts.

120. There is also the statement from Phocas Murwanashaka who had been a neighbour of CM's whose various statements are at Volume 1, Pages 113 onwards. In April 2008 he explained that named people were trying to encourage others to make accusations against CM. In 2008 he wanted to remain anonymous but by the time he made his statement in 2014 he was serving 19 years after pleading guilty to being involved in a particular attack, something he had not mentioned in his statement of 2008.

121. Inevitably I have to give less weight to the witnesses who remain anonymous but note that if their evidence is true then the case against CM may have been made up against him by people in the community. At the same time Muwananashaka who had been anonymous in 2008 had made no mention of his involvement in killing. I have to question whether the reason he remained anonymous in 2008 was to avoid having anyone look at his role in the genocide.

122. Having considered the case against CM including the various statements relied upon by the defence, there is much positive evidence that he helped Tutsi families in the genocide but there is nothing that I have read that undermines the prosecution case to such an extent that it is worthless.

Emmanuel Nteziryayo

123. Diana Ellis QC and Miss Evans contend that the GoR has failed to show that there is evidence against EN requiring an answer. They too invite the court to discharge on the basis that the evidence produced is 'worthless'.

They rely on material which was not considered in the last proceedings when they argue the parties were concentrating their fire on the fair trial arguments.

124. In 2009 the Divisional Court concluded that in relation to the GoR's evidence found in a large number of witness statements "*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*" (*Brown and others*, Paragraphs 124 and 125). They argue that in the light of the new material they have obtained, where much of the material is exculpatory, the court no longer has to take 'at face value' the *prima facie* statements. Some of the new material consists in previous statements made by the GoR's witnesses which are inconsistent with the statements relied on by the Ngoga. Miss Ellis argues that the veracity of the evidence is undermined.

125. I have set out in full Miss Ellis' arguments and evidence in the appendix to this judgment. I find that the witnesses are undermined to a lesser or greater extent but should be cross examined to determine how much weight a court should attach to their evidence. The defence evidence is strong and should be put before a court. I do not find the prosecution evidence is worthless (subject to what I have said in the appendix in relation to named prosecution witnesses). I find in short there is a prima facie case.

Celestin Ugirashebuja

126. In 2008 and 2009 District Judge Anthony Evans found a prima facie case against CU which was upheld by the High Court. Realistically Mr Fizgerald QC acknowledges that this should be the court's starting point and as he puts it in his preface to the Closing Submissions this court is invited to consider whether the further evidence of Scarlet Nerad and CU/1 casts "*such doubt on the reliability and integrity of the prosecution case that it can no longer be said that there is a prima facie case*".

127. Mr Fitzgerald relies on the submissions he made in the 2007-9 proceedings which are at Tab 1 of the Appendices to his 2015 submissions. The arguments about prima facie are to be found at Page 10, Paragraph 2 of the 2007-9 submissions. I have read those submissions. They were reliant on the evidence gathered by Ms Nerad from defence witnesses who exculpated CU but who wished to remain anonymous. There were allegations made by the witnesses that the government witnesses had been bribed. The defence contended that the prosecutors only gathered evidence that inculpated CU and ignored any other evidence. Ms Nerad uncovered a political agenda against CU which was being directed by a member of Ibuka who allegedly had been conducting joint meetings with prosecution witnesses and other community members "*in an effort to recruit these individuals into making statements against Mr Ugirashebuja*". This is a quotation from Ms Nerad's evidence given in 2008 found at para 2.19 of the 2008-9 submissions.

128. In 2008-9 Ms Nerad found that six of the 11 prosecution witnesses were not reliable or truthful and the remaining five lacked the detail necessary and appropriate for the offences of genocide etc. When looking at the defence

case Mr Fitzgerald QC pointed out that the court in 2008-9 knew the entirety of the defence case as opposed to a carefully selected portion of the prosecution evidence. Despite that evidence a prima facie case was found.

129. CU/1 gave statements to the defence and live evidence to the court by way of Skopia link on 27th March 2015 and June 2015. I also was shown photographs of injuries received after his arrest shortly after the genocide in 1994. CU/1 was one of the prosecution witnesses in the case against CU whose evidence was read by counsel for the GoR. He is now 81 years old and had undoubtedly been deeply affected by his treatment in custody in 1994.

130. He gave evidence to this court that he had told the Rwandan prosecution authorities that CU was innocent of any crime when they interviewed him. He did not accept what was said he had said in the statement relied upon by the GoR. He said he had signed the statement without knowing what it said because he wanted to be safe. I have weighed up the evidence of CU/1 and what he said in cross examination. I noted that he did not appear to know at the beginning of the cross examination which RP he was speaking about; he contradicted himself as to whether the GoR had arrested him prior to him making a statement against CU and whether it had been read back to him before he signed it; whether he had been kept locked up by the GoR for three days when making the statement and whether the GoR had ill treated him. In summary he was a confused elderly man whose evidence I found unreliable.

131. There was nothing in the evidence of either CU/1, Scarlet Nerad or any other witness which undermined the findings of the District Judge and the Divisional Court in 2009. I find there is a case to answer against Mr Ugirashebuja.

132. CU/1 was a witness also relied upon by CU in his submissions in relation to fair trial.

Celestin Mutabaruka

133. In relation to CMU I am satisfied in relation to the matters in section 84. I note his position which is that he makes no concession in relation to prima facie case but is not contesting it in these extradition proceedings. I find there is a prima facie case against him.

Section 87 Human Rights Article 3, 6 and 8

134. Articles 3, 6 and 8 are raised by all or some of the RPs in this case. Section 87 reads as follows:

"87 (1) if the judge is required to proceed under this section (by virtue of section 84, 85 or 86) 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 the question in the affirmative he must send the case to the Secretary of State for her decision whether the person is to be extradited."

Article 3 – VB, CM, CU and EN

135. Article 3 of the European Convention on Human Rights ("ECHR") provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment"

136. It is argued by VB at Paragraphs 110 to 142 (Pages 25 to 35) in his Closing Submissions that there is a real risk that if extradited he will be treated in a way that breaches his Article 3 rights. His submissions have been adopted by EN, CM and CU.

137. I accept the argument that Article 3 is one of the most important guarantees given by the Convention. It is irrelevant that the RPs are accused of very serious crimes, the protection is absolute.

138. The test is set out in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 by Lord Bingham at Paragraph 24:

"…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 and degrading treatment or punishment…"

139. A recent Divisional Court decision on Article 3 in Europe was *Elashmawy v Italy* [2015] EWHC 28 (Admin). Aikens LJ gave the following guidance:

" 49. A number of general propositions are very well established by ECtHR case law and accepted by the courts of England and Wales in relation to ***Article 3*** *and its application to prison conditions in the context of extradition. We think that they can be summarised as follows: (1) the extradition of a requested person from a Contracting state to another state (whether or not a Contracting state) where that person will be held in detention (either awaiting trial or sentence or in order to serve a sentence lawfully imposed) can give rise to an* ***Article 3*** *issue, which will engage the responsibility of the Contracting state from which the extradition of the requested person is sought. (2) If it is shown that there are substantial grounds for believing that the requested person would face a "real risk" of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country then* ***Article 3*** *implies an obligation on the Contracting state not to extradite the requested person. (3)* ***Article 3*** *imposes "absolute" rights, but in order to fall within the scope of* ***Article 3*** *the ill treatment must attain a minimum level of severity. In general, a very strong case is required to make a good violation of* ***Article 3****. The test is a stringent one and it is not easy to satisfy. (4) Whether the minimum level is attained in a particular case depends on all the circumstances, such as the nature of the treatment, its duration, its physical and mental effects and, possibly, the age, sex and health of the person concerned. In that sense,*

*the test of whether there has been a breach of **Article 3** in a particular case is "relative". (5) The detention of a person in a prison as a punishment lawfully imposed inevitably involves a deprivation of liberty and brings with it certain disadvantages and a level of suffering that is unavoidable because that is inherent in detention. But lawful detention does not deprive a person of his **Article 3** rights. Indeed, **Article 3** imposes on the relevant authorities a positive obligation to ensure that all prisoners are held under conditions compatible with respect for human dignity, that they are not subjected to distress or testing of an intensity that exceeds the level of unavoidable suffering concomitant to detention. The health and welfare of prisoners must be adequately assured. (6) If it is alleged that the conditions of detention infringe **Article 3**, it is necessary to make findings about the actual conditions suffered and their cumulative effect during the relevant time and on the specific claims of the complainant. (7) Where prison overcrowding reaches a certain level, lack of space in a prison may constitute the central element to be taken into account when assessing the conformity of a given situation within **Article 3**. As a general rule, if the area for personal space is less than 3 metres squared, the overcrowding must be considered to be so severe as to justify of itself a finding of a violation of **Article 3**: (see the ECtHR judgment of **Ananyev v Russia** (Application Nos 425/07 and 60800/080910) of January 2012, referred to at [9] of **Florea v Romania [2014] EWHC 3538 (Admin) ("Florea")).** (8) However, if over crowding itself is not sufficient to engage **Article 3**, other aspects of the conditions of detention will be taken into account to see if there has been a breach. Factors may include: the availability for use of private lavatories, available ventilation, natural light and air, heating, and other basic health requirements".*

140. Alun Jones QC argues that the case of *Soering v United Kingdom* (1989) 11 EHRR 439 established that the availability of prosecution in the requested state is a factor to be taken into account when considering whether there might be a violation of Article 3. He argues as a secondary concern that the RPs Article 3 rights will be breached by being accommodated in Kigali Central Prison despite the GoR's assurance they will be held in Mpanga. He relies on the undisputed fact that the five transferred for trial (Mugasera, Bandora, Uwinkindi, Munyagishari and Mbarushimana) are all in Prison 1930 (Kigali Central Prison) and have been there for months or even years. Furthermore there is evidence from Ms Nerad that the facilities in Remera prison where Mudhinyuka (not one of the transferred defendants) is being held are very overcrowded, there is malnourishment amongst the prison population and some of the prisoners sleep in the open on the ground.

141. His primary concern is in relation to the conduct of the GoR towards detainees generally and its human rights record. He argues Dr Brown as an erstwhile alleged member of the *Akazu*, is particularly at risk. He is said to be a leading Hutu. Of the other RPs taking this point, CM was the Hutu *bourgmestre* of Kinyamakara in 1994, EN the *bourgmestre* in Mudasomawa and CU the *bourgmestre* of Kigoma. They were all important players in local politics at the time of the genocide.

142. Mr Jones contends that VB will be seen as a political opponent of the regime who will be dealt with in the manner in which the GoR deals with the opposition. He relies on the Table of Violations relied upon by Diana Ellis QC which was available to the High Court in 2009 which showed that torture and serious ill treatment of detainees was and still is common.

143. I was provided with photographs of Mpanga and Kigali Central Prisons in the GoR Rebuttal Material Bundle 3, Tab 1, Page 21 onwards. They show the exterior and interior of the prisons and indeed show some of the transferred defendants. The conditions look good, the prisons are clean and spacious. Munyagishari's room is shown, it has a bed, a desk and a printer for his computer that I have read about. I have also had a chance to consider the schedule of meals signed for by the defendants and they seem wholesome and nourishing. The list of telephone calls made by the defendants was also exhibited. They are able to make regular calls to their families and their lawyers.

Conclusion

144. On the one side of the balance, Mr Jones submits there are a number of examples of suspects who have been ill-treated in camps. I noted they were usually well known, sometimes current opponents of the Kigali regime. I do not consider that VB or the other RPs will be considered as political opponents of the GoR. I also put in the balance that a prosecution in relation to these allegations could take place in the United Kingdom and when Police in this country started to look into the evidence they were not given assistance by Rwanda. On the other side of the balance, and of significance, I noted that there is no suggestion that the five detainees recently returned to Rwanda have been tortured to obtain confessions or ill-treated in any way. The ICTR monitors in relation to Uwinkindi, to give just one example, report on his complaints about the prison which relate to his ability to go to church, his diet and other matters which are insignificant and certainly do not amount to a breach of Article 3.

145. I have had to consider evidence in relation to a number of prisons around the world (including Peru, Ukraine and Thailand) and these are the most comfortable conditions I have yet seen. I do not find that the conditions in Kigali Central Prison or Mpanga are remotely sufficiently severe to cross the Article 3 threshold and I note it has not been suggested that the assurance given by the GoR will not be adhered to.

146. I find that if returned there are no grounds for believing that any of the RPs face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment.

Article 6 - all RPs

147. Article 6 of the 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:
to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
to have adequate time and the facilities for the preparation of his defence;
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;
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;
to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

148. The test is set out in *R v Special Adjudicator ex parte Ullah* in Paragraph 24 which follows on the consideration of the test for Article 3 (see above Paragraph 141). Lord Bingham said:

"*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…*"

149. The meaning of the expression "*flagrant denial of a fair trial*" was considered again by Lord Bingham in *EM (Lebanon) v Secretary of State* [2008] 3 WLR 931 at Paragraph 34:

"*What constitutes a "flagrant" denial of justice …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…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.*"

150. The test for this court is whether the defence has satisfied the court that there is a real risk of a flagrant denial of justice or fair trial.

151. In *O v SSHD* [2010] EWHC 58 (Admin) the Claimant had been convicted and sentenced to life imprisonment by a court in the Lao People's Democratic Republic (Lao PDR). The Claimant argued that her conviction was obtained in a court which was neither independent nor impartial. In the Divisional Court Dyson LJ at Paragraph 94 said:

"*It has been said by the ECtHR many times that "in order to establish whether a tribunal can be considered "independent", regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence…*"

152. A more recent case is the case of *Kapri v HM Advocate* [2014] HCAJ 33 a Scottish High Court decision which has been described as highly persuasive by Laws LJ in the Albanian extradition case of *Bardoshi, Sadushi v The Government of Albania* [2014] EWHC 2756 (Admin). The judgment of the then Clark LJ questioned the status of reports from non-governmental organizations ("NGOs") and others which experts rely on and whether the court should accept as true statements which rely on this evidence. The prosecution argue in their Closing Submissions that the evidence from first hand witnesses and experts should be preferred to more detached witnesses (Prosecution Closing Submissions Paragraph 34).

153. I accept the argument in the GoR's Paragraph 36 that the approach of *Kapri* is consistent with that of the ECHR, where that court has found it necessary to look at the particular circumstances of the suspect and not just at the general situation. Only in extreme cases does the court find that any removal to the country will necessarily violate a Convention right and then will proceed on the basis of generality.

Brown and others in 2009

154. The starting point for this court must be the judgment of the High Court in *Brown and others* in 2009 and the findings that court made. I must also bear in mind that since 2009 a number of courts in other countries have returned or transferred requested persons to Rwanda. The GoR relies on five cases in particular of returned or transferred defendants who they say have had or are having fair trials. It is of course instructive to see what form the trials of those five have taken. This evidence has become available in the months leading up to the final stages of this case in the magistrates' court.

155. The 2009 High Court findings are as set out in Edward Fitzgerald QC's argument in his Closing Submissions. In 2009, the Court accepted the GoR's concession, as to the test under Article 6 being met by the absence of an independent and impartial tribunal, was correct. The Court held, regardless of the concession, if the appellants' "*whole case*" on the lack of fair trial was "*substantially made out*", the test under Article 6 would be satisfied; the Court held that if defence evidence had to be given by video-link, that would be a breach of Article 6 because of a lack of equality of arms but not a nullification of the very essence of the right. Importantly, at Paragraph 67 the court found that the issue of the non-availability of defence witnesses did 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 contexts 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."

156. The Divisional Court pointed out in Paragraph 68 that:

"*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*."

157. A consideration of the political system is therefore relevant and I have heard much evidence on this point as well as having the benefit of Diana Ellis QC's 'Table of Violations' which were before the High Court in 2009 but have now been updated for this court.

158. The Divisional Court in 2009 accepted that the Rwandan justice system had taken significant steps forwards since the genocide. The Court reviewed the district judge's findings and the evidence from the experts called during the hearing in the magistrates' court in 2008. The Divisional Court relied heavily on the 2008 report of HRW based on research conducted between 2005 and mid-2008 which was critical of the justice system in Rwanda. This report had not been before the district judge. The Court also relied on the Bizimungu case in which the trial judge had said later that the verdict had been dictated to him by others. Bizimungu's trial was in 2004 and his unsuccessful appeal to the Supreme Court in Rwanda was in 2006. The Divisional Court regarded what happened in the Bizimungu case as "*significant evidence of executive interference in the judicial process in the High Court, and thus of a want of impartiality and independence*".

159. The Divisional Court also pointed out that they had no day-by-day details of the conduct of the Rwandan High Court's business, "*no details of trials; of defences run, successfully or unsuccessfully; no details of the myriad events that show a court is working justly*" (Paragraph 121). The conclusions they had reached in relation to the problems defence witnesses would face did not promise well for the judiciary's impartiality and independence. That combined with the nature of the Rwandan polity offered "*no better promise*". The

evidence they had heard led to the conclusion that if returned there would be a real risk that the four RPs would suffer a flagrant denial of justice.

Cases up to 2009 - refusals to transfer/extradite/deport

160. Leading up to the judgment in 2009 there had been a number of requests from the GoR which had led to the ICTR first then other courts refusing to transfer RPs on genocide related charges. On 28th May 2008 the ICTR Trial Chamber refused to refer Munyakazi for trial on three grounds, the two relevant grounds to these proceedings are that there was a real risk that the single judge in Rwanda who would try the case would be unable to withstand direct or indirect pressure to produce a judgment in line with the GoR's wishes. The second ground was that a violation was found of the right to have defence witnesses attend court and be examined in the same way that prosecution witnesses would. This decision was appealed to the Appeals Chamber on 8th October 2008 which upheld the Trial Chamber's decision but not in relation to the single judge.

161. In 2008 the ICTR refused the transfer of a number of Rwandans accused of genocide offences. Kanyarukiga was considered by the Divisional Court in *Brown and others*. The ICTR Trial Chamber and Appeals Chamber reasoning echoed the decision in Munyakazi. In relation to defence witnesses' fears, whether well-founded or not, the court found they "*may be unwilling to testify for the defence as a result of the fear that they may face serious consequences…*" (Paragraph 43). The Trial Chamber and Appeals Chamber reached the same decisions for similar reasons in Hategekimana, Gatete and Kayishema. In Gatete the court mentions the offence of '*genocidal ideology*' which may put off some potential defence witnesses who are afraid of being accused of that. In none of these cases did the ICTR hold that the judge or judges would not be independent or impartial.

162. Other courts in Europe followed the ICTR's example with various requested persons. Extradition was refused by the Toulouse Court of Appeal on 23rd October 2008, the Appellate Court in Frankfurt am Main on 3rd November 2008, the Mamoudzou Court of Appeal on 14th November 2008, the Paris Court of Appeal on 10th December 2008 and the Lyon Court of Appeal on 9th January 2009. All these cases relied on the decisions of the ICTR in relation to defence witnesses.

Defence case - summary

163. The defence case in summary is that the defects in the trial process outlined by the High Court in *Brown and others* remain. There is an autocratic government, there are judges who lack independence and are influenced by the executive and the real risk that witnesses are too frightened to tell the truth to the prosecution or to appear for the defence. During the proceedings in front of this court, a new problem emerged, that defence counsel would be incapable of providing effective representation, either because of a lack of resources or because of a lack of skill and experience. The evidence of the Dutch Judge Martin Witteveen given between 8th and 10th June 2015 was par-

ticularly important in this respect. The defence contend that there has been no substantial change of circumstances in Rwanda since the 8th April 2009 judgment in *Brown and others* and therefore this court should find a breach of Article 6 and discharge the RPs.

164. The defence approach to the GoR's 'sea change' of accused who have now been returned to Rwanda is to argue that it was triggered by the ICTR which has made decisions on an '*aspirational basis'*. They contend the changes in the '*black letter of the law*' in Rwanda do not correspond to what happens in practice.

Political situation in Rwanda since Brown and others in 2009

165. The 2009 judgment of *Brown and others* makes it clear that the question of whether a court is independent and impartial should be looked at in the context of the political frame in which it is located (Paragraph 68 of the judgment which is set out in Paragraph 159 of this judgment). It is also true that the willingness of defence witnesses to give evidence might well be affected by the political situation in Rwanda.

166. The Divisional Court relied on 'Tables of Violations' created by Diana Ellis QC and her team. These tables have been updated with events since *Brown and others.* I find they reflect accurately what is found in a number of different source documents.

167. The reports and documents that form the basis for the tables are produced by respected bodies such as the US Department of State (in their Human Rights Report: Rwanda); the UN Committee against Torture; HRW; Amnesty International etc. The sources of the information are set out. I accept of course that some of the original source data may be inaccurate and may be based on multiple hearsay. There is a certain amount of cross reference in that some of the complaints are found in more than one table. I accept too that sometimes the conclusions of a particular report are based on the conclusions of another report and not on direct evidence. Also not every killing or extra-judicial act in the tables may be laid necessarily at the feet of the GoR. Nevertheless I find that overall the tables paint a clear and compelling picture.

168. There is a large amount of material and rather than summarize it at length I have taken examples from each table before coming to a conclusion about the state of the polity in Rwanda. I am concerned with events that have taken place since the High Court judgment in 2009.

<u>Diana Ellis QC's Tables – 2009 onwards</u>

169. Table A is entitled Actual and Attempted Extra-Judicial Killings and Attacks; Table B starts at Page 18 and sets out Disappearances/Inadequate Investigation; Table C is at Page 28 onwards and is entitled Torture/Inhuman or Degrading Treatment or Punishment; Table D starts at Page 36 and is entitled Arbitrary Arrest/Unlawful Detention; Table E at Page 45 is entitled Fair Trial Standards; finally Table F at Page 62 is called Freedom of the Press/Civil So-

ciety. This final table is divided into sections headed by the name of the defendant the report is concerned with.

Table A - Actual and Attempted Extra-Judicial Killings and Attacks

170. In Table A at Page 8 is the case of Patrick Karegeya, the exiled former Rwandan intelligence chief who was found murdered in a Johannesburg hotel room in early January 2014. He had fallen out with President Kagame and had been granted political asylum by South Africa in 2009. He was a supporter of a Rwandan opposition party. Page 9 sets out what various ministers in Rwanda said about his killing, essentially that he got what he deserved.

171. On 12th January 2014, President Kagame said in a speech: "*Whoever betrays the country will pay the price, I assure you. Letting down a country, wishing harm on people, you end up suffering the negative consequences*". He then denied killing him but said that "*you should be doing it*" (killing traitors). To the Wall Street Journal he denied that Rwanda had killed Karegeya but added "*I actually wish Rwanda did it*". BBC Newsnight revealed later that Mr Karegeya had been advising South African and Tanzanian intelligence services as they prepared to send troops to Congo to fight the Rwandan backed rebel group M23.

172. Table A has a brief summary of the case study from the 2014 Human Rights and Democracy Report produced by the British Government. The original document is at 'Objective' Bundle 10, Page 44. The one page document itself is worth looking at. In five paragraphs it sets out some of the Foreign Office concerns in relation to Rwanda, including a reference to the murder of Karegeya in South Africa, where a South African court convicted four men of the political murder which according to the court had emanated from a certain group of people from Rwanda.

173. The British Government notes in another case that a number of people were held for two months with no charge and regretted that due legal process was not followed. The case study mentions Mutabazi and Ingabire and Sibomana of the FDU Inkingi opposition party. The study picks out positives such as the East African newspaper's freedom to report but notes that two journalists were arrested in 2014 and the BBC Kinyarwanda service has been suspended after a documentary about the Rwandan genocide.

Table B - Disappearances/Inadequate Investigation

174. The example I take from Table B is that of Emmanuel Mughisa (aka Emile Gafirita) at Pages 23-24, a former soldier who had just been summonsed and was due to give evidence to a French judge on 8th December 2014. It was anticipated that he would say that President Kagame ordered the shooting down of President Habyarimana's aeroplane in 1994. In November 2014 Gafirita was kidnapped and bundled into a vehicle in Nairobi, Kenya. The police say he had not been arrested and according to Table B he has not been seen since.

Table C - Torture/Inhuman or Degrading Treatment or Punishment

175. The way Joel Mutabazi was treated is an example taken from Pages 31-32 of Table C (Torture etc). I heard evidence over the Skopia link from Mr Mutabazi's wife, Mrs Gloria Kayitesi and Mr Mutabazi's brother, Thadius Lwambonera.

176. Mr Mutabazi had worked for President Kagame as commander in charge of security at the Presidential palace in Rwanda. Mrs Kayitesi gave evidence that the intelligence service had said that his crime was that he had taken a photograph of a newspaper article and photograph of Kayumba Nyamwasa (an opponent of President Kagame's) and he had kept it on his mobile telephone. He was arrested in April 2010 and taken to Camp Kami. From there, some months later, he was taken to hospital where his wife managed to see him. He had been hit in the face and had blood in his eyes and on his body. There was puss coming from his genitals. He was handcuffed and guarded.

177. The next time she saw him was nearly 16 months later. He was released into home detention and the family was accommodated in a safe house in Kigali by G2, the intelligence service. Her husband was very thin and was not allowed to leave the house. He used to sleep with his legs together because they had been tied together so long. He had physical marks all over his body. She left for Uganda and was joined by her husband there.

178. Gloria Kayitesi said that in Uganda they lived first with Mr Mutabazi's brother before moving to a safe house provided by the UN. He was abducted from this house in Uganda on 25th October 2013 and taken to Rwanda against his will despite his refugee status and the protection he was receiving from the UN. Ugandan authorities confirmed that the forcible return had not followed legal procedures.

179. When he appeared in a military court in Rwanda in January 2014 charged with terrorism, he and others stated they had been tortured. He was convicted of various offences relating to Rwandan security. In October 2014 he was sentenced to life imprisonment.

180. Mr Lwambonera confirmed that Mr Mutabazi and another of his brothers, Jackson, were both taken to Rwanda and stood trial. Jackson was released but disappeared and has not been heard from since 20th October 2014. Mr Lwambonera had been asked by the intelligence services in Rwanda to give information against his brother.

181. I accepted the evidence given by Mr Mutabazi's wife and brother that they had seen evidence of torture on Mutabazi's body. The description that his wife gave that he slept with his legs together as that is what he had got used to when he was held in Camp Kami was compelling. I accepted Mrs Kayitesi's evidence too that she was frightened now to go to Rwanda to visit him in prison.

182. There is much evidence of torture and Table C gives some of the detail. Once again the victims are in and outside Rwanda, sometimes in Uganda and

in other neighbouring countries. Sometimes torture at, for example, the Rwandan military intelligence camps such as Kami and Kinyinga is raised as an issue in the courts, but the courts do not appear to follow this up. There is a suggestion that there are other secret detention centres where torture takes place.

Table D - Arbitrary Arrest/Unlawful Detention

183. As before there is a certain overlap between this table and earlier ones. Sadly there appears to be very little investigation by the authorities into the various allegations made. There are numerous examples of Rwandans being held for lengthy periods, on the face of it, unlawfully.

184. Two examples taken from Table D are that of Peter Erlinder and Sylvain Sibomana and Dominique Shyirambere. Erlinder was a US lawyer who was arrested in May 2010 as he was entering Rwanda to become part of the team of defence lawyers assisting Victoire Ingabire at her trial in the High Court (Table D, Pages 36-37). He was arrested on accusations of genocide denial and spreading malicious rumours which could endanger national security. He was released three weeks later. His arrest related to articles he had written in earlier years outside Rwanda in which he questioned key events of the genocide.

185. More recent are the arrests on 25th March 2013 of Sibomana and Shyirambere outside the courtroom where Ingabire's trial was taking place (D, Page 39). They were questioned about the possession of T-shirts bearing the slogan "*democracy and justice*" and badges calling for Ingabire's release. They were charged with contempt of public officials, illegal demonstration and inciting insurrection or public disorder. Sibomana was found guilty of the first two charges and sentenced to two years imprisonment whilst Shyirambere was sentenced to five months.

Table E - Fair Trial Standards

186. Table E gives examples of the way, in particular, opposition politicians are treated in the trial process. The main case which the defence in these proceedings has examined is the trial of Victoire Ingabire. I will come back to her trial later in this judgment. Another example is to be found on Page 55, when in September 2013 two students were arrested after they tried to deliver a petition to the Prime Minister's office protesting the GoR's decision to levy fees on certain students. They said they were beaten in custody and held in solitary confinement without food or water for two days. Although it was positive that a judge dismissed all the charges one week later, when they reported the torture the judge carried out no investigation.

187. At Table E, Page 59, is a reference from the respected Bertelsmann Stiftung's Transformation Index 2014 Rwanda Country Report which covered the period from January 2011 to January 2013 at 'Objective' Bundle 9, Pages 54 onwards. Page 62 looks at the rule of law. It describes the Rwandan Parliament's power as weak with limited authority and a one-sided

composition. The judiciary is said to be formally independent "*but in reality is subordinated to the will of the executive in all politically sensitive matters*". Bertelsmann Stiftung describes the Gacaca system as "*marred by false accusations, corruption and difficulties in calling defense witnesses*". Genocide ideology, sectarianism and "divisionism" are prosecuted and as they have vague definitions, "*they enable a biased justice system to carry out political indictments and verdicts, particularly aginst opposition leaders, among them 2010 presidential candidate Victoire Ingabire and critical journalists*".

Table F - Freedom of the Press/Civil Society

188. Finally Table F sets out the ways that press freedom has been stifled since 2009. Private newspapers are suspended; critical journalists are intimidated and/or prosecuted with common charges being "*threatening State security, genocide ideology, divisionism and defamation or incitement to civil disobedience*".

189. I have taken more than one example from this table. At Page 67 is the story of Gasasira, a journalist, who was harassed by a Rwandan diplomat in Sweden. The latter was expelled. Gasasira had been tried in Rwanda and convicted in his absence of displaying contempt for the head of state and incitement to civil disobedience. Another example at Page 69 is the case of Habrugira a community radio presenter who mixed up the words "victims" and "survivors" and was detained for minimizing the genocide and spreading genocide ideology. It would appear he made a simple mistake although it may be more sinister than that.

190. At Page 70 is set out what happened to LIPRODHOR. In July 2013 one of the last remaining independent human rights organizations in the country was taken over by a group who voted in a new board ousting the independent leadership. The ousted President of LIPRODHOR challenged the takeover and was threatened by board officials and other anonymous individuals. A legal challenge by him foundered in August 2014 on procedural grounds. In June 2014 the pro-government New Times newspaper assessed Human Rights Watch (and HRW says grossly misrepresented it by) saying it supported the Democratic forces for the Liberation of Rwanda (FDLR). The FDLR operates in eastern Congo and some of its leaders participated in the genocide.

191. In terms of political society, at Page 78, the July 2013 law which Parliament passed ensures that the Rwanda Governance Board has the power to register political parties. The GoR was suspected of infiltrating opposition parties to undermine them. Freedom House in 2014 gave Rwanda a "Not Free Status" with a Freedom Rating of 5.5, Civil Liberties 5 and Political Rights 6, all out of 7. Independent organizations are reported as much weakened by Government intimidation, harassment etc.

192. Finally at Page 92 is set out a number of comments made in the US House Committee on Foreign Affairs – Subcommittee on Africa – Developments in Rwanda paper. The Committee states "*we are also concerned that political*

competition in Rwanda continues to be limited. There are eleven registered political parties in Rwanda. Ten are aligned with the ruling RPF in a government of consensus". More worrying is this comment: "*We have articulated our concerns about Rwanda's human rights record and highlighted the deteriorating situation*", this comment made by Steven Feldstein, the Deputy Assistant Secretary of State, Bureau of Democracy, Human Rights and Labor, US Department of State.

193. HRW World Report of 2015 reports progress in economic and social developments remain impressive "*but the Government continues to impose severe restrictions on freedom of expression and association and does not tolerate dissent. Political space is extremely limited and independent and civil society remains weak. Real or suspected opponents inside and outside the country continue to be targeted. The ruling Rwandan Patriotic Front dominates all aspects of political and public life. Opposition parties cannot operate in a meaningful way*" (Page 94).

Osman warnings to Rwandans living in the United Kindom

194. There is one entry that has caused this court particular concern. At Table A, Page 3 is the report that three Rwandan exiles living in this country had been told by the police that their lives were at risk from the GoR. I heard evidence from two of them, Rene Mugenzi and Mr Marara (who has a new name which he did not give to the court).

Mugenzi

195. In 2011 President Kagame took part in a BBC radio phone in programme whilst he was visiting the United Kingdom. Mr Mugenzi rang in, gave his name and was critical of Rwanda. He spoke about the lack of political space and human rights abuses taking place. He said the same thing that had happened in North Africa (the uprising) could happen in Rwanda. The President was clearly furious and said that the Rwandans were happy and that he had been elected in a fair election even if he got 93% of the vote.

196. Mr Mugenzi is a Kings College graduate with a degree in Astro-Physics. He has a responsible job and stood in the local elections in the United Kingdom. On 12th May 2011, a few weeks after the radio phone in, Mr Mugenzi received a visit from two members of Special Branch. They gave him an Osman warning. They told him they had credible and reliable information from the security service that the GoR was trying to assassinate him. He was told to be careful and he was given advice about security measures he should take. He exhibited the Osman form he was given and gave the names of the officers who had visited him. He had weekly contact with them to begin with then it reduced but after the recent assassination in South Africa (January 2014 Patrick Karegeya – Table A, Page 8-11), they initiated contact again and it happened about every three weeks. I found Mr Mugenzi a credible witness and I accepted his evidence as truthful.

Marara

197. Mr Marara was the second witness who gave evidence about an Osman warning. He had been in the Rwanda Patriotic Army and became a close protection officer and bodyguard of President Kagame's. He was foreman of the vehicles he used. He described Kagame as having difficulty controlling his temper and says he was slapped on occasions by Kagame. In 2000 when Kagame went to the United States, he was organising the cars and they arrived three minutes late. He was sent to prison for 15 days for getting it wrong but managed to get away and left the country.

198. In recent times, in 2009 or 2010 he had been warned by Special Branch that he was at risk of being killed by the GoR. The police had got in touch again after the death in January 2014 of Karegeya. Part of the advice he was given was that he should change his name. He said that when coming to this court to give evidence a man called "David" from the embassy had taken photographs of him. He also spoke about someone from the embassy who was looking for genocide suspects. He did not suggest however that the embassy was finding people who were not involved and framing them in some way.

199. It was suggested in cross examination by James Lewis QC that Mr Marara had not received an Osman warning. It was clear after further information and documentary evidence had been received that he had and that the police believed the threat emanated from the GoR.

200. I find that the UK authorities had received information that led them to believe that the GoR was threatening to kill UK citizens on UK soil. I was not in a position to see the evidence relied upon by the police before they gave those warnings but I had to accept there was sufficient concern for the police to take what is a very unusual step in each of these three situations. If the police were correct in their concerns, it is not a satisfactory state of affairs that a foreign government thought it appropriate to plan to kill those taking refuge here at a time they were seeking to take advantage of a memorandum of understanding brought about by diplomatic ties between the two countries, which they hoped would lead to extradition.

201. *Postcript* - President Kagame gave a speech on 25th June 2015, when both Mr Mugenzi and Mr Marara get a mention. His speech followed the arrest of Lt General Karenzi Karake in London on a European Arrest Warrant issued by Spain. President Kagame complained that the arrest was directed to show contempt to and to inconvenience and destabilize Rwanda. He blamed criminals "from here" (the UK) who gave advice to those who arrested the General. He named Rene Mugenzi and "*another thug from our army who ran away, a criminal called Marara*". (Table E, Pages 60-1).

Experts' view of Rwandan political situation

202. Two GoR witnesses, Dr Clark and Judge Witteveen, accepted that the description of the Rwandan State in the *Brown and others* judgment still stands. I also heard from the defence experts Professors Reyntjens and Longman.

203. Dr Clark had visited Rwanda recently for research purposes. In terms of the political landscape Dr Clark accepted in cross-examination that various NGO reports reflected what was happening in Rwanda. He accepted too in evidence that the regime was authoritarian as he said "*in the broadest possible sense – you could argue over some of the specifics*". He also accepted that there have been extra-judicial killings and disappearances.

204. Dr Clark accepted in cross examination that there was a shrinking political space in Rwanda but he didn't think it had got worse in the last couple of years. He said that what it meant was a clamp down on opposition parties, on critical media and local human rights' groups and on the local population expressing critical views. He described the picture as nuanced. When he was asked whether the human rights' situation was pretty dire, he said there were significant complications in human rights' terms, but it was not entirely bleak.

205. Dr Clark pointed out also that there had been some very important improvements in human rights, particularly if one looked at recent changes to media and genocide laws. He said that in Rwanda there is talk about human rights but also about socio-economic rights, Rwanda has developed substantially in the past 20 years. Dr Clark averred that economic equality should be taken into consideration. There had been an improvement in living standards with a knock on effect on ethnic relations, this also encouraged wider participation in the Gacaca system.

206. I accepted Dr Clark's evidence in that respect. It was quite clear that there had been great strides in living standards for the population, there was political stability but I found that the cost of this was a reduction in a number of basic freedoms.

207. Judge Martin Witteveen (see later) made it clear he was not giving evidence about the political situation in Rwanda. He did accept however that Rwanda was currently a repressive and autocratic regime.

208. Professor Longman was one of the the defence experts on the political situation. He had not been to Rwanda since 2006 but made it clear in his evidence in January 2015 that he kept up-to-date with the current situation. Between 2000 and 2006 he had been to Rwanda for periods of two weeks to three months more than a dozen times. Since the genocide he had been a prosecution witness in cases against Rwandan nationals.

209. His knowledge of the current state of affairs was through reading secondary material such as academic publications, human rights reports etc but he also remained in regular touch with his contacts in Rwanda including government officials, human rights researchers and spoke regularly with Rwandan expatriates with specific knowledge of what was happening in Rwanda.

210. Professor Longman in his first report dated 9th December 2013 said that Rwanda had gone through an ostensible transition to democracy with the reality that power had become more centralised and the government more authori-

tarian (Page 4, Paragraph 13). Power had increasingly concentrated in the hands of the RPF, Tutsi and Anglophones (Paragraph 14) with President Kagame increasing his personal power.

211. Professor Longman in his report at Page 12, made the telling observation that "*The public and official policies of the government often appear moderate and consistent with standards of democracy and human rights, but the realities in practice are quite different, revealing a regime that maintains strict control and is deeply authoritarian. For example, de jure power may be shared among parties and ethnic groups, but de facto power is firmly in the hands of Tutsi from the RPF"*.

212. I noted that Bertelsmann Stiftung in their 2014 report (referred to above) at 'Objective' Bundle 9, Pages 54 onwards, at Page 61 summarised the system as "*a skillfully designed institutional facade that conceals the real distribution of power. All major political and power-related matters are decided by the president, together with his key advisers*".

213. Professor Longman recognised that the GoR had achieved much, driven by their "Vision 2020" policy that Rwanda will transform from an agricultural to a knowledge based economy by 2020. It will do this by "*promoting good governance and efficient administration, training the population for work in sciences and information technology, developing the infrastructure and encouraging private business*" (Paragraph 15). The government is fighting corruption and Rwanda has moved from 158th to 58th in terms of the ease of doing business.

214. Professor Longman recognised the many positives of the Rwandan regime whilst pointing out that in his view the international community is being manipulated and conned into seeing the positives of good technocratic governance whilst ignoring the authoritarian RPF's grip on politics. Professor Longman explained that a key element of the RPF's strategy to maintain strong support from the international community is by justifying many of its policies by referring to the genocide and its legacy. It has suppressed discussion about its own violence against civilians as it took power and in its invasions of Congo. The RPF justifies its behaviour by saying that it is preventing another genocide. The restrictions on free speech and the laws banning "*divisionism*" and "*genocide ideology*" are said to be because of a necessity to prevent extremism from gaining strength in Rwanda (Paragraph 21).

215. In this expert's view since 1999 the RPF had given up the extensive violence it used to control the population after the genocide to using more subtle means to silence it and keep it fearful (Page 6, Paragraph 19). Laws had been passed to regulate speech, judicial processes are used to silence critics, opponents are arrested whether they are journalists or politicians. Professor Longman's evidence was that all the human rights organisations have either been taken over, coerced or closed. The press is similarly controlled. His evidence is that the population from the "*most local*

communities to the highest levels of political and civil society, feel threatened and fearful".

216. Professor Reynjens (VB File 1, Page 1 onwards) was another expert who had not been able to go back to Rwanda since 1994 when he was critical of human rights' violations carried out by the new RPF Government. For his information he relies on a network of researchers in Rwanda as well as academics based there. He did not name them at their request and explained at Page 5 "*Both they and I hold the view that to identify them would likely have an adverse impact on their personal security and their ability to undertake the work they do*".

217. Reyntjens said the regime exercises strong control within the country. Opponents are arrested, they disappear or they flee the country. He described the government as highly autocratic and authoritarian (Page 10, Paragraph 20) and said matters had deteriorated since his first statement for the 2007 proceedings. He held the strong view that the political landscape had closed even further since 2010. He points out that in the Democracy Index 2012 of the Economist Intelligence Unit, Rwanda now occupies the 132nd place out of 148.

Conclusions from the evidence about the political state in Rwanda

218. From the evidence I heard and read I have no doubt at all that the overall picture of Rwanda is of an authoritarian repressive state that is not less so than it was and is probably more so than in 2008-9, a state that is stifling opposition in a number of ways. There is evidence that the state is suspected of threatening and killing those it considers to be its opponents or they simply disappear at home and abroad. There is evidence that suspects can be tortured in secret camps where basic human rights are ignored.

219. Political opponents are far and few between and the evidence suggests that the trial of one, Victoire Ingabire, who had come to Rwanda to take part in the Presidential elections of 2010, was not fair. I will look at her trial in more detail in a moment. There appears to be no longer a free press; journalists who do not support President Kagame's political party are persecuted and, if they do not leave the country, imprisoned. The approach of the GoR to NGOs appears to be exemplified by what happened with HRW in Rwanda, which had been a respected organization. Those running it in Kigali were removed by pro-Government supporters who have taken it over and neutralized its role.

220. The question for this court is whether taking into account these findings in relation to the political landscape there is a real risk of a flagrant denial of justice if these RPs are extradited. This court has to consider whether there is evidence that the State's actions influence the judiciary and witnesses that are likely to be called to give evidence in these RPs' genocide trials.

Evidence of trials in Rwanda

221. The defence rely on trials that are said to politicized and unfair. I have set out an analysis of Victoire Ingabire's trial below but also Alun Jones QC for one relies in particular on another trial of a defendant who has political significance. Appendix B to his Closing Submissions looks at this evidence in some detail obtained partially through the unchallenged evidence of Scarlet Nerad and partially through a recently disclosed judgment of the Rwandan Supreme Court.

222. The trial was that of Bernard Ntaganda who was the leader of the Ideal Social Party of Rwanda (PS-Imberakuri). He too was going to register as a Presidential candidate in June 2010. Shortly before registration, he was arrested with others and kept in custody. He was tried by the High Court. Ms Nerad had spoken to some people who had observed the trial. She also obtained some papers from the High Court case. Amnesty described the timing of the arrest and accusations as suggestive of a political motivation.

223. In his High Court trial Ntaganda was not allowed to cross examine prosecution witnesses and was prevented from calling any defence witnesses. He was convicted on 11th February 2011 on all charges which included genocide ideology, divisionism, creating a criminal organization and threatening national security. Between the conviction and his appeal to the Supreme Court which was dismissed on 27th April 2012, two letters were received by the Supreme Court from separate prosecution witnesses in which they said they had been forced to write what they had in their statements. One of the witnesses requested that his evidence be dismissed.

224. In the Supreme Court, despite the letters from the witnesses, no evidence was heard either for the prosecution or for the defence. The judgment of the Supreme Court makes it clear that the High Court had a discretion whether to hear witnesses live or not. The law clearly gives such a discretion, the issue I have is that there is no analysis of whether that decision was reasonable in the circumstances.

225. The Supreme Court also rejected the claim that two of the witnesses had been terrorized by the investigators and relied on the original inculpatory statements produced for the prosecution. At the very least the court could have examined the evidence of the two witnesses to establish what had led to the change in their evidence. It seems that the Court did not do that but accepted instead the original statements as truthful.

226. It is at the very least arguable in the light of the evidence of Ms Nerad and the judgment of the Supreme Court that Mr Ntaganda did not have a fair trial and certainly the timing of the original arrest appears to be politically motivated.

227. Alun Jones QC's submission is that the GoR has called no evidence to challenge the assertions that recent trials have been unfair and he contends if these sort of trials in the High Court are politicized and unfair how could this court not find that the trials of these RPs would be too. His strong argument is summarized in his Appendix B, Page 2, Paragraph 4: "*it is absurd to claim*

that if the Rwandan judiciary is prepared to tolerate and administer unfair trials they will nonetheless act independently and impartially in what is said to be a different type of case. The judiciary either adheres to the rule of law or it does not". He goes on to ask rhetorically why it is these trials would be conducted differently.

The case of Victoire Ingabire – opposition leader

228. In the case of Victoire Ingabire the defence say there is evidence of the politicisation of the justice system. In January 2010, Ingabire, a Rwandan national, returned to Rwanda from Holland to take up the reins as leader of the FDU-Inkingi party. The significance of the date is that the presidential election was due to take place later on in the year. Her plan was to register her party and then stand in the Presidential election against Kagame. She was arrested and eventually stood trial. Amnesty, HRW and the European Parliament were of the view subsequently that she had been the subject of an unfair trial; that the charges were politically motivated and they were concerned that public officials made statements before the trial about her guilt.

229. The most valuable commentary on Ingabire's trial comes from Amnesty International; that respected organisation's report is to be found in the Second Bundle of 'Objective' Evidence, File 1 of 2, Tab 17, Pages 172 onwards. The evidence of how the trial was conducted was obtained from observation of all bar four days of the trial, with an observer assisted by a Kinyarwanda interpreter provided by the court to the defence. The trial ran from September to December 2011 and then from March to April 2012. On April 16th 2012 Ingabire and her lawyers withdrew from the trial after a defence witness' cell was searched and his notes obtained after he had given evidence.

230. The guilty verdict was given on 30th October 2012 when Ingabire was sentenced to eight years' imprisonment. Ingabire faced six charges, three relating to genocide ideology, discrimination and sectarianism and that of willingly disseminating rumours aimed at inciting the public against the established authority; and three relating to complicity in acts of terrorism, creating an armed group and recourse to terrorism. She was convicted of only two offences, the first, conspiracy to harm the existing authority and the constitutional principles using terrorism and the second that of grossly minimizing the genocide.

231. The conclusion at Page 196 of the Amnesty report summarises the fair trial concerns as follows: from the start comments by President Kagame relating to Ingabire's culpability and the strength of the evidence against her raised concerns about her right to a presumption of innocence. In May 2010 well before her trial started in September 2011 President Kagame was telling a Ugandan newspaper that "*on our side we have evidence, which has been brought to her attention, and about 10 things she has been denying. Now she's saying that seven of them are actually true and this has come as a result of the overwhelming evidence that was put in front of her including the people she was working with, the former soldiers in the FDLR who are here in our hands, who are testifying to these accusations*" (Page 187). Later in the same interview after discussing some of the evidence against her he says "…*issues are*

being sorted out. This woman will certainly be where she belongs…Now the outsiders who want so badly Ingabire to be an opposition leader here or later on be our president, well they may wait for a while.".

232. These comments in my view go well beyond the sort of superficial comment politicians sometimes allow themselves to make in relation to on-going proceedings. Also the President appears to know much detail about a case that will not be in court for another 16 months about one month after confessions were made by prosecution witnesses who had been held between September 2009 and April 2010 at Camp Kami. He discusses the case again on Twitter in April 2011 just a few months before the trial starts.

233. Professor Reyntjens commented in evidence that the impact of Kagame's comments is that it would become impossible for the judges to acquit her. Professor Reyntjens accepted however, that Avocats Sans Frontieres had given much training to the judiciary and he was of the view that the quality of the judiciary had improved tremendously.

234. Another more minor concern is the prosecution comment during the trial in reply to a defence complaint that their bags were being searched by security. On 7th September 2011, the prosecution said that this happens across the world (true) but added that "*the defence was representing 'a bunch of criminals' and could not be trusted*" (Page 188). Unfortunate.

235. The next concern of Amnesty was in relation to the set of speech-related charges based on, as they describe it, an imprecise piece of Rwandan legislation which lacked a clear legal basis. The evidence heard in relation to those charges, in Amnesty's view, fell within the framework of what constitutes freedom of expression. Amnesty pointed out that Ingabire should not be convicted in relation to her legitimate and peaceful exercise of freedom of expression.

236. The Amnesty report criticized the court for not investigating the circumstances which led to the confessions of the co-accused. The prosecution said the defence needed to prove to the court that one of the co-defendants had been treated poorly and could not cross-examine on allegations of mistreatment. Amnesty's view was that the judge seemed willingly to obstruct the defence from asking questions about detention conditions in Camp Kami. The court did not ask what had happened to the two men during their seven-month period in Kami.

237. The final criticism was that Ingabire was not treated in a fair and impartial way. According to Amnesty, the judges showed signs of hostility and anger towards her and interrupted her regularly. The impression given to Amnesty's observer was that there was an inequality of arms with defence evidence being repeatedly undermined "*whereas basic questions about the evidence presented by the prosecution were not asked. The defendant was repeatedly challenged by the court, in a manner which appeared intentionally confrontational*" (Page 196).

238. Amnesty made recommendations to the GoR and the judiciary which included encouragement to uphold equality of arms and to encourage judges to test evidence, by asking probing questions about individuals who may have been detained in secret establishments to find out when and by whom they were arrested, where they were detained, by whom, about what and how many times they were interrogated and whether any records existed of those interrogations.

239. Amnesty recommended that the GoR should encourage judges to summon the responsible authorities to provide information on the detention. Judges should decide on matters impartially, on the basis of facts and in accordance with the law without interference etc (Page 198). Amnesty requested that the Rwandan authorities ensure that Ingabire was not convicted because she had legitimately and peacefully exercised her right of freedom of expression.

240. A report by the respected HRW (referred to in Ms Ellis' 'Table of Violations' at Tab E, Page 48 which summarises evidence found in 'Objective' Bundle 2, File 2 of 2, Tab 50, Page 671 onwards) outlines its concerns in a balanced way. I say balanced because it is clear that HRW does not want to comment on the appropriateness of the charges relating to Ingabire's alleged conspiracy with armed groups. They refer to documentary evidence obtained by the Dutch police from her home which suggests she may have been sending money to an armed group.

241. The description of the trial starts at Tab 50, Page 671. The factors which lead HRW to consider that she had not received a fair trial were the politically motivated charges, including "genocide ideology", doubts about the reliability of some of the evidence, senior government officials' public statements before trial in relation to her guilt and broader concerns about "*the lack of independence of the Rwandan judiciary in politicized cases*". Part of the case was based on the evidence of four co-conspirators who alleged she was implicated in armed groups. The four received sentences ranging between two years and seven months' imprisonment and four and a half years'. During the trial it emerged that three of the four had been imprisoned in Camp Kami for several months. HRW had received information that other detainees in that military camp had been put under intense pressure and in some cases tortured to extract confessions.

242. HRW pointed to the fact that despite a defence witness saying that one of the four co-conspirators had said he did not even know Ingabire and that the same man had tried to get the defence witness to collaborate with the intelligence services to incriminate Ingabire, the court did not discount that co-conspirator's evidence.

243. HRW points out that various GoR ministers made comments about Ingabire before the trial started. The Foreign Affairs Minister said "*she is a criminal… She is bad news, she is connected to the FDLR and terrorist groups and she has a criminal history*". Comments like that were in the newspapers and the Africa director of HRW (Mr Bekele) considered in those circumstances it was highly unlikely she would receive a fair trial.

244. Another statement which shows HRW's balanced approach is the one made at Tab 50, Page 674 in relation to Rwanda's responsibility to prevent hate speech and incitement to violence which it accepts is legitimate, "*however, the responsibility to prevent violence should not be used as an excuse for stifling criticism or prohibiting discussion of certain events – nor should it be invoked as a pretext for delaying democratic reforms*".

245. In terms of HRW's comments in relation to Ingabire's trial I have approached its views cautiously as it is not clear to me whether, unlike Amnesty, HRW had observers in court watching the trial.

246. In May 2013 the European Parliament passed a resolution on the case of Ingabire. It had regard to various Charters and Agreements between States and the Amnesty report 'Justice in Jeopardy' (see above). It sets out at 'Objective' Material Bundle 1, Tab 5, Page 157 at Paragraph A onwards the background, the various stages in the trial and the criticism at G that "*the prosecution of Victoire Ingabire for 'genocide ideology' and 'divisionism' illustrates the Rwandan Government's lack of tolerance of political pluralism*".

247. It expresses its deep concern at the initial trial of Ingabire which did not meet international standards (Page 158, Paragraph 1), strongly condemns the politically motivated nature of the trial, the prosecution of political opponents and the prejudging of the trial outcome (Paragraph 2) and importantly for this extradition request and the very recent change in the law in relation to defence investigations, in May 2013 is calling for "*the principle of equality to be upheld through measures to ensure that each party – prosecution and defence – is given the same procedural means of and opportunity for discovery of material evidence available during the trial, and is given equal opportunity to make its case…*" (Paragraph 3).

248. At Paragraph 6, the European Parliament recalls that freedom of assembly, association and expression are essential components in a democracy, and "*considers these principles to be subject to serious restrictions in Rwanda*". At Page 159, Paragraph 10 the Parliament calls on the Rwandan judicial authorities to investigate allegations of torture effectively. At Paragraph 12, the Parliament calls on the Rwandans "*to ensure the separation of administrative, legislative and judicial powers, and in particular the independence of the judiciary…*". The Parliament took the view at Paragraph 13 that the 2008 genocide ideology law was used to accuse Ingabire as a political instrument to silence criticism of the government. At Paragraph 15 the Parliament stressed that the trial of Ingabire was important both politically and legally, "*as a test of Rwandan judiciary's capacity to deal with high-profile political cases in a fair and independent manner*". At Paragraph 18 the Parliament instructed to forward the resolution to the President of Rwanda amongst others.

249. Ingabire's case went to the Supreme Court. The judgment is in VB File 8, Page 2917 onwards. The Supreme Court found that all persons, not just the defence, were searched on the way into the High Court, that the judges were not biased against the defence but were merely robustly managing the case,

that the High Court had correctly analysed the evidence for the offence of minimizing genocide (Page 2984) and correctly found that Ingabire was supporting a "*two genocide theory*". The Supreme Court convicted her of minimizing genocide.

250. I noted that the Supreme Court ruled against the prosecution in relation to its appeal against an acquittal of one of the charges, that of creating an armed group. In relation to the prosecution appeal against the acquittal of the charges of spreading rumours aimed at exciting the population against the established government, the Supreme Court ruled against the prosecution in respect of certain pieces of evidence (documents Ingabire had written or speeches and interviews she had given) but at VB File 8, Page 2999, Paragraph 446 finds that those speeches (highly critical of Kagame and the government) are not a normal politician's views "*that seek to promote harmonious coexistence among the population or to criticize the government, …instead they are aimed at inciting to revolt and to discredit the ruling regime to the Rwandan citizens*".

251. The Supreme Court convicted her of treason with intent to undermine the existing government, the crime of spreading rumours with intent to incite the population against the current regime and the crime of minimizing genocide. The sentences imposed were 15 years, 3 years and 9 years concurrent, respectively, totalling 15 years (VB File 8, Page 3005), a near doubling of the original sentence.

252. Ingabire gave evidence in these extradition proceedings on 28th March 2014 from Kigali. She is serving her sentence. She explained that her appeal to the Supreme Court had taken place and was dismissed in December 2013 with the judgment published in February 2014. She is appealing to the African Court for Human Rights.

253. Ingabire agreed when cross examined that her case did not involve the genocide nor did she have the benefit of the protection of the various Transfer Laws although she pointed out that a US lawyer Mr Erlinder, who was coming into Rwanda to support her case, was arrested on the way into Rwanda because of things he had said at the ICTR. She explained that she had not denied the genocide and did not accept that in the Rwandan context certain statements have a different meaning to Rwandans than to an outside observer.

254. Professor Longman, the defence expert, adopted Amnesty's concern in his first expert report at Page 14. He picks out their comment that in relation to Victoire Ingabire's trial "*The judges appeared confrontational towards the defence and the defendant was regularly interrupted or reprimanded by the judges*" and points out that Amnesty considered that defence evidence given on behalf of Ms Ingabrire was treated differently to the prosecution evidence and repeatedly called into question.

255. The factors that the Professor relies on to indicate Ingabire did not receive a fair trial include the arrest of the defense lawyer Erlinder, prosecution witnesses whose evidence may have been obtained through force and intimida-

tion of a defence witness whose cell was searched and personal documents including notes for his evidence seized.

256. Professor Longman was of the view that there was evidence that the regime was willing to undermine Ingabire's defence in this high profile case in a really obvious way and it sent a chilling message to others "*who might seek to offer a vigorous defence of Rwandans whose cases are politically relevant*" (Page 15, Paragraph 39). The arrest of Erlinder would put lawyers off from coming to Rwanda.

257. Professor Longman points out that Ingabire's trial is not the only obviously political prosecution in recent years and gives examples of journalists and others involved in politics being prosecuted in 2010, 2011 and 2012 as well as the Mutabazi kidnapping in 2013 (Paragraph 40). Various political convictions have been upheld on appeal which indicates to him that the court process is politicised. Although the Professor recognises that none of these cases involve accusations of genocide, he argues at Paragraph 41 of his report that genocide prosecutions have become more politicised and sees no reason why they would be less.

258. Professor Longman described the regime's approach: any person who criticises them is said to support genocide. When he had argued that the RPF ought to be held responsible for its own crimes, he was accused of genocide denial despite the fact that he had never said there was a double genocide (Hutus on Tutsis and then Tutsis on Hutus).

259. In cross-examination Professor Longman accepted that there was nothing wrong with the appeal decision of the Supreme Court in the Ingabire case but pointed out that knowing about her case, this court had to look at the political context and he noted that her sentence was increased to one of 15 years' imprisonment from the eight imposed by the lower court.

Conclusions – Victoire Ingabire

260. For my conclusions in relation to the Ingabire case I am dependent on the Amnesty report which says that she had an unfair trial in the High Court in a number of ways. I cannot say that she was unfairly convicted of the treason related charges, they may well have been partially based on evidence obtained by the Dutch authorities including written documentation which was said to show her sending money and emails to the co-conspirators. Her conviction was also based on confessions of her co-defendants who had been held incommunicado for seven months in a detention centre. The obvious unfairness in that respect was the failure of the High Court to investigate this detention to see whether it might undermine the reliability of their inculpatory evidence.

261. I noted too in the evidence about the 2011 trial of Ngarambe and others who were accused of terrorist attacks, Amnesty complains the court put the onus on the defendants to prove they had been tortured rather than asking the prosecution to investigate the allegations.

262. Ingabire's conviction in relation to what she said, for example, at the Tutsi memorial was based on a law which is clearly open to abuse and in many jurisdictions would have been considered an interference with her right to free speech. The Supreme Court judgment explains that the reason for the law is to prevent genocide denial which makes a recurrence of genocide more likely. In the first instance trial and at the re-trial in the Supreme Court, Ingabire's speech at the Kigali Genocide Memorial Centre was used in evidence against her. Ingabire read the speech in evidence and I have a copy of it. Out of context, and I appreciate that is important, it does not appear to be controversial.

263. The Amnesty observer's description in particular of the court's lack of challenge to the co-conspirators' evidence and lack of interest in the possible reasons for the confessions is concerning. I have to accept that the prosecution described the defence lawyers as defending a bunch of criminals and that Kagame made a series of remarks about the strength of the evidence against Ingabire both of which undermined the presumption of innocence. It was surprising that he knew so much about the evidence against Ingabire 16 months before the case started. I was also concerned about the attitude shown by the judges to Ingabire and the defence. I noted she was tried by more than one judge and, despite this, Amnesty described Ingabire as not being treated in a fair and impartial way; worryingly the judges showed signs of hostility and anger towards her and interrupted her regularly.

264. The overall impression given to Amnesty's observer was that there was inequality of arms with defence evidence being repeatedly undermined "*whereas basic questions about the evidence presented by the prosecution were not asked. The defendant was repeatedly challenged by the court, in a manner which appeared intentionally confrontational*" ('Objective' Evidence, File 1 of 2, Tab 17, Page 196).

265. Another of my concerns in relation to her trial is that the cross-examination by Ingabire's lawyers had to be provided to the court one week in advance and as Ingabire told this court in evidence, the judges would conduct the questioning of witnesses rather than her lawyers.

266. The conclusions I have drawn from the evidence of the conduct of the High Court trial is that the Court was not fair to Ms Ingabire and that political considerations may have been at play. It is clear that the President and the GoR were very concerned about the prosecution against Ingabire but at the same time there is no evidence that the judges were directly interfered with by the executive.

267. I cannot exclude the fact that the High Court judges may have been reacting to Kagame and his ministers' repeated comments, the press reporting and other factors that are unknown, when they convicted her. These comments undermined the presumption of innocence in her case and I give more weight to the influence that ministers' comments may have in Rwanda than I would give to such comments in a genuinely democratic country. I noted, against the above, that the High Court did acquit her of four out of the six charges she faced. The Supreme Court although doubling her sentence and convicting her

of a new charge, did not uphold all aspects of her conviction. The Supreme Court judgment is detailed and I have no evidence that that Court was unfair in its conclusions other than it is upholding (as indeed the Court must) the law of minimizing genocide, which interferes with free speech and did so, in Amnesty's view, on this occasion.

Joel Mutabazi and his military court trial

268. Mr Mutabazi features in Ms Ellis' Table of Violations (Paragraph 178 above); he was tried in a military court in Rwanda for desertion and for offences against national security. That court did not find he had had refugee status in Uganda when he was brought against his will to Rwanda although the UNHCR thought he had. The military court found that his detention was lawful based on a domestic decision to remand him. Mr Mutabazi was sentenced to life imprisonment.

269. Mr Fitzgerald argues in his submissions at Page 16 that "*the court's approach combined with the actions of the executive in facilitating Mr Mutabazi's removal, is ample evidence of a state which demonstrates through its executive and judicial arms scant regard for the rule of law*". I agree with this characterisation of the proceedings against Mr Mutabazi; even if he was a threat to security he should never have been rendered to Rwanda from Uganda.

Ahurogeze and the five transfer cases – Uwinkindi, Bandora, Munyagishari, Mugesera and Mbarushimana

270. Very important evidence in terms of fair trial are the proceedings in Rwanda in relation to the five transferred defendants ordered since 2009 to return to face trial in relation to genocide offences. The defence teams in these proceedings have divided up their work and have each undertaken a detailed analysis of the evidence and made submissions in relation to one of the five transfer cases.

271. I have looked at all five cases but have spent the most time on the case of Uwinkindi. In his case there is an abundance of material with ICTR monitor reports, Judge Witteveen's statements and evidence and the various documents produced by the GoR via Ms Kabasinga.

272. The GoR provided a green file with Tabs 3 to 13, which contains a number of the judgments deciding the five accused should be returned to Rwanda. Documents in relation to Ahorugeze are also found in this file. He is not one of the five transfer cases relied upon by the GoR.

Ahorugeze – Sweden, Supreme Court 26.5.09, ECHR 27.10.11

273. Behind Tab 3 of the GoR's green file is to be found the Swedish case of Sylvere Ahorugeze ("SA") which was decided by their Supreme Court on 26th May 2009, the conclusions of which court are poorly translated and not altogether clear. The evidence the Swedish court considered was a Swedish

Foreign Ministry Report on human rights in Rwanda of 2007, a further report from the Swedish embassy in Kigali, a letter from Amnesty, another report and recent extradition decisions rejecting extradition requests including the magistrates' court's decision and the High Court decision in *Brown and others*.

274. Sweden emphasised that the Rwandan judiciary is evolving and improving in different areas. It found the most difficult problem in relation to Article 6 was the difficulty for defendants of obtaining the attendance of witnesses at trial. I was unable to find any detailed consideration of the question of the independence and impartiality of the judges. The conclusion was that SA should be extradited. The reasons for the decision made are short. The importance of this decision of course is that it was followed thereafter in other jurisdictions.

275. Ahorugeze took his case to the ECHR and the judgment was given on 27th October 2011 (GoR's green file, Tab 7). The relevant consideration of the arguments is at Paragraph 96 of the judgment. SA's argument was that in Rwanda defence witnesses would not come forward, there was a lack of qualified defence lawyers, the judiciary was not impartial or independent of the executive and this was compounded by SA's high profile previous role as head of the Rwandan Civil Aviation Authority. He had also been convicted by Gacaca courts of looting etc. He pointed out that if returned his trial would not be subject of monitoring in the same way that ICTR referrals were. In short he raised many of the issues the five RPs raise in front of this court. The Swedish Government countered his arguments from Paragraph 103 on, at Paragraph 105, they are said to have pointed out that in the extradition request Rwanda "*had stated that all accused persons were informed of their right to counsel of their choice*".

276. The Court's assessment is to be found at Paragraph 113 onwards. The test "*flagrant denial of justice*" is a stringent one. The Court relied on amendments to the Rwandan legislation; as to defence witnesses' fears of reprisals, the Court pointed out that the question is whether there are objective reasons to believe that witnesses would refuse to come forward. Since a change in the Rwandan law of May 2009 witnesses are afforded immunity from prosecution for statements made or actions taken during the trial.

277. Not only is there the VWSU witness protection programme under the direction of the Prosecutor-General but there is also a new WPU under the direction of the judiciary. The Court also took into account the submissions made by the Netherlands Government that during their work in Rwanda they had never been interfered with by the Rwandan authorities. The Norwegian police found the same and they had interviewed 149 witnesses in Rwanda since September 2009.

278. The Court found Ahorugeze's claim that he would not find a qualified lawyer to defend him unsubstantiated and it pointed out that he would be free to appoint foreign lawyers. The Court relied too on the judgment of the ICTR in the Uwinkindi case where the Referral Chamber noted that many members

of the Bar had more than five years' experience, they were obliged to provide pro bono services to indigent persons and there was a budgetary provision for legal aid.

279. As to the independence and impartiality of the judiciary, the Court took note of the concerns raised but pointed out that the ICTR had concluded the judiciary met the requirements and were qualified and experienced and had the necessary skills and there were constitutional guarantees of its independence and impartiality. The Court concluded there was no sufficient indication that the Rwandan judiciary lacked independence and impartiality. In short the Court found no real risk of a flagrant denial of justice if he was extradited.

280. Edward Fitzgerald QC makes the criticism in the Appendices to his Submissions, Tab 4, Page 16, Paragraph 54 that the Swedish Supreme Court had found "*clear improvements*" had been made since *Brown and others* in the High Court, whilst that was not the case. Furthermore he criticises the decision that comfort was taken from the lack of direct evidence that judges followed political orders; he points out the High Court's findings that *Bizimungu* was not likely to be the only such case of political interference in the judiciary. He argues that the ICTR and ECHR failed to consider the evidence of "*reality in practice rather than the law on paper*".

281. I find that Mr Fitzgerald's criticisms have some validity; it is true that the judgment of the ECHR is silent as to how the changes of the law have changed practice in the justice system. Furthermore he points out that the court did not consider whether there were available appropriate advocates for such cases. Finally he castigates the one paragraph in the ECHR judgment (Paragraph 125) where the independence and impartiality of Rwandan judges is considered which runs counter to the UK High Court judgment in *Brown and others*.

Jean Uwinkindi – ICTR Referral decision 28.6.11 and Appeal Chamber 16.12.11

282. Tim Moloney QC and Ian Edwards examined the case of Uwinkindi. Their submissions are set out in Mr Fitzgerald's Appendices, Tab 5.

283. Behind Tab 4 in the GoR green file is the ICTR decision of 28th June 2011 made by the Referral Chamber Designated Under Rule 11 *bis,* the Chamber returning Uwinkindi to Rwanda for trial. The ICTR dealt with a number of issues that are raised by the defence in the case before this court. This is an important decision as it was the first decision of the ICTR deciding to return an alleged *genocidaire* to Rwanda. I deal with his case in some detail below.

284. The ICTR judgment explains that referral "*is a sui generis mechanism where the referring Tribunal retains the power to revoke its decision if fair trial rights are not ensured. Referral is also ordered pursuant to a stringent monitoring mechanism that keeps the Tribunal informed of the perceived State's adherence to the conditions of referral*" (Paragraph 43 of the judgment).

285. The Uwinkindi case included the defence argument that the defence witnesses they would want to call in a trial in Rwanda were afraid of being threatened, harassed, jailed or killed. *"They have no 'faith in the Rwandan law' and 'do not trust the judiciary system' in the country. Most of them believe that if they testify for the defence their relatives in Rwanda will face repercussions which could ultimately result in death. They are further 'terrified' of Rwandan laws on genocide denial, revisionism, genocide ideology and minimization of genocide"* (Tab 4, Page 21, Paragraph 71). Each of 49 witnesses had agreed to give evidence for the defence only if their identities were not disclosed to the Rwandan authorities. If the case was transferred to Rwanda, they said they would not be willing to give evidence for the defence (Paragraph 70).

286. The prosecution relied on the evidence that between 2005 and 2010 357 witnesses from Rwanda had testified for the defence at the Tribunal whilst 424 testified for the prosecution (Paragraphs 71 and 72). The ICTR Witnesses and Victims Support Section (WVSS) indicated that no witness who returned to Rwanda subsequently raised security concerns. The defence replied that there was no evidence that the WVSS conducted any follow up checks to ensure that the defence witnesses had not experienced any negative experiences after giving evidence.

287. The ICTR judges were concerned not with whether the fears of potential witnesses were legitimate but with whether the accused would be able to secure the appearance of defence witnesses and thus obtain a fair trial (Tab 4, Page 26/59, Paragraph 90 of the judgment). In the circumstances, the Court took the view that "*the immunities and protections provided to the witnesses under the Transfer Law are adequate to ensure a fair trial of the Accused before the High Court of Rwanda*". They had reviewed affidavits from 49 witnesses and considered that their fears were mostly in relation to being prosecuted under the genocide ideology laws. The ICTR considered that there was "*little indication that they have been advised of the immunity provisions under Article 13 and 14 of the Transfer Law*".

288. The question of defence witnesses within Rwanda was considered by the ICTR at Paragraph 97 onwards. The Chamber noted that even without the protection afforded by the Transfer Law the defence in most of the 36 genocide cases tried by the Rwandan High Court was able to secure the attendance of witnesses (Page 28/59, Paragraph 100). With the increased protection it was logical that more witnesses would be willing to give evidence. The ICTR relied on the willingness and the capacity of Rwanda to change, including by giving immunity to statements made by witnesses at trial and also improvements made to the WVSU and the creation of the Witness Protection Unit ("WPU").

289. The Chamber pointed out that even before its Tribunal some witnesses were afraid of testifying. It was satisfied that Rwanda had taken adequate steps to amend its laws (Paragraph 102). "*The relevant Rwandan laws must be given a chance to operate before being held to be defective*" (Page 29/59,

Paragraph 103). The Chamber also noted the power to oblige a witness to give evidence when summonsed.

290. The Rwandan witness protection programme was also examined by the court. The original VWSU has been strengthened by the creation of the WPU which is under the control of the judiciary. The prosecution argued that the WPU in 2011 was being continually strengthened. The defence argued the service had not yet started as no cases had been transferred. They pointed out that defence witnesses still have to make their request for assistance to the Prosecutor General. The Chamber pointed out that Rwanda was taking steps towards creating an additional WPU and that the WVSU had improved in the preceding two years. It pointed out that no judicial system can guarantee absolute witness protection. Finally it found that the issue of "*protective measures for defence witnesses is prima facie guaranteed ensuring a likely fair trial…*".

291. The question of the impartiality and independence of the Rwandan judiciary was also considered in the part of the judgment entitled Rwandan Legal Framework from Paragraph 177 onwards. The court found the Judges of the Supreme Court and the High Court of Rwanda to be suitably qualified and experienced and have the necessary skills (Paragraph 178). The allegations of judicial corruption were not detailed enough to amount to a denial of fair trial rights on transfer (Paragraph 185). Finally the Chamber found that the Rwandan legal framework guaranteed independence and impartiality. Its independence is guaranteed by the Rwandan Constitution with various supportive provisions (Paragraph 186). The prosecution relied on the acquittal rate to show a lack of bias. In 2008 there were 283 trials before the High Court in Rwanda of which about 83 ended in acquittals. Between 17% and 18% of the convictions had been reversed.

292. It was clear from Paragraph 196 that the Chamber distinguished between political cases and the sort of trial and charges that Mr Uwinkindi faced, and relied on the monitoring mechanism and noted that if there were reports that the fair trial rights of the Accused, "t*he Residual Mechanism may invoke the revocation clause under Rule 11 bis and recall the case from Rwanda*".

293. Jean Uwinkindi appealed to the Appeals Chamber of the ICTR and the judgment was given on 16th December 2011. The latter decision is found at Tab 8 of the green bundle. Unfortunately some of the pages are missing. Uwinkindi argued that he had already been convicted *in absentia* by two Gacaca courts and that although it appeared the convictions had been vacated in fact they had not. As well as a ground relating to the difficulties of obtaining defence witnesses willing to give evidence in a trial, one of the grounds argued by the defence was that the Referral Chamber lacked enough evidence to find that there were reasonable funds available to the defence for the conduct of the trial.

294. He argued that the Referral Chamber had erred in its assessment of the independence and impartiality of the Rwandan judiciary but this was rejected by the Appeals Chamber. It accepted the distinction drawn between political

and non political cases by the Referral Chamber was not wrong. It accepted the Chamber's distinguished reasonably "*Mr Uwinkindi's case from the 'handful of high profile political or politically sensitive cases' in which the defence and amici suspected executive interference*". The Appeals Chamber considered the Referral Chamber had "*extensively examined*" the legal framework, its operation in practice, the competence and qualification of the judges and allegations of corruption. It found no error in the approach of the Referral Chamber which had concluded that although there were individual cases of influence and corruption, it found there was no evidence to suggest that "*they were cases similar to Mr Uwinkindi's*".

Uwinkindi in Rwanda

295. Uwinkindi arrived in Rwanda in April 2012. The evidence of the fairness or otherwise of Uwinkindi's trial can be examined not only through the lens of the ICTR monitors who have been observing it but also via the Rebuttal Material produced by Ms Kabasinga on 1st July 2015 and Judge Witteveen's additional report. Although the proceedings started in June 2012, the trial itself commenced with the prosecution opening on 14th May 2014.

296. I have tried to produce below a chronology of the proceedings against Uwinkindi. The information is taken from the sources mentioned above.

297. The monthly monitor reports are to be found in the volumes of Uwinkindi material. The monitors are thorough; they report facts and feed back in a contemporaneous way what is said in the interviews they conduct with various parties. Ms Buff is the first of the monitors and gives detailed and impressive reports about the proceedings in the preceding month. The monitors meet the prosecution and defence lawyers, the defendant, the prison personnel, representatives from the Ministry of Justice ("MiniJust") and Kigali Bar Association ("KBA") or Rwandan Bar Association ("RBA") and representatives of the new Witness Protection Unit ("WPU"). The monitors' reports give the clearest and in my view most accurate picture of the proceedings which are still on-going. The monitors rarely make comments on what they see so are not reliable sources when the quality of work is being considered.

298. I heard evidence from Ms Kabasinga on 1st July 2015. She had brought with her a number of files of documents in relation to Uwinkindi's trial including official summaries of the High Court and Supreme Court decisions in relation to Uwinkindi's application as an indigent to be able to chose his representation as opposed to having lawyers imposed by the RBA.

299. From the first monitor's report covering June 2012 at Uwinkindi Volume 3, Tab 15, the topic of the lack of legal aid is raised. Specifically at Paragraph 8 of Ms Buff's report at Page 2168 she noted that before referral neither the ICTR Trial nor Appeals Chambers in Uwinkindi addressed the issue of finances and fair trial guarantees in any detail but the Trial Chamber held that it was satisfied that legal aid would be made available if he was transferred. She warns that should there be further financial constraints, "*the existence of*

monitors and the possibility of the revocation of the Accused's referral should address any failure by the Rwandan authorities to make counsel available or disburse funds for legal aid and ensure the Accused's fair trial rights". Ms Buff also notes that she has asked MiniJust to schedule a meeting as soon as possible to discuss this issue.

300. Uwinkindi identifies 41 potential defence witnesses who live abroad whilst only eight were based in Rwanda (Uwinkindi File 3 of 3, Tab 15, Page 2169, Paragraph 10). Ms Buff puts this in perspective as she contacted the ICTR and found out that of the defence witnesses in the 57 cases tried at the ICTR, 74% lived outside Rwanda when they testified.

301. Buff in the same monitor's report explains what the KBA said to the ICTR Referral Chamber, I consider the KBA attitude is instructive: "*the cost for the defence of an accused person at the ICTR certainly includes payments that are not necessary in relation to a case handled in Rwanda…*". Specifically the KBA submitted that "*a large part of the investigations would be conducted locally*" and that investigations are conducted by the judicial police. Buff had reviewed the submissions made by the GoR and KBA and as she puts it "*there is no evidence that these institutions have anticipated the need to pursue investigations outside Rwandan territory*". Neither could the GoR point to any defence witnesses of those called in the non-Gacaca courts that had come from abroad. As the monitor puts it, the issue on 4th July 2012 is "*not whether witnesses will travel to testify from abroad, but whether financial resources are available that would permit the conduct, by either the defence or the prosecution, of investigations abroad*" (Uwinkindi Volume 3 of 3, Page 2169, Paragraph 11).

302. Buff describes the Rwandan system for finding witnesses in the same report of July 2012. In Rwanda the prosecution and the judicial police conduct investigations both for the prosecution and the defence, performing the functions that an investigative judge would in the civil law systems. Uwinkindi told her that he would rather die than provide the names of his witnesses to the prosecution but said he would allow Mr Gatera his lawyer to contact the witnesses. Gatera told Buff that he would not recommend that Uwinkindi rely on the prosecution and judicial police to investigate on his behalf. On this issue Buff concludes that although the Interim Monitoring Mechanism did not object to the Rwandan system in principle "*it remains to be seen whether it will function in practice*" (Uwinkindi File 3 of 3, Tab 15, Page 2170 Paragraph 14).

303. The next report of the monitor is for July 2012 at Uwinkindi File 3 of 3, Tab 17, Page 2182. Buff notes that there are now two defence counsel working part time on Uwinkindi's case, which they are doing pro bono. She has a meeting with Mr Rutabingwa, the Chairman of the KBA, and Gatera, lead counsel for Uwinkindi. Rutabingwa tells Buff that he has had several meetings with MiniJust about legal aid for transfer cases. Gatera was asking for more or less the same financing as that provided to a defence team at the ICTR. The Chairman of the KBA and the Minister were going to sign a MOU in relation to legal aid for transfer cases on 27th July 2012.

304. In her report she also explained that the second witness protection unit, the WPU was in a fledgling state and had yet to be set up. Her meeting with the WVSU coordinator revealed a fully functional and as she described it a "dynamic" organization. In relation to Uwinkindi, the coordinator explained that they were working with 18-20 prosecution witnesses whilst the WPU would work with defence witnesses. Buff suggested that the ICTR provide training and assistance to the registrars of the WPU so it could become functional.

305. Buff met with the Uwinkindi prosecutor and he explained that investigations abroad had taken place in the past and that money would be available but he provided no figures and she was unclear whether the prosecution had enough funds to permit investigations abroad both for the prosecution and for the defence. Significant, in my view, is Buff's comment that cross-examination has thus far never existed in the Rwandan courts (Uwinkindi File 3 of 3, Tab 16, Page 2179, Paragraph 16) although I noted that one of Ingabire's complaints was that she had to provide questions for the prosecution witnesses one week in advance (See Paragraph 268 of this judgment).

306. In terms of fair hearing, the next monitor (Anees Ahmed) comments in the report at Tab 17, Page 2182 on the 27th August 2012 first instance hearing that the issues, bail and dismissal of the case, were well argued "*the parties appeared well prepared with well researched arguments supported by legal provisions, case law and sound factual awareness of the dossier. The Judge provided equal opportunities to each of the parties to address the court and also provided opportunity to the accused to address the court …also whenever a new argument was taken up…The accused played an integral part in the presentation of the defence case, standing side-by-side with the defence counsel*." The monitor was at court when the Judge gave his decisions dismissing both defence arguments which the defence then said they would appeal to the High Court. The parties were each given time to address the court and the proceedings seemed fair.

307. The next monitor's report at Uwinkindi File 3 of 3, Tab 18 deals with the appeal from that decision held on 14th September 2012. Again there is nothing to suggest that the court did not treat the parties fairly. I noted too from Page 2186, Paragraph 6, that the parties "*argued vigorously, supported by legal authorities and factual evidence in an adversarial fashion*". The judge hearing the appeal gave each side the opportunity to respond to the opposing argument. His written judgment was given on 24th September 2012, described as detailed and reasoned, it dismissed the appeal.

308. The monitor spoke to the prosecutor and the lead defence counsel Mr Gashabana, the former saying they had not received any request from the defence in relation to the arrangements for defence witnesses and the latter indicating that they were facing constraints "*on account of unavailability of funding to conduct defence investigation*s" (Uwinkindi File 3 of 3, Tab 18, Page 2187, Paragraph 14). The legal aid provided only pays for the lawyers' services and not for the hiring of investigators or the payment of travel expenses

to identify potential witnesses. There had been no progress in their negotiations with MiniJust.

309. Ahmed writes a monitor's report dated 30th November 2012 found at Uwinkindi File 3 of 3, Tab 19, Page 2190 onwards covering the events during October and November 2012. There are two monitors who have meetings with MiniJust and others to discuss various issues including the provision of legal aid. The situation as set out to Ahmed is that in Rwandan law investigations are usually carried out by the judicial police and for the defence to have funds to do their own it has to be approved by the High Court.

310. A meeting was held on 8th October 2012 between MiniJust and others and the President of the KBA at which it was agreed that the latter would pay defence counsel normal KBA rates of 30K Rwf per hour for a specified amount of days only. The meeting acknowledged that defence counsel had presented a bill which was based on ICTR rates (which are considerably higher).

311. On 31st October 2012 the KBA and defence counsel for Uwinkindi signed an agreement in which it was agreed that Gashabana and Mr Niyibizi would bill for the number of hours spent on the case, it would go to the KBA and from them to MiniJust which would clear the payment within ten days of its receipt. As agreed between Mini Just and the KBA the rate was to be 30K Rwf per hour; pre-trial the defence could bill a maximum of four hours a day up to two days a week, also there was a pre-determined maximum of hours spent in court during proceedings and for the amount of time spent with Uwinkindi in prison (Uwinkindi File 3 of 3, Tab 19, Page 2193, Paragraph 17).

312. Gashabana pointed out to the monitors that the hourly rate was fixed in May 2001 and was a basic indicative sum and could not be justified for a complex case such as Uwinkindi's.

313. On 5th November 2012 MiniJust told the monitor that it had the budgetary allocation to provide for investigation by the defence once the High Court had allowed the request.

314. The next report at Tab 20, Page 2199 deals with the proceedings in December 2012 as seen by court monitor Constant Hometowu. It reports that the High Court has summonsed Uwinkindi to appear for trial on 14th January 2013, whilst the defence responded on 27th November 2012 pointing out that one issue is the non-appointment of defence investigators and assistants to help identify defence witnesses, most of whom lived outside Rwanda. They would need an additional six months once that issue was resolved to prepare for the start of the case.

315. The prosecutor's reply to the defence was contrary to what had been said at the meeting on 8th October 2012, when no legal provisions against the appointment of investigators was raised; the prosecution said that the Organic Law 11/2007 did not "*envisage the provision of defence investigators and As-*

sistants to defence teams". The Rwandan Prosecution Authority ("NPPA") asked that the defence indicate which part of the defence file needs investigating so that the NPPA can proceed to conduct the investigations on behalf of the defence. They opposed the request for an adjournment.

316. The monitors' reports continue monthly. In January 2013 the defence launch an appeal to a nine-member bench of the Supreme Court in relation to the defence question of whether the High Court should be hearing the case. The defence team applies for an opposed adjournment as they are not ready to proceed and are granted one. Meanwhile in the High Court the defence apply to adjourn the substantive hearing and despite the opposition of the prosecution obtain an adjournment to 4th March 2013. The Court found it would be in the interests of justice to do so.

317. The same monitor reports that defence counsel raises with him the problem of a defence team consisting of two lawyers and no investigators. Gashabana explained that there was an application to the court for the appointment of investigators. "*He questioned the practice whereby the prosecution would conduct investigations on behalf of the defence*".

318. In February 2013 (Uwinkindi File 3 of 3, Tab 22) the monitor notes that no decision in relation to the provision of defence investigators had been made and Mr Uwinkindi had heard Mr Ngoga saying he was disappointed about the acquittal by the Appeals Chamber of the ICTR of two Rwandan indictees. The good news was that defence counsel was now being paid his fees.

319. In March 2013 the monitor watches the beginning of the trial which is adjourned from 4th to 20th and then 22nd March 2013 as the defence point out they have not had the opportunity to prepare for the trial and explain that they have not yet been granted the appointment of independent defence investigators (other issues with the translation of parts of the indictment also remain).

320. On 20th March 2013, the defence submitted that they had been unable to conduct investigations as Uwinkindi had not been granted adequate facilities including two counsel, two investigators and a legal assistant to conduct his defence as promised by the GoR to the ICTR prior to transfer. The prosecution pointed out that the GoR had not promised to provide investigators and the Rwandan Penal Code stipulated that any investigations were to be carried out by the Judicial Police. The GoR had made it clear via the KBA that the Judicial Police would conduct investigations on behalf of the defence (Tab 23, Page 2222, Paragraph 20).

321. Uwinkindi explained that he had 19 witnesses around the world, including in Belgium and Switzerland, Zambia, Uganda and the Republic of South Africa. "*On further enquiry from the Court…Mr Gashabana, said the Budget provided to the defence would not allow the defence Lawyers to purchase tickets and travel to the countries where the witnesses are located*". Uwinkindi agreed to provide the list of witnesses by the 26th March 2013. The Court asked the defence to submit a budget to pay for the required investiga-

tions. The matter was adjourned to 16th April 2013. The WPU's set up was continuing and was staffed, the programme also had two safe houses at its disposal.

322. The next hearing was on 16th April 2013 when the matter was adjourned as the defence had produced a number of documents in relation to the appointment of defence investigators and the court needed time to read them. On 2nd May 2013 the court heard oral submissions and gave a ruling at Tab 25, Page 2232, Paragraph 8 denying the application for defence investigators as the Transfer Law did not allow for their appointment and deciding that the Judicial Police should conduct investigations on behalf of the defence. The Court directed the defence to approach MiniJust and the KBA to obtain the means for them to conduct defence investigations. It gave a deadline of 20th August 2013 for the defence enquiries to take place.

323. In the Rebuttal Material produced by Ms Kabasinga at Bundle 1, Page 117 is the minute of the meeting held on 24th June 2013 between MiniJust and Uwinkindi's defence team. The question of witnesses abroad is considered at paragraph 2, where the lawyers are asked to show clearly where the witnesses reside so that they know where to go when they visit them.

324. Gashabana told the monitors that MiniJust had advised at the meeting that funds would be released for the conduct of investigations (Tab 25, Page 2233, Paragraphs 9 to 10). Discussions then took place between MiniJust, defence counsel and the KBA. At one stage MiniJust was suggesting the defence had not provided sufficient detail and MiniJust had a budget problem.

325. So far as the WPU was concerned on 31st July 2013 the monitor was shown around the facilities and told that its services had been used in one genocide case before the High Court and/or Supreme Court (Tab 25, Page 2243, Paragraph 46).

326. On 7th August 2013 MiniJust told the monitor that the submission for funding lacked detail (Uwinkindi File 3 of 3, Tab 25, Page 2236) and they needed a breakdown of the expenses which had not yet been received. On the same day that was filed by Gashabana.

327. A hearing took place on 5th September 2013 at which the defence were not ready and the prosecution suggested they had fraudulently misused State funds and delayed the case for ulterior motives. The end result of that hearing was that Uwinkindi agreed to the defence witnesses living in Rwanda to be heard first whilst the negotiations continued between the defence and MiniJust for the resources to contact the witnesses abroad. Uwinkindi pointed out to the monitor at Uwinkindi File 3 of 3, Tab 26, Page 2239, Paragraph 21 that his fair trial rights would be prejudiced without the funding to identify, locate, contact and interview the defence witnesses, most of whom lived abroad. He also claimed that he would not receive justice as the prosecutors, Judges and all in his case are Tutsi and as the media coverage and State authorities regularly say he is guilty.

328. In the GoR Rebuttal Material Bundle 1, Pages 43 and 44, the defence lawyers have set out the budget they would require for investigating the 38 witnesses living in ten countries abroad, nine countries in Africa and New York. That totals US $64,925 (about £43K) whilst the budget for looking for witnesses in Rwanda comes to 876,750 RwFr (about £800). It is only the latter MiniJust pays in a cheque dated 26th September 2013 (Page 55) which is credited to the RBA on 8th October 2013.

329. The question of witnesses is raised by Uwinkindi's lead defence lawyer Gashabana in the monitoring report dated 4th July 2014 in Uwinkindi Volume 4A, Tab 12, Page 91, Paragraph 73: "*Mr Gashabana indicated that the defence has already started its investigation for witnesses who reside in Rwanda. For witnesses outside Rwanda, Mr Gashabana explained that only those who are imprisoned are willing to testify. Those who are free are afraid to tell the truth, Mr Gashabana concluded that it will be difficult to secure their testimony. Witnesses who reside in Rwanda have been under a lot of pressure*."

330. The funding for Uwinkindi's defence is raised repeatedly with the ICTR monitors, MiniJust, the KBA and the court. In June 2012 the lawyers were contracted to be paid 30K RwFr per hour. This was reduced to 1 million RwFr per lawyer per month in November 2014.

331. In December 2014, MiniJust adopted a new legal aid policy which reduced the agreed monthly pay to a lump sum of 15 million RwFr (about £12,500) for the trial and any appeal. By then they had been paid about 80 million RwFr. Worryingly, the new contract included Article 6 which provided for a unilateral cancellation in the event "*Counsel make any statements aimed at discrediting the Government or the Ministry in the course of their work, either to the press or during the trial*". Uwinkindi's counsel did not accept the agreement and MiniJust terminated their contract with a notice period of three months when the lawyers were expected to go on assisting the defendant but would be paid.

332. In the GoR Rebuttal Material Bundle 1, Pages 177-9 there are the minutes of a meeting between MiniJust and Uwinkindi's first set of lawyers on 4th December 2014 when the lawyers pointed out that not only had their hourly rate been reduced from 30,000 RwFr per hour to 1 million RwFr per month but that so far no funds had been released for gathering the testimony of witnesses abroad. MiniJust explains that it cannot continue to support the contract because it is not in line with the Ministry guidelines for the defence of genocide cases, the money so far spent is beyond the amount budgeted and since the case is mid-way through the proposed amount of 15 million RwFr per case is more than enough. All the contracts for transferred defendants needed to be harmonized.

333. On 8th December 2014 the lawyers for Uwinkindi write to MiniJust about the draft contract that they had been given (copy to be found in Objective Material 9A, Tab 17, Page 86). They are concerned about Article 6 set out above. The lawyers consider in their Opinion and Comments on the draft

at GoR Rebuttal Material Bundle 1 Page 176, Paragraph 21, that this interfered with their independence. I shared their concerns but accept that Article 6 was removed from the final contract. There were other articles in the contract the lawyers were not satisfied with including terms such as to detail the progress of the case to MiniJust and report all actions taken which also might limit their independence.

334. On 22nd December 2014, MiniJust terminated the lawyers contract because of their lack of agreement to the new one. In the three month period of notice they were expected to continue working on the case (Page 183) and be paid accordingly.

335. After their application for an adjournment until a new contract had been signed had been refused, the lawyers withdrew from the case and left the defendant unrepresented. They informed the High Court of this on 30th December 2014, they were asked to continue negotiating with MiniJust. (Witteveen Additional Report Paragraph 22).

336. On 15th January 2015 with his old lawyers there, Uwinkindi asked for an adjournment but the High Court ruled that the proceedings should continue with either the same defence lawyers or new ones appointed in their stead. In a short adjournment the lawyers did not return to the court room and Uwinkindi was left unrepresented. The High Court found that they had done that to delay the trial and they were fined 500K RwFr each. The High Court ordered that the concerned authorities should assist Uwinkindi in finding legal counsel (Rebuttal Material Bundle 1, Page 202).

337. On 29th January 2015 two new lawyers were appointed by the KBA and on 5th February 2015, Uwinkindi objected to their appointment on the basis that he had not had the chance to choose his representatives. The High Court found that as an indigent accused he was not entitled to choose but if he wished to he could be unrepresented. The Court ordered that the case continue.

338. On 16th February 2015 (Rebuttal Material Bundle 1, Page 232), Uwinkindi argues that one of the High Court judges in his case, Alice Ngendakuriyo was biased against him, not listening to him, listening to the prosecutor only, acting in a threatening manner and taking decisions 'against the truth'. The court rejected his application.

339. During March 2015 the new representatives remained in court but did not participate in the hearing during which 14 prosecution witnesses and nine defence witnesses gave evidence without being questioned by either Mr Uwinkindi or his new defence lawyers.

340. The new defence lawyers although present in court "*never represented Uwinkindi and are not in possession of the case file*". Within a few days of this happening all the prosecution witnesses had been heard without being cross examined as well as a few defence witnesses without being examined-in-chief. Closing submissions were however postponed. In the meanwhile the

Supreme Court in Rwanda ruled on 24th April 2015 that Uwinkindi as an indigent accused did not have the right to a free choice of defence lawyer and that the High Court was right to request the RBA to appoint new lawyers.

341. The lawyers launched an appeal to the Rwandan Supreme Court and the High Court refused to adjourn in the meanwhile. There was an appeal against the refusal to adjourn. The High Court decided to carry on with the case leaving Uwinkindi unrepresented. The Rwandan Supreme Court confirmed the appointment of the new lawyers as lawful on 24th April 2015.

342. The 1st May 2015 contract with Uwinkindi's new lawyers is at Page 319. The fees agreed to be paid are 15 million Rwfr in total however many counsel are appointed.

343. Uwinkindi's trial continued on 2nd June 2015; he had by then requested the MICT to revoke the decision to refer the case. He asked that the Rwandan proceedings be postponed until that decision had been made. The prosecution position became that they considered Uwinkindi could not be without defence representation and asked the High Court to order the newly appointed lawyers to stay in the case and represent Uwinkindi.

344. On 9th June 2015, the High Court decided that the new counsel should continue to represent Uwinkindi but that the witnesses heard in March should be re-heard and the trial was adjourned to 10th September 2015 for the new lawyers to prepare for the trial. After the defendant had not communicated with his new counsel the High Court allowed Mr Uwinkindi to choose new lawyers from a list of 68 but he refused to do so on the basis he was concerned about their competence. On 29th September 2015 the High Court indicated that the new counsel appointed to try the case were to continue to represent him and ordered that the case resume on 15th October 2015.

345. Mr Uwinkindi had his case taken back to the ICTR Mechanism for International Criminal Tribunals ("MICT") Trial Chamber in an effort to have the decision to refer his case to Rwanda rescinded. Argument was in writing and there was no oral hearing. The High Court proceedings in Rwanda were not adjourned whilst MICT considered his application. The threshold for revocation is set out in the judgment dated 22nd October 2015 of the Trial Chamber for MICT. The referral may be revoked according to Article 6(6) of the Statute of the Mechanism "*where it is clear that the conditions for referral of the case are no longer met and it is in the interests of justice*". The Mechanism's role is to determine whether "*the conditions for a fair trial in the domestic jurisdiction no longer exist*".

346. Uwinkindi argued that his right to have counsel of his choice has been infringed when new counsel were imposed on him. He complained he had no counsel in March 2015 and was forced to choose counsel from a list compiled by MiniJust which violated the separation of powers, finally he argued that the Rwandan High Court's order of 29th September 2015 compounded this violation. The prosecution opposed his submissions.

347. The MICT Trial Chamber found that an indigent accused could either represent himself or have free legal assistance assigned to him when the interests of justice so required (Paragraph 24 of Trial Chamber Decision). Uwinkindi had not shown it was unreasonable for the High Court to appoint new counsel to represent him, however measures should be taken to ensure that the new counsel provided effective representation in the interests of justice.

348. The MICT Trial Chamber was of the view that the High Court should have taken steps in March to ensure the defendant had legal assistance but noted that in June 2015 the High Court had decided that the evidence should be re-heard. The High Court had found that new counsel could analyse the charges, assess the evidence and make written submissions on behalf of the defendant even though the defendant was refusing to communicate with them. There was no evidence that the new counsel had insufficient years experience and that their appointment prevented the possibility of a fair trial. The Trial Chamber considered that Uwinkindi "*unjustifiably refused to cooperate with his newly appointed counsel*" (Paragraph 26 of judgment). A transferred defendant could not claim a breakdown in communication by his own actions and use that as a reason for revocation of the referral order.

349. Any potential violation of Mr Uwinkindi's rights to a fair trial resulting from the lack of lawyers in March 2015 "*could still be remedied at trial or on appeal*". Although provided by MiniJust the list of 68 qualified counsel had been put together by the President of the RBA. The defendant had not shown that counsel on the list lacked competence or were biased (Paragraph 28 of the judgment). The Trial Chamber noted that the disputed Article put into the contract had been removed after objection from the RBA.

350. As to his argument that the lack of funds to conduct defence investigations undermined his right to have adequate facilities for defence preparation and the principle of equality of arms, the prosecution pointed out that Mr Uwinkindi's defence team had by November 2014 received 83% of all the budget available for all transfer cases. The GoR pointed out that he had received funding to carry out defence investigations in Rwanda and it relied on a new practice direction explaining how additional funds for investigations beyond those conducted by the judicial police should be provided.

351. The Trial Chamber found that equality of arms did not require material equality between the parties. Rwanda had introduced legal aid programmes and had provided a budget of 100 million RwFrs for all such transfer cases. The 2014 15 million RwFrs (about £12,500) allocated to counsel for the whole case did not include fees for additional defence investigations which is funded as set out in the new practice direction.

352. The RBA had agreed to the new flat rate policy for lawyers. It also pointed out that the judicial police is responsible for gathering evidence both for the prosecution and the defence. Importantly, at Paragraph 34 of the judgment, the Trial Chamber makes it clear it is not for them to enquire into the size of the Rwandan legal aid budget nor to decide what fees should be

paid to lawyers. The Trial Chamber accepted that over 60 qualified lawyers had said they were willing to represent the indigent accused in transfer cases.

353. The Trial Chamber pointed out that Uwinkindi had failed to explain how the 876K RwFrs was insufficient and noted that in November 2013 the defence said they had started defence investigations in Rwanda. Uwinkindi had not explained to what extent he had used the services of the judicial police and whether he submitted a more detailed budget to MiniJust as requested. The Trial Chamber found that Uwinkindi had failed to substantiate that the effective preparation of his defence had been impaired by the High Court's decision that investigators should not be appointed (Paragraph 35).

354. Uwinkindi's final complaint was also rejected by the Trial Chamber. He contended that the fine the High Court imposed on his lawyers and the way the court allowed the prosecution to make disparaging remarks about the defence lawyers showed a bias towards the prosecution. This was rejected by the Trial Chamber which held that any defect could be remedied on appeal. All Uwinkindi's complaints were rejected by the Trial Chamber on 22nd October 2015.

355. I requested and was sent the August 2015 Practice Direction recently drafted by the Chief Justice of Rwanda. It concerns transferred defendants from the ICTR and other States and sets out various conditions that have to be complied with when an application for funding for further investigation is being made. The application must be *ex parte,* made 30 days before the travel, it must include a detailed explanation of the purpose of the investigation, the start and end dates and place of travel, the most economical route to be taken, the dates and duration of interviews with witnesses, information about the whereabouts and availability of the witnesses, an explanation of why the information cannot be obtained by video link, or other more economical means and any interpretation costs.

356. The High Court is to determine whether the investigation is reasonable and where travel is required the number of persons authorized to travel. The High Court is then to notify MiniJust to extend the necessary funding.

357. On 11th November 2015 this court received a joint defence response to the MICT decision. They make the point that Trial Chamber did not consider the evidence that Mr Witteveen gave to this court in relation to the ability of defence lawyers in Rwanda to conduct genocide cases which was based on his observations of all three live transfer cases. In its views on funding MICT were working on the basis that the funding in Uwinkindi received by the defence is 97 million RwF whilst the current flat fee for work on a transfer case is 15 million RwF all in, including any appeal. MICT also considered that it was not within its purview "*to scrutinize the Rwandan legal aid budget, inquire into its sufficiency, or verify its administration and disbursement*.". (MICT-12-25-R14.1 Paragraph 34).

358. The defence make the valid point that '*equality of arms*' connotes a value judgment as to the adequacy of defence assistance available to the de-

fendant and MICT has not grappled with that problem. Another concern raised by the defence is that MICT notes that the judicial police will be responsible for gathering evidence for the prosecution and defence. I agree with the defence in this respect that I have heard no evidence about how this police force functions and I do not consider the defence witnesses with the sort of fears I have heard about will be able to be marshalled by the judicial police.

Findings - Uwinkindi case

359. Over the years of these proceedings, the monitors have reported that there have been a number of complaints from the defence. In summary, MiniJust reduces the amount to be paid to the two defence lawyers on the basis that the legal aid fund simply cannot afford the amount initially they contracted to pay. The question of funding for the location and interviewing of defence witnesses particularly abroad is continually raised and not resolved.

360. By the end of the reports that are in evidence the position with the 38 defence witnesses abroad is that there are no funds allocated for their identification, location, interviewing etc. The defence lawyers complain that whenever they raise the question of the funding of their fees and/or ask for an adjournment the prosecution accuse them of delaying tactics to get more money and on one occasion accuse them of defrauding the public purse. This is then picked up by the press and they are publicly blamed for doing this.

361. I have gone into much of the evidence in relation to Uwinkindi's proceedings which provides information in relation to how the judges perform on a day-to-day basis, their attitude to defence applications and the defence case generally, the legal aid issues and other matters that have arisen in the last three years or so that Mr Uwinkindi has been before the courts of Rwanda.

362. The monitors' descriptions tend to be short as each report (of about three to five pages) has to cover not only any court hearings but also interviews with the accused, his lawyers, the prosecution, MiniJust and on occasions the prison governor and the director of WPU. The value of the reports is that they are a contemporaneous snapshot of every hearing which includes the reactions of the various parties to what has happened in the month. Unfortunately there is not much detail about what happens in court.

363. Throughout the monitors' reports there was no evidence that the judges lacked impartiality or were not independent. Instead I saw a number of occasions where the three judges in the High Court granted opposed applications made by Uwinkindi for adjournments (Uwinkindi material File 3 of 3, Tab 21, Page 2209, Paragraph 20 and Page 2219, Paragraph 9) and an example of an adjournment being granted at Page 2208, Paragraph 10, where the Supreme Court adjourned an interlocutory argument to enable the defence to receive the State's response before the argument took place. I noted too that the court ordered the recall of witnesses heard when Mr Uwinkindi was unrepresented. The judges listened to arguments and on occasion ruled against the prosecution on substantive matters. One example of this is that the Supreme Court ruled against the prosecution who tried to argue that the defence interlocutory

appeal against a decision of the High Court was unlawful (Prosecution Closing Submissions, Annex 11, Paragraph 25).

364. Ms Kabasinga's documents include the reasons the High Court and the Supreme Court gave for not finding anything wrong with the procedure of appointment of the new lawyers. Uwinkindi had no means to pay his lawyers and I do not find anything wrong with a procedure that allows the KBA to select lawyers for him, as long as the lawyers have the ability to conduct cases of this nature.

365. In the many interviews with the accused and his defence lawyers there are very few complaints about the lack of independence or impartiality of the judges. The defendant makes a point on one occasion that all the judges in his case are Tutsi. The implication is that they must lack impartiality because of their ethnicity. He also complains about the media coverage and the fact that various State authorities regularly say he is guilty. As I have noted above when looking at the case of Victoire Ingabire, the presumption of innocence is not valued by all politicians in Rwanda.

366. Uwinkindi makes a second complaint about the judges to MICT when he says they showed bias in that they allowed the prosecutors to make disparaging remarks about his defence lawyers and went on to fine them. MICT rejected his complaint.

367. The defence would argue that pressure happens behind closed doors; it can be consciously applied or applied through comments made in the press by politicians and others. It is very rare that a situation occurs, such as in the case of Bizimungu, when a judge confesses that he was pressurised into giving a particular verdict. The defence is of course right. Inappropriate pressure is almost impossible to expose and the only possible way to look at whether it is being applied in the Uwinkindi case is consider the way the case is being conducted by the parties in particular by the judges. I saw no sign of anything of out of the ordinary in the hearings that were described by the monitors.

368. I also had summaries of judgments of the High Court and Supreme Court in relation to Uwinkindi's complaints about the lawyers imposed on him once his earlier lawyers had withdrawn. The judgments were appropriate and the decisions ones they were entitled to make. There is nothing in those that cause me any concern.

369. I was concerned in one particular respect that on 3rd March 2015, the High Court refusing an application to adjourn made on the basis that the Supreme Court was due to decide whether the High Court was right in finding the appointment of new counsel was lawful, then heard in quick succession over two days nine prosecution witnesses who were not questioned by the defence. Another five gave evidence unchallenged on 10th March and the following day the court heard seven defence witnesses in one day, they having been picked by the court, most probably because they were detainees from the local prison. The tenth witness called did not even know who Uwinkindi was.

It was on the basis that all the case had been tried without Uwinkindi being represented that MICT decided to look at revocation of transfer.

370. I will comment later about the quality of Uwinkindi's representation.

Charles Bandora Extradition from Norway – District Court 11th July 2011 and Appeal Court 19th September 2011

371. The translation of the transcript of Mr Bandora's extradition hearing in Norway is to be found in the GoR's green file, Tab 5. The hearing took place between Uwinkindi's ICTR Referral Chamber hearing and the Appeals Chamber hearing. Like Uwinkindi and in these proceedings, Ntezilyayo and Ugirashebuja, Bandora had been prosecuted before the Gacaca courts. He had been acquitted at first instance, the prosecution had appealed and then he had been convicted by the Gacaca Appeals Court.

372. In Norway Bandora argued Article 6. His defence counsel was able to go to Rwanda to investigate on his behalf and argued that there was a real risk of a violation of Article 6. He applied to adjourn the case to call Peter Erlinder (the American lawyer connected to Ingabire's case who was arrested on the way in to Rwanda), this was not granted and a one day hearing was conducted on 24th June 2011. A Police Superintendent who was the lead investigator gave evidence and relied on a report he, the Superintendent, had written. In particular he gave evidence about the length of time before Bandora's case would be heard in Rwanda if extradited. HRW's report "Law and Reality", the Amnesty Annual Report 2011, the decision of the Referral Chamber in Uwinkindi and other reports were referred to. In his submissions defence counsel relied on the Divisional Court decision in *Brown and others*. He contended too that defence witnesses were unwilling to testify.

373. The Norwegian decision in relation to fair trial is dealt with shortly at Pages 11 and 12 of the judgment: *"The Court, however, is of the opinion that given the changes that Rwanda has made to its laws and legal system, and the guarantee that Rwanda has provided that Mr Bandora will be given a fair trial if he is extradited to Rwanda, there are no longer any grounds for rejecting the application*" for extradition.

374. The Oslo District Court then lists what the Rwandan authorities have emphasised, that he would be tried by three or more judges, receive an open and fair hearing by a competent and impartial court, he will be considered innocent until proven guilty, that he will have the right to a lawyer of his own choice, that he will be allowed to call witnesses in his defence in the same manner that witnesses will be called to testify against him, he has the right not to incriminate himself and can appeal. The court relied on the existence of the witness protection service and article 13 of the Transfer Law in Rwanda which protects from prosecution what witnesses say or do related to a trial. The Rwandan authorities had also said that observers would have permission to follow Mr Bandora's trial and it would be in public.

375. The Court also relied on the evidence of a Police Superintendent who had visited Rwanda 10 times between September 2009 and the hearing in July 2011 to interview 149 witnesses and he had never had the impression that the witnesses had been instructed to testify in a particular way. None of the witnesses had ever "*expressed any fear of any authorities in connection with the interview*". As regards defence witnesses not one had been reluctant to testify to the Norwegian police, "*nor do we have the impression that they are afraid to testify for any reason, and we have never heard of any threats, reprisals, etc that has influenced the testimony in any direction*" (quotation in the judgment from the Police Superintendent's report dated 23rd June 2009 (probably should read 2011)).

376. Finally the Court in Bandora gave great weight to the recent decision of the ICTR in Uwinkindi (see Page 14 of the report) particularly as the threshold for the ICTR to allow transfer is higher, as it must be satisfied that the accused will have a fair trial as opposed to in Norway where extradition can only be denied if there are objective indications of violations of the fair trial requirement for which the person charged carries the burden of proof. Extradition was therefore not denied by the Oslo Court.

377. This judgment is of particular interest in that 149 witnesses were seen by the police and none appeared reluctant or fearful. Unfortunately the judgment is silent as to the precise number of defence witnesses interviewed or what they were told about giving evidence.

378. The judgment is short and it must be said with the greatest respect to the Court in Oslo a little lacking in detail.

379. Mr Bandora's case went to the Borgarting Court of Appeal and the transcript of that appeal is to be found at GoR's green bundle, Tab 6. The Court's decision is at Page 7, Paragraph 3.1 after the arguments have been set out. The main appeal related to the issue that the Uwinkindi Referrals Chamber decision was sent to the District Court between the hearing and judgment being given and was not the subject of submissions. It went on to consider the Article 6 decision made by the court below at Page 10, Paragraph 3.2 of the judgment. The major part of the judgment concerns whether the right test was applied by the lower court. It was. The appeal was dismissed.

Mr Bandora in Rwanda

380. Mr Bandora arrived in Rwanda on 9th March 2013 and appeared at the High Court in Kigali for the first time in November 2013 (Tab 6, Page 3, Paragraph 9 of the Appendices to CU's closing submissions). His case was not monitored officially but the GoR witness Martin Witteveen and a colleague from the Dutch Embassy sat in on at least nine days of the trial between 22nd September 2014 and 15th December 2014. Mr Bandora was convicted on 15th May 2015 and sentenced to 30 years' imprisonment.

381. A 39 page full note of the High Court judgment is at GoR Rebuttal Material Bundle 2, Tab 4, Page 24 onwards produced by Kabasinga. It makes

it clear that some witnesses changed their evidence in the trial saying that they were forced to testify against the accused. It is quite clear that apart from those witnesses there were a number of others either inculpatory or exculpatory.

382. Martin Witteveen is a Dutch judge who had arrived to work in Rwanda in June 2014 and was acting as an advisor in international crimes to the NPPA in Rwanda. When he arrived he made it clear as one of the conditions of his appointment that he wanted access to anyone he chose (Report Paragraph 263). The assignment is funded by the Dutch government. In his career in Holland he had served as a national prosecutor between 1984 and 2004 mainly in organised crime. From 2004 onwards he has had an international career.

383. From 2004 to 2008 he served as investigation team leader in the Office of the Prosecutor of the International Criminal Court and was leading a criminal investigation into alleged war crimes and crimes against humanity in Northern Uganda. He conducted multiple field missions there and had a primary responsibility for witness protection, organisation and networking. Between 2008 and 2012 he was an investigation judge in the district court in The Hague for international crimes.

384. He conducted pre-trial investigations and heard numerous witnesses mostly abroad including when he was working as an investigation judge in relation to two genocide cases in Rwanda. This involved approximately 30 field missions to Rwanda; each mission was between one and two weeks long. From 2012 to 2014 he worked for a Rule of Law mission of the European Union in Palestine: he advised and assisted the Palestinian Prosecution in capacity building.

385. He is on the Board of Advisors for a project run by the American Bar Association on corporate liability for international crimes and violations of human rights. He had also drafted an investigation manual for Transparency International. By the time of his second report he was on a panel of experts for a research project conducted by Amnesty International and another.

386. It was clear from his evidence that this was a witness with great experience of investigations in Rwanda. I found him to be a credible, reliable and compelling witness. He was compelling as he was clearly an objective witness who told me what his recent experiences of the trial system in Rwanda were. His evidence was also useful as he had conducted many investigations in Rwanda and he explained to the court his experience of dealing with witnesses in genocide cases.

387. Mr Witteveen's first report was dated 19th September 2014. This concerned his experience of interviewing witnesses and his views of the independence and impartiality of judges in Rwanda. He explains in the section "*Scope of this report*" that his written evidence is based solely on his experience and he tries not to rely on secondary evidence. He also makes it clear in Paragraph 16 that he is going to refrain from making observations on the hu-

man rights and political situation in Rwanda for two reasons, firstly it is not his expertise but secondly he endorses the GoR's approach that he does not see how observations on human rights and the political situation in Rwanda can help the court to decide whether VB and others will get a fair trial. With respect to a witness that I found persuasive in many ways, the High Court in *Brown and others* disagreed with him and so do I.

388. Overall the tenor of Mr Witteveen's first report was positive in relation to Article 6 and it was clear that he considered that any alleged *genocidaire* returned would have a fair trial. In terms of the trials of Bandora and the others returned to Rwanda, the second report he wrote on 3rd June 2015 is more relevant. His second report was written at his own instigation and served by the GoR days before he was due to give evidence.

389. In the months since his first report in September 2014, he had attended a number of court proceedings in the five transfer cases. The purpose of the additional report was to provide an update on the topics he had addressed in his first report as well as to provide an expert opinion on the status and work of the defence attorneys in the transfer cases currently in the High Court in Kigali. He emphasised in his Paragraph 8 that his intention was not to criticise but to assist Rwanda in building their justice system.

390. His concern as expressed in Paragraph 14 onwards was in relation to the status and quality of the defence lawyers acting for the defendants transferred to Rwanda:

"*I have a deep concern on the status and quality of the defence attorneys acting for their clients in the genocide transfer cases. In the cases I witnessed, none of the defence attorneys performed at a level that meets any international standard. In summary: in some cases there is currently no defence, either officially or materially, in other cases the defence attorneys act or acted substandard and even irresponsible* (sic)".

391. His evidence is based on a number of visits to court hearings in relation to all five transferred men. Importantly his expert evidence is not only based on what he saw but also on the notes made by the legal officer of the Dutch Embassy in Rwanda who had attended almost all the trial sessions between September and December 2014. A local member of staff accompanied them and translated for them and made typed notes of the proceedings.

392. Bandora had had two defence lawyers whom he had selected from the RBA list. He had paid for them privately until his money ran out. He then applied for legal aid. On 14th September 2014 a contract was signed between the defence lawyers and MiniJust, the agreed fee for the case was 15 million RwFr.

393. The important matter to note is that the defence lawyers accepted that fee one week before the trial started when they had been paid privately for all the preparatory work leading up to that point. As Mr Fitzgerald points out in

his Appendices to his Closing Submissions, Tab 6, Page 5, Paragraph 14, this was a "*welcome top-up*".

394. During the trial between September and December 2014, 12 prosecution and 14 defence witnesses gave evidence. Mr Witteveen considered the performance of the defence was problematic: the cross examination of the prosecution witnesses and examination-in-chief of the defence witnesses was "*chaotic*" (Paragraph 40 of his Additional Expert Report). "*The defendant personally led much of the questioning without any guidance or direction from his attorneys, who were silently sitting next to him*".

395. The lawyers' questioning was not structured, they did not appear to have any strategy, they talked over each other and were interrupted by Mr Bandora. Mr Witteveen described their questions as "*very brief and superficial*". The answers were not followed up and the lawyers constantly moved from one topic to another. Many questions either were or seemed irrelevant and repetitious. The presiding judge interrupted occasionally because of this. Finally Mr Witteveen pointed out that Mr Bandora and his lawyers repeatedly mentioned the name of a protected witness whose name was not supposed to be mentioned.

396. A major problem was that the defence "*left many opportunities unused, especially in reaction to prosecution witnesses*". He gave the example in his Paragraph 41 of two prosecution witnesses (Hakizimana and Baziga) who had incriminated Mr Bandora in the Gacaca proceedings, retracting their statements in the High Court, saying they had been visited by the prosecutors in prison who promised they would be released if they testified against Mr Bandora. They said they had given evidence against Mr Bandora in the Gacaca appeal because they were forced by businessmen to do this.

397. In rebuttal, the GoR served material from the Bandora trial (Bundle 4). Unfortunately it was not put to Mr Witteveen. It shows an evolution in the evidence of one of the witnesses, from saying he was pressured to give false evidence against Bandora in 2008 in an appeal against his acquittal in Gacaca, to saying important meetings had taken place at Bandora's home, to accusing him of direct killings when interviewed by the prosecutor whom he said had induced him to falsely accuse Bandora. Baziga also said he had been induced into giving false evidence, his evidence follows a similar pattern to that of the first witness, Hakizimana. Both said the inducement was in relation to early release. There was no testing questioning from anyone about their evidence as Mr Witteveen said.

398. Mr Witteveen found it "*incomprehensible that the defence attorneys did nothing with this information: no additional investigation was requested, nor did the defence submit an additional list of witnesses to clarify these allegations, that, if proven true, could have an impact on the outcome of the case*". One of the businessmen referred to was also a witness but was not asked about this part of the evidence. It was of concern that the High Court relied on their evidence to convict Bandora yet made no mention of the weight to be given to the way their evidence has been undermined.

399. Documents in relation to another witness Matabaro (Rebuttal Material Bundle 4, Tab 3, Page 77) said in evidence that Baziga and another asked him to change his testimony. The Court asked questions and the witness said that Baziga and another had been bribed to change their evidence by defence counsel. It was surprising that there is virtually no enquiry made into what he said by either the Court, the prosecution or the defence. At the very least the prison could have been contacted to find out if defence counsel had visited these witnesses.

400. Witteveen's other concern was that a limited number of witnesses gave evidence whilst the names of many other possible witnesses were mentioned yet no attempt had been made by the defence to get them to court. He also explains that there had been no effort made to contact witnesses abroad and the defence lawyers had not even asked MiniJust for a budget to investigate the defence case.

401. His summary was that the defence lawyers' performance revealed their lack of knowledge and experience in cases of genocide "*as well as the immaturity of the state of the defence in serious criminal cases. They simply were not capable of building a credible defence case that could have impacted on the outcome of the defence*".

Findings in relation to the trial of Bandora

402. I accept the evidence of Witteveen; he had seen some of the trial and for anything that he had missed he had been able to rely on the contemporaneous account of it made by someone from the Dutch embassy. According to Witteveen, the defence lawyers had neither the experience nor the skill to ensure that Mr Bandora received a fair trial. Nothing, however, that Witteveen said led me to conclude in that case that the judges were not independent or impartial nor that defence witnesses were reluctant to give evidence.

Bernard Munyagishari – ICTR Referral Chamber 6th June 2012 and Appeals Chamber 3rd May 2013

403. Mr Munyagishari was arrested in May 2011 in the Eastern Congo and first appeared in the ICTR on 20th June 2011. He is another defendant sent to Rwanda by the ICTR for trial.

404. Helen Malcolm QC and Mark Weeks look in detail at the events surrounding his transfer in their Closing Submissions at Page 35 onwards.

405. Munyasighari was a defendant who had also had his conviction in the Gacaca court nullified after the event. An oddity relied upon by Helen Malcolm QC and Edward Fitzgerald QC is that when it came to the request to transfer Munyagishari to Rwanda the KBA was granted *amicus curiae* status (Appendices to Ugirashebuja's submissions, Tab 8, Paragraph 3). As has been seen in the case of Uwinkindi the KBA is responsible for putting together the list of lawyers able to defend in transfer cases.

406. After argument on 12th April 2012 the Referral Chamber decided the following in relation to the 11*bis* motion in a judgment given on 6th June 2012. Statements made by the media and others (including President Kagame) in relation to the accused persons on trial at the ICTR did not breach the presumption of innocence; monitoring combined with the possibility of revocation would be sufficient to protect Munyagishari and the presumption of innocence "*clearly forms part of the Rwandan law*" (GoR green file, Tab 12, Paragraph 52). In my view rightly, the ICTR make the comment that judges are trained and experienced professionals "*capable of separating comments made by public officials from evidence presented in the courtroom*" (Tab 12, Paragraph 54).

407. The Chamber decided he was not subject to double jeopardy and relied on comments by the Human Rights Committee (of the ICTR) on Article 14(7) of the (International Covenant on Civil and Political Rights (ICCPR) that the "*prohibition [against double jeopardy] is not at issue if a higher court quashes a conviction and orders a retrial*" (Tab 12, Page 16, Paragraph 59).

408. Amongst other findings the Referral Chamber held that the legal protections for witnesses were adequate on the basis of the Transfer Law and that the Genocide Ideology law would not stop them from giving evidence. This was despite the lawyers for Munyagishari presenting evidence in the form of affidavits from 16 anonymous witnesses who said they did not want to testify in Rwanda.

409. The Chamber found the defence affidavits prima facie credible but it was beyond their role to determine whether their fears were well founded; it took note of the fears outlined in the affidavits but found that following the amendments to the Transfer Law in 2009 and improvements to the witness protection services, the Chamber "*is satisfied that there now exist adequate safeguards to address the fears of witnesses and increase the likelihood of their appearance*" (Tab 12, Page 30, Paragraph 117 of the Referral Chamber decision in the GoR's green bundle).

410. The Referral Chamber held that the legal aid system in Rwanda was adequate even though as an indigent accused Munyasishari would not be able to choose his lawyer (Tab 12, Page 37, Paragraph 14). The Referral Chamber was reassured by the KBA in relation to the budget for legal aid. The Chamber also looked at the membership of the KBA which in the Chamber's view consisted of a "*sufficient number of competent, qualified and experienced lawyers*" who could be assigned to the case. Five of the lawyers are included in the ICTR roster of defence counsel. Miss Malcolm argues that of course this conclusion was reached without the benefit of Witteveen's evidence of what was happening in the trials taking place in Rwanda.

411. In relation to allegations made about the lack of independence of the judiciary the Court found that that was speculation and it relied on Rwandan law and on the Constitution. Mr Fitzgerald notes at his Paragraph 5 (xii) that the Referral Chamber described allegations concerning the trial of Victoire

Ingabire were "unsubstantiated", "*The IADL has failed to suggest why the Ingabire case is similar to that of the Accused*" (Paragraph 187 of the Referral Chamber decision); "*in the absence of evidence to the contrary, it must be assumed that judges "can disabuse their minds of any irrelevant beliefs or predispositions". Therefore, it is for the appellant doubting the impartiality of a judge to adduce reliable and sufficient evidence to rebut this presumption of impartiality*" (Paragraph 185 ibid). The Chamber also found that the appointment of international judges was a realistic possibility, this was despite the defence argument that the appointment of such judges was at the discretion of the President of the Supreme Court. I agree with Dr Clark that such an appointment is very unlikely for the reasons he gave, one amongst which is national pride.

412. I accept Miss Malcolm and Mr Fitzgerald's argument that overall on many occasions in its judgment, the Referral Chamber drew comfort from the fact that monitoring would take place and there was the possibility of recall. Of course both these are absent in a case of extradition. I also accept Miss Malcolm's argument that the decision was made without the "*benefit of the quantity, quality and type of evidence that is before this Court. In particular the evidence of Professor Longman, Martin Witteveen and the various individuals such as Victoire Ingabire and Enos Kabaga have provided the necessary substance to the claims made by the defence, and regarded as (then) unsubstantiated by the Chamber*".

413. Munyagishari and the Prosecutor appealed the decisions made. The appeal judgment dated 3rd May 2013 is found at GoR's green bundle, Tab 13. The Appeals Chamber heard new evidence in relation to the newspaper and media reports about Rwanda's willingness to abide by conditions set by the Tribunal but found it would not have been a decisive factor in the Referral Chamber's decision.

414. Another new piece of evidence relied on in the Appeals Chamber related to the Amnesty Report in relation to Ingabire's trial. The Appeals Chamber found that although the report was sufficiently credible to be admitted into evidence it would not have had a decisive bearing on the decision taken by the Referral Chamber. The Appeals Chamber reiterated that unlike the Ingabire case, Munyagishari's case "*would be subject to independent monitoring and to additional protections and guarantees under Rwandan laws applicable to cases transferred from the Tribunal*". The overall appeal against the decision taken by the Referral Chamber failed. The threshold for an appeal is high, it is only if the Referral Chamber has made a discernible error that the Appeals Chamber will intervene.

415. The Appeals Chamber was not reaching a decision on the merits *de novo*. I agree with Miss Malcolm's arguments in her Closing Submissions at Page 39, Paragraph 131 and with Mr Fitzgerald's submission at Tab 8, Page 8, Paragraph 11 of his Appendices to his Submissions and I attach very little further weight to the Appeals Chamber decision rather than to the original decision to transfer Munyagishari. The significant decision is the one made by the Referral Chamber. The cross appeal by the prosecution in respect of the ICTR

requiring a written guarantee that the defendant would be assisted by a counsel with previous international experience was allowed. I agree with Miss Malcolm that in the light of Witteveen's evidence this is troubling.

Munyagishari in Rwanda

416. Helen Malcolm QC and Mr Weeks have looked at the proceedings against Munyagishari and consider his position in their Submissions at Tab 1, Page 34, Paragraph 122 onwards. Munyagishari arrived in Rwanda on 24th July 2013. As a transfer case his proceedings are being monitored by the ICTR. Unlike Mugesera, he was immediately granted legally aided lawyers on 31st July 2013 (Rebuttal Material Bundle 2, Tab 3, Page 1). On 14th August however, the defendant refused to instruct the lawyer suggested by the RBA. On 16th August 2013, it was suggested by the RBA that he should be given a list of lawyers and asked to choose one (Page 8). At a hearing on 3rd September 2013, the defendant applies to have a judge disqualified from hearing his case because he says he shows bias in favour of the prosecution. This was on the basis the hearing was being conducted in Kinyrwanda when this was subject to appeal. He also complained he was not allowed an interpreter (Page 11).

417. Within five weeks the defendant had applied for revocation of transfer on the basis of the breaching of his rights including his rights to be informed of the case against him in a language he understands and his rights to have his initial appearance before a competent and independent court in accordance with the law (Supplementary Material Munyagishari File 5A, Page 34 of 122).

418. This application was rejected by the ICTR on 13th March 2014. The proceedings are still in the pre-trial stage and when Mr Witteveen gave evidence the defendant was due to give his list of defence witnesses to the court.

419. There have been issues over Munyashishari refusing to speak Kinyarwanda in the proceedings and whether he would be provided with interpreters. He claimed not to be Rwandan but to have been born in the Congo. The prosecution argued that he understood and spoke Kinyarwanda whilst Munyagishari claimed he did not. At an early hearing the Court had decided to hear Munyagishari's case in Kinyarwanda (see monitoring report for September 2013) and this was confirmed during the 16th January 2014 hearing before the High Court.

420. The monitoring reports from 19th December 2013 onwards are in file 5A of the Supplementary Munyagishari Material. From the first report Muyagishari is complaining that he does not speak Kinyarwanda and he needs all documents to be translated into French. He was also demanding a defence team consisting of a lead counsel, co-counsel, legal assistants and investigators. He has a number of other complaints and the sense I get from these is that he is doing his best to have his case referred back to the ICTR.

421. On 14th January 2014 in an argument before the High Court the defence lawyers for Munyagishari argue for a funded defence team including

two investigators and point out that the ICTR Chamber urged Rwanda to allocate sufficient funds to conduct investigations including into witnesses abroad. He complains that the 15 million RwFr provided for the trial and appeal by MiniJust in agreement with the RBA was not sufficient funding for his lawyers, Niyibizi and Hakizimana. They refused to work for that amount. Defence counsel made it clear they wanted to be paid in the same way counsel for Mr Uwinkindi were, i.e. 1 million RwFr monthly per counsel. In any event, on 14th March 2014, Munyagishari wrote to the President of the RBA and made it clear he wished to be represented by Ms Faveau-Ivanovic who had defended him at the ICTR and expected her to be given expedited accreditation (GoR Rebuttal Material Bundle 2, Tab 3, Page 26).

422. Munyagishari made a second application to the ICTR to revoke the referral on 6th April 2014 on the basis he had insufficient legal aid and although he had two lawyers they had not been granted resources to do their job properly (File 5A, Tab 7, Page 52 and 53 of 122). He pointed out that defence counsel had not been paid a penny since their appointment which was not what Rwanda had said at the ICTR when it had said that the funds for referred cases were assured and that Rwanda could provide indigent accused with financial support. He contended it was on that basis that his case was referred to Rwanda.

423. His next complaint related to the role the KBA was playing, it should be the administrator of the legal aid scheme and it was not. There was in those circumstances no equality of arms between the prosecution and the defence. This application was opposed by the prosecution in an argument dated 2nd June 2014 which said the request was premature. The application was dismissed by the ICTR on 26th June 2014 (File 5A Tab 11, Page 105 of 122).

424. A meeting took place on 18th March 2014 between MiniJust and the lawyers then representing the defendant about the funding. The Permanent Secretary explained that Rwanda was determined to administer fair and proper justice based on international principles to those suspected of genocide. They had found that paying lawyers by the hour was too expensive and then decided that the lawyers should be paid 1 million Rwfr by the month. Then after a meeting with the RBA MiniJust decided that all new cases should be paid at a rate of 15 milllion Rwfr for the whole case irrespective of how many lawyers were employed. The lawyers explained it was not enough and the Permanent Secretary pointed out it had been agreed to by the RBA (Tab 3, Page 50-1).

425. On 19th March 2014 the Court decided after opposition from the prosecution that although the trial would be conducted in Kinyarwanda a French language interpreter would be provided for the defendant throughout the proceedings. He was to be allowed to plead in French. This was a fair decision but it took a long time for the court to make it. I noted that it took until July 2014 for the indictment and the materials to be translated into French.

426. In the monitoring report dated July 2014 the defendant argues again that he should have counsel, a legal assistant and an investigator. These should be funded and were not.

427. The case was due to start in November 2014 but the question of payment for the lawyers had not been resolved and they were not ready for trial. The case was adjourned to February 2015 with preliminary objections filed by the defence on 2nd December 2014 (GoR Rebuttal Material Bundle 2, Tab 3, Page 34) in which they ask for a 21 month adjournment to prepare the defence case including dealing with defence witnesses abroad. In January 2015 the monitoring report records that Munyagishari stated that Rwanda "*had reneged on many of its promises – it has failed to provide sufficient legal aid, Counsel are being intimidated and are withdrawing from cases, there is no equality of arms, and the accused are being pressured to complete the cases 'expeditiously' without regard for fair trial rights*…" Importantly at Paragraph 24 of the monitoring report in the Objective Bundle 9A, Page 267, it was said by his counsel that the case could not progress as expected as the defence did not have the resources to conduct investigations. The High Court had asked the defence to submit a response to the indictment but this was not possible without undertaking any investigations.

428. On 25th February 2015 despite the lack of response to the prosecution case the Court determined the case should go on and Counsel for Munyagishari submitted to the Court that he needed two investigators. The prosecution in reply said that defence counsel should know how to obtain funding but that Rwandan law did not allow for private investigators. The Court agreed.

429. A third application for revocation was made on 3rd March 2015 which was refused on 8th April. MICT said that the subject of the complaints were still being negotiated but said "*I am concerned by the long delay in concluding an agreement on renumeration for Mr Munyagishari's counsel and consider that should such a delay continue for a significant period it could give rise to fair trial concerns*;" (Miss Malcolm's Closing Submissions Page 45, Paragraph 152).

430. On 22nd May 2015, at another meeting between the lawyers, the RBA and MiniJust, the latter explained they could not afford to pay more than 15m per case. The amount had proved to be sufficient in other cases. The lawyers left the meeting (Tab 3, Page 72). The Permanent Secretary to MiniJust explained to the monitor that the previous system of an hourly rate was open to abuse as payment was made even if no tangible work was performed. The amount did not include travel. The civil servant said that the RBA assigned counsel and MiniJust was not involved.

431. The President of the RBA said that counsel for Munyagishari were acting pro bono and the defendant repeatedly complained about the fact that he had not been given a full list of potential lawyers to choose from and was unable to finalise his defence team.

432. The monitor had a meeting with the WPU and the official told the monitor that his office was neutral. He explained that they have video link for witnesses unable to come to Kigali to testify and can use voice distortion microphones and speakers to protect a witness' identity. This technology was al-

ready being used. Mr Bayingana explained to the monitor at Page 21 of 122, Paragraphs 22 and 23, that prior to giving evidence, the witness is told of his or her rights, they are told about the court proceedings and how they are conducted. They can house the witness in a secure location and provide transport to Kigali and food to the witness.

433. As far as Munyagishari's lawyers are concerned his lead lawyer is also co-counsel in the Uwinkindi case. There are the same problems over the contract in each case. Counsel have refused to accept the contract for a fee of 15million RwFr for the whole case and at the time Witteveen gave evidence in June 2015 no negotiations were going on and the defence lawyers had not turned up for the hearing on 3rd June 2015. Witteveen's view of Munyagishari's case is that by and large he is defending himself, his lawyer is in court usually quiet, apparently acting pro bono and the only contributions he makes are in relation to a few procedural issues and his complaint about the contract.

434. I agree with Miss Malcolm's characterization of the delay as due to the consequence initially of the prosecution's refusal to permit the proceedings to be in French and the Court's failure to provide an interpreter. Thereafter delay was caused by the failure to provide what defence counsel considered to be adequate renumeration for their work, which prevented the instruction of defence investigators which at the time, statute did not allow for.

435. Miss Malcolm's conclusions in relation to the various problems are found at her Paragraph 157, "*either …counsel are simply too inexperienced properly to conduct the case. They lack the basic ability to complete the necessary applications to secure funding in the case to undertake proper investigations. This would sit comfortably with Mr Witteveen's evidence. The other explanation is that they are doing their best but that they are being met with intransigence and inflexibility by the GoR and the prosecution. Either way, defendants are not receiving fair treatment and are currently being denied a fair trial in a reasonable time. Whatever the truth of the matter the position is that Munyagishari (and others) are not being represented properly by counsel*".

Findings in relation to Munyagishari

436. In the light of the very recent change in Rwandan law to allow the instruction and funding of investigators it would appear that the prosecution was right when it said at an early point in the proceedings that there were no provisions allowing for them to be instructed.

437. I was very concerned to hear of Witteveen's description of the trial which is that Munyagishari is essentially defending himself. He has a lawyer beside him who is usually quiet making few contributions and when he does it about the contract to defend the defendant. Witteveen was present in court and I accept his description of the proceedings. I questioned the professionalism of those defending Munyagishari.

438. When it comes to payment for the defence lawyers, I cannot say without more that the GoR is being intransigent but I consider that the GoR had not anticipated how expensive these sort of cases are to investigate and defend adequately. As the complaints to the ICTR multiplied and in the light of the comments of Witteveen, who was after all the GoR's own witness, the GoR have bowed finally to the pressure and changed the law in relation to investigators. This should have happened before when this issue was raised by other defendants such as Uwinkindi in 2011 at the ICTR and in 2012 in the High Court in Rwanda. The change in the law is so recent there is no evidence how the new law will be applied in practice. I have to put in the balance the unfortunate fact that there are numerous examples of the law in Rwanda being changed but being very slow to be put into practice (video-links are but one example).

439. I concluded that the initial reported budget the GoR had set aside for such cases was clearly inadequate and would not begin to cover the sort of investigation required by these genocide cases.

Leon Mugesera deportation from Canada – 23rd January 2012

440. Dr Mugesera's case is dealt with in the Submissions of Diana Ellis QC at Section 2, Page 44 onwards and at Appendix 2 where there is a chronology in relation to Mugesera's case. The other RPs adopt their submissions.

441. Mugesera was deported from Canada on 23rd January 2012 with Canada stipulating that he be tried under the Rwandan Transfer Law. Three '*notes verbales*', one note and letters from the Prosecutor General Martin Ngoga were provided to Canada during the deportation process. In a letter dated 24th December 2009 Ngoga explained that although Mugesera was being deported to Rwanda his case would be treated as a transfer for the purposes of the Organic Law. In relation to legal aid, a note set out that the accused should apply to the judge for legal aid. Separately the KBA contended in a different case at the ICTR that in applications for legal aid, certificates of indigence (required in domestic cases) were not required.

Dr Mugesera in Rwanda

442. A number of documents in relation to the proceedings in Rwanda in relation to Mugesera are to be found in the GoR Rebuttal Material Bundle 2. His case was not an ICTR case.

443. On his arrival in Rwanda, Mugesera indicated to John Bosco Siboyintore in January 2012 that he had been provided with several names of counsel by his lawyers in Canada. He asks for time to find a lawyer.

444. I note two worrying developments in the case. On 19th March 2012 Mugesera's then lawyer Mr Mutunzi meets with Siboyintore as a decision to allow confidential communications between him and Mugesera has been annulled. The day after he is prevented from going to a conference with his

lawyer. He is not granted legal aid and Mutunzi has to withdraw as he can no longer afford to work for Mugesera pro bono. Mr Rudekemwa replaces him.

445. In June 2012 a defence team consisting of an American attorney Ms Kanas and a Kenyan lawyer Ottachi Bw'Omanwa as well as Rudekemwa is set up. In late June 2012 Kanas applies to the KBA for permission to appear in the Rwandan courts. In July Rudekemwa applies for legal aid to MiniJust. He gets no reply. In July 2012 Ms Kana writes to MiniJust asking for confirmation that the 2009 amendments to the Transfer Law apply that "*no person shall be criminally liable for anything said or done in the course of a trial*" applies to defence lawyers acting for Mugesera. She gets no reply. In July she also sends a letter to the NPPA asking for the papers in the case including indictments, dossier, witness statements etc. She gets no reply. On 26th July 2012, Kanas is admitted to the Kigali Bar and forwards the confirmation to the NPPA and asks them for a reply to her earlier July letter.

446. On 6th August 2012, Mr Mutangana emails Kanas explaining that Mugesera's trial will be heard in Kinyrwanda and that as he is not indigent, he has no right to court provided translations of documents. He does not respond to her request for the papers.

447. In court on 17th September 2012 Mugesera makes an application for legal aid to the court which is refused; neither is he granted translations for the documents. In the later months of 2012 Rudekemwa applies to the President of the High Court asking for legal aid and includes a letter of indigence from Mugesera's Canadian lawyer. No replies to the letters are received.

448. On 17th January 2013 the trial begins despite objections from Kanas, Otachi and Rudakemwa and with no legal aid having been granted. Between January and July 2013, letters are sent to MiniJust and on one occasion to the President of the KBA about legal aid with no response. Other correspondence in relation to previous statements or records of the testimony given by prosecution witnesses is also not responded to.

449. In January 2014 the court told Mugesera to make his own enquiries as to defence witnesses. The court did not say how he should pay for this. In February 2014 Hakizimana, representing the ICTR transferee Munyagishari, and Rudekemwa sent a joint letter requesting an end to the violations taking place with regard to both cases. In May 2014, State attorney Eulade reports that the two foreign counsel appearing for Mugesera do not need to be paid by the GoR as that is not indigence, "*However in order to avoid hampering the policy of transferring other suspects to Rwanda to be prosecuted for genocide it would be necessary to establish modalities for the government to assign him a Rwandan third counsel in accordance with the usual procedure…*" (Kabasinga material Bundle 2, Tab 1, Page 24-25).

450. Finally in June 2014 MiniJust replies for the first time to all the correspondence, MiniJust advises Rudekemwa to send a request for legal representation to the RBA and once that is approved to send it to MiniJust. Rudekemwa tells MiniJust that he already has the approval and asks for a meeting

with MiniJust. He has to repeat the request in July 2014. In the same month he is given a legal aid form to complete which the Court bailiff tells Mugesera is the wrong one as his application for legal aid dates from September 2012. The negotiations start on 30th July 2014.

451. There is a dispute between the GoR and the defence as to why Mugesera still has not got legal aid. The GoR say it is because he has not filled in the July legal aid form. I noted that the trial started in January 2013 and I find that the GoR repeatedly failed to reply to correspondence and consider granting legal aid before July 2014. .

452. Since July 2014, Ms Kabasinga has produced letters, the first dated 19th September 2014 in the GoR Rebuttal Material Bundle 2 at Page 31, where the defence lawyer makes it clear to the Minister of Justice, Busingye, that defence counsel still have not got legal aid which continues to deprive him of a fair trial. The undated response from the Minister is at Page 33. He claims that it is because the defence have not filled in the application form with proof of the lawyer's designation and a letter requesting the contract negotiation start. There is another letter from Minister Busingye on 6th January 2015 to Mugesera where he is reminded that on 30th July 2014 the Court Bailiff informed him about the requirements for requesting legal aid.

453. The documents in relation to Mugesera's case were provided by the GoR as the prosecution witness Kabasinga was about to give evidence before Westminster Magistrates' Court on 1st July 2015 when they had been asked for (along with documentation about other transfer cases) in July 2013. In June 2013, the defence in VB and others asked the GoR for details of the funds available for defence investigations outside Rwanda and any legislation in relation to the grant of legal aid. Unfortunately this material was not provided.

454. In March 2014 the prosecution case against Mugesera was still ongoing and as at June 2015, 23 prosecution witnesses had been heard. No defence list of witnesses has been provided. The trial format as explained by Witteveen is that Mugesera comments on the witnesses but his lawyer remains silent and it is thought by Witteveen to be acting pro bono. Witteveen concluded that he is not being defended by a professional defence lawyer. Witteveen's conclusions are of considerable concern to this court.

455. Kabasinga, who had been a prosecutor at the UN between 2003 and 2012, had held various positions from a case manager to becoming an appeals counsel. She was a member of the RBA and held a Batchelor in Law and a Masters from an University in Uganda. She was called as a witness in rebuttal. I did not accept she was an expert but she had been in court when the Mugesera case was happening and she was able to say what she witnessed there. She explained that Mugesera is a highly educated man who is using the court hearing to get his opinions across. He asks non relevant questions purposefully. He has had a lawyer in court at all times and has not been prevented from putting his case. As the system is a civil law one he and his lawyer have the right to ask questions. Mr Mugesera has filed a list of 57 defence

witnesses but the list includes the titles of the person, such as the Ambassador of Ghana. He has been asked repeatedly to give names and has refused to.

456. Ms Nerad gave evidence that potential defence witnesses for Mugesera were contacted from summer 2013 onwards but said they were too frightened to give evidence publicly, because the office tasked with protecting them was not in their view independent. There was a view that their allowances and privileges as genocide survivors might be removed if they gave evidence and their identities were discovered.

Findings - Dr Mugesera

457. MiniJust has failed repeatedly to grant legal aid to the accused despite around 12 contacts in the form of letters etc. Unfortunately it would appear that the defence lawyers or perhaps Mugesera have refused to fill in the right legal aid form. The GoR make it clear in their correspondence with the defence that they will not be treated differently than any other transfer case. It would seem as if Mugesera is refusing to write a letter asking for legal aid based on the assurance the GoR gave in Canada that he could have it. He made an oral application in court for it on 17th September 2012 (Rebuttal Material Bundle 2, Page 29). He provided the sworn affidavit of Guy Bertrand, his Canadian lawyer which certified the right of the defendant to legal aid but then did not fill in the form. It seems to be a competition in stubbornness between on the one side the defence team and Mugesera and on the other MiniJust. The Ministry points out that they have a responsibility to commit public funds according to strict procedures. They point out at Page 33 that the affidavit of Guy Bertrand is irrelevant. An added complication is that there may have been a mix up with an out-of-date form being used by the Court Bailiff.

458. The GoR made it clear to Canada that his case would be treated as a transfer case. It was clear in the *pro-justicia* document filled in on his arrival in Rwanda in January 2012 that he had no assets (see Kabasinga material Bundle 2, Tab 1, Pages 5-6). The GoR position is that the RP and his lawyers have refused to fill in the right forms. I cannot say from the evidence where the fault lies. It is quite clear that the most recent legal aid form was not provided to the accused until July 2014 when the case had been running since January 2013.

459. The other failings I note from the evidence I have read and heard is that the prosecution in Rwanda have failed to provide the documents required for his defence to Kanas and crucially she was not told that the 2009 amendments to the Transfer Law would apply to a case of deportation. The failure too to pay for translation costs of the documentation also means that foreign lawyers would be unable to represent Mugesera. Kanas, the American lawyer originally instructed to defend Mugesera, explains in a statement read to this court the problems with the lack of funding. They could not find an expert to examine the recording of a speech which was given by Mugesera and is at the centre of the allegations against him; furthermore they could not hire investigators.

460. It seems to me that with the reluctant defence witnesses I have heard about from Ms Nerad the funding to allow for a professional investigation is crucial.

461. The evidence I have read and heard leave me with considerable reservations about whether the assurances given by the GoR to Canada are being respected and whether Dr Mugesera's trial is fair.

Emmanuel Mbarushimana extradition from Denmark

462. Mr Mbarushimana contested extradition on the basis that he would not receive a fair trial. Proceedings started on 29th February 2012 in Denmark and the court ordered his extradition. This decision was upheld by the Danish Supreme Court 6th November 2013.

Mbarushimana in Rwanda

463. He arrived from Denmark on 3rd July 2014. His first appearance unrepresented was on 14th July when the matter was adjourned for him to be given a list of counsel registered with the Rwandan Bar Association. On 22nd July 2014 Mbarushimana complained that there were 300 fewer names on it than on the list which formed part of the contract between the ICTR and the RBA and he asked for a longer list. GoR Rebuttal Material Bundle 2 Tab 2, Page 6 makes it clear that the defendant is complaining the list had only 530 lawyers' names on it whilst in their submissions supporting the prosecutor's request for the transfer to Rwanda of Mbarushimana's case the RBA's list had 890 names on it.

464. Since then various hearings have taken place with the accused not represented. There appears still to be a dispute about whether he can choose counsel or not. The full trial had not started as at June 2015 and I am not able to draw any conclusions from what has been happening in relation to his representation although I note Witteveen's comment in evidence on 9th June 2015 that he understood an application had been made for a team of lawyers, including a monitor and an investigator and he was concerned that after a year no representation had been provided.

Findings - Mbarushimana

465. It may be that Mbarushimana is to blame for the lack of representation in his case because of his insistence that he be able to choose from a much longer list of lawyers than the list provided by the KBA. I do not hold the way this case has been dealt with against the GoR although I share Witteveeen's concerns that after a year this situation has not been resolved.

466. What is clear to me from the notes or summaries of proceedings in the High Court that are in the Rebuttal Material is that the High Court is granting the adjournments it should. Mbarushimana raises his concern at Rebuttal Material Bundle 2, Tab 2,Page 15 that the prosecutor came in to court through the

same door as the Judges and this is dealt with in a sensible way. He is able to raise this argument and an explanation is given.

Other defence evidence - fair trial

467. Diana Ellis QC in her submissions summarises accurately the evidence of Gerald Gahima (Submissions Page 32, Paragraphs 75 to 80). Dr Gahima had been the Prosecutor General and Vice-President of the Rwandan Supreme Court and had therefore experience of the judiciary between 1994 and 2003. He was criticized by the prosecution as it was said that he had left Rwanda in 2004 and had no personal knowledge of the judicial system thereafter. Of course that is right, but I accepted his evidence that he had kept in close contact with a number of people still in Rwanda. I noted that Dr Clark considered that Dr Gahima was a respected academic and when he lived in Rwanda had been dedicated to cross ethnic dialogue.

468. Dr Gahima said the Supreme Council of the Judiciary is largely comprised of RPF members, takes its instructions from the Secretariat and most judges appointed are still members of the RPF (Gahima Volume 4, Tab 21, Page 155). He also said that "*I do not believe it possible for anyone who held a high-ranking position in the government, military or security services to have a fair trial in Rwanda today*". He explained the official narrative is that all those who were involved in senior leadership are guilty of genocide. Although he left the county in 2004 he had been responsible for putting the list of judges together after the introduction of the new constitution and knew the way the system of appointments worked. Many of these judges are still in post today and his evidence was that a large number of current judges were active RPF members.

469. Dr Gahima, when he gave evidence to this court, gave some background to the Bizimungu case, he explained that President Kagame had sent his Chief of Staff to ask him to have Bizimungu arrested and put on trial. Dr Gahima refused but the arrest went ahead when he was abroad. Bizimungu was tried, convicted and imprisoned. He appealed and had his appeal rejected by the Rwandan Court of Appeal in 2006. The Judge left Rwanda soon afterwards and later said he had been told what to put in his judgment and the trial was accepted generally as being flawed.

470. Dr Rudasingwa who was formerly the Secretary General of the RPF and close to Kagame and at one point was the Rwandan ambassador to the United States stated it was not possible for a former *bourgmestre* to have a fair trial (EN Volume 4, Tab 22 Page 235 and in cross examination on 16th June 2014). Dr Clark the GoR's expert did not deny the point.

471. On 18th July 2015 I heard evidence from Philippe Larochelle an ICTR defence advocate who had defended Mr Mungwawere who was tried in Canada for genocide and was acquitted in 2013 after the court found coordinated fabrication by prosecution witnesses. The defence team in that case, consisted in three lawyers and three investigators who had met more than 500 possible witnesses around the world. He also had documents from Gacaca hearings. In

the same way that the cases against the RPs are complex, the case for and against Mungwawere was complex both legally and factually.

472. Larochelle was asked about whether the Rwandan authorities had cooperated in their defence investigation and he explained that to the contrary the defence had ensured they never knew who their witnesses were or how or when they were meeting them. He reported there was intimidation towards potential defence witnesses trying to prevent them from giving evidence. Intimidating speeches were made during the annual commemorations of the genocide and this was followed by some harassment by police. The prosecution in Canada was so concerned that Mr Sibyintore had a prosecution witness' mobile telephone number on his speed dial that this was disclosed to the defence.

473. Mylene Dimitri also gave evidence on 18th July 2015 and was not challenged. She was a defence counsel in the case of Desire Munyaneza in proceedings in Canada where Rwandan witnesses came over to give evidence. She explained that contrary to what Witteveen had said the defence witnesses were not assisted by the WPU, all arrangements for the witnesses' travel from Rwanda to Canada were made by her and her investigator. They collected the witnesses from their village in Rwanda, took them to Kigali airport where they tried to prevent the authorities from knowing what they were doing.

474. She spoke about the fears the witnesses had. She said they were very frightened as they did not want the authorities to know they were testifying. They were scared they would have problems in the future, that something would happen to them if it was found out they were going to testify for the defence. They were scared for their jobs and for their family. After giving evidence, four refused to return to Rwanda and disappeared. One who went back had a visit from the authorities, another had to face a Gacaca re-trial and was locked up for genocide offences of which he had been earlier acquitted.

475. CMU relied on the evidence of John Philpott in a statement of 9th June 2015. He has worked extensively at the ICTR and said he was no longer able to go to Rwanda for fear of his own safety because of the work he has done in the past and because he was critical of the Rwandan government. He was of the view that the arrest of Erlinder who was held in custody until released after a campaign had been run, would put other lawyers off from coming to Rwanda to provide robust defence representation.

476. Christopher Black was another defence lawyer at the ICTR who said he had received threats and who said he was no longer able to go to Rwanda. Like the witnesses Marara etc in the United Kingdom he said he had received a warning from the Canadian Security Intelligence Service that the GoR wanted to kill him and were going to try to do so.

477. Judy Rever is a Canadian journalist who has been researching war crimes allegedly committed by the RPF. She had related various disturbing instances and in particular that the Belgian authorities had given her 24 hour security in 2014 when she was doing research there. She had been told that the Rwandan Embassy in Brussels posed a threat to her safety.

478. A witness EN-O provided a redacted witness statement (EN Volume 4, Tab 31, Page 267) dated March 2014 which was read into evidence by Miss Ellis. He or she was a Rwandan attorney who refused to give their name on the basis that at the "*very least I will lose work, and at most, I could face imprisonment for speaking against the Government. In the past, attorneys, investigators and even judges have been arrested and detained just for going against the wishes of the government*." This witness makes it clear that he or she was working for free for a defendant returned to Rwanda who was indigent but was not granted legal aid. He or she then stopped working on the case. EN-O says that when defence witnesses were contacted, four agreed to help but others refused as they were afraid and they knew others who had come forward and who had got into trouble. EN-O said the witnesses feared the GoR. Also the witness explained that they had been unable to obtain Gacaca records.

479. There is also evidence from Dr Clark that he had spoken to Minister of Justice Busingye who confirmed that executive interference has continued. Unfortunately Dr Clark did not obtain more information in relation to this executive interference and Minister Busingye although due to give evidence to this court never did. I noted however he attended Westminster Magistrates' Court in relation to the arrest on an European Extradition Warrant of General Karenzi Karake who made a brief appearance in June 2015.

480. According to *Brown and others*, in 2008 Mr Busingye who was then President of the High Court told two others that judges of his court had been subject to attempts by the executive to influence their decisions. He had felt compelled to call those trying to pressurise the judges to discourage such interference. Two matters arise, firstly it is encouraging that the Minister when he was President of the High Court was told by his judges what was happening and acted upon it but secondly it is concerning because for every judge who reported what had happened there may be others who did not.

481. Dr Clark had also spoken to the previous Minister of Justice, Mr Karugarama, he too said that some politicians might ring judges but they just ignored the calls. The defence say that there is evidence that a culture of interference is tolerated. Such matters are taken up with the ombudsman but there is no evidence that any politician has been disciplined. President Kagame in a speech of 1st March 2015 directed criticism in relation to corruption within the judiciary. He said "*corruption in the judiciary is still as alive as it was yesterday… I think this is about the tenth time I am asking you and begging you and others who are responsible for it. He (the Supreme Court chief) is telling me, "you sit and look at this and that", is a good way but not enough, some drive needs to come into it. Corruption even in the judiciary continues as a way of business…*".

482. Another past President of the High Court Mr Cyanzayire (Uwinkindi Referral Decision 28th June 2011, Paragraph 184) described the justice sector as "*very prone to corruption*". Dr Clark conducted interviews with the ombudsman, Tito Rutaremara who said "*in recent years there were far fewer com-*

plaints of political interference in trials". There was also evidence from the statement of Minister Busingye that since 2004 40 judges had been dismissed for corruption or serious misconduct.

483. Unfortunately there is no evidence as to the sort of cases in which corruption or undue influence can occur and who might be the would-be corruptors. The fact that President Kagame is appealing to the judges not to be corrupt suggests to this court that the sort of corruption he envisages is financial and not that of executive interference.

484. In these proceedings I also heard evidence from judges who gave evidence that after the acquittals of CU and EN in Gacaca courts they were summoned and interrogated about the decisions they had reached. CU/2 and CU/3, for example, were both former Gacaca judges, CU/2 had been a judge at Mr CU's Gacaca proceedings in 2008. CU was exonerated after the hearing of numerous defence witnesses and the acquittal was then nullified. CU/3 said that after the acquittal, some Gacaca judges were arrested and interrogated.

485. A number of the RPs suggest the case has been fabricated against them. Professor Reyntjens in his expert report at (VB File 1, Page 30, Paragraphs 82 onwards) said the GoR had a "*well-documented history of attempts to manipulate or fabricate evidence through either the use of inducements or through the threat or use of violence*". He also speaks of the courts' failure to investigate the allegations but gives examples that are now a number of years old, including the Bizimungu case.

486. The most recent example he gives is at paragraph 87 which dates to September 2012. A UN Group of Experts proved that a witness had falsified his evidence against a UN coordinator. The witness blamed "*representatives of the Rwandan Presidency*" who he said were calling him to prepare a story about the coordinator that he was to recount in a press conference. The story was that the coordinator was planning to blow up bridges in Rwanda. Another recent example is the trial of Ingabire where the court asked no questions in relation to the detention of the co-conspirators in Camp Kami.

487. I have looked at some of the allegations that evidence has been fabricated against various defendants by prosecutors. One such allegation is made by Peter Robinson an ex US federal prosecutor and now an eminent and respected criminal defence attorney. His allegation is not related to this case but Dr Clark gave this court a transcript of Robinson's remarks made at the Oxford Transitional Justice Research Seminar on 22nd February 2010 (VB File 8, Page 3269).

488. Robinson told the seminar that a couple of weeks before, they were going to call a prisoner defence witness in Arusha. The witness had told the defence he wanted to go back on his evidence implicating the accused. The night before he was due to give evidence he told Robinson that the day before in Rwanda he had been visited by a Rwandan prosecutor and someone from Military Intelligence who told him if he testified for the defence he would never be let out of prison. When he gave evidence the day after he made it clear he

wanted to be a prosecution witness. Mr Robinson impeached his own witness and the witness denied saying that it was the prosecution who had said he should lie. He was confronted with the recording of the conversation he had had with Robinson the night before and he switched his story to saying that Robinson had given him a script to read and $500 and told him to say these things. That was given as an example of the problems defence counsel encounter with these sort of cases.

489. I accept not only that the judiciary was not independent until 2004 (Dr Clark in cross examination to Edward Fitzgerald QC) but also that that period was followed by a period of reform from about 2008 (Clark, Reyntjens).

490. I accept of course that it is very difficult to prove interference as if it happens it will happen in private and will be hidden.

491. I do accept that the cases of the five RPs will be thought of as high profile cases in Rwanda. Three of the RPs were *bourgmestres* and another a member of the *Akazu*. This was accepted by the Divisional Court in 2009 and CMU the fifth RP was said to have been a high profile director of a forest management company and is said to be the leader of a gang of killers in an infamous massacre.

492. I accept Mr Fitzgerald's argument that just because there have been acquittals in the High Court that does not mean there would be in a case that is perceived as important by the regime.

Defence expert evidence - fair trial

493. Professor Reyntjens and Professor Longman both gave evidence in these proceedings.

494. Professor Longman explained that the rights he was concerned about if the five RPs were returned to Rwanda for trial were whether defence witnesses would feel free to speak and appear in court, in a context where free speech is actively discouraged and where you are punished for what you say.

495. He had concerns about whether the RPs would be able to access a lawyer. It is a well known fact that Erlinder was arrested in relation to the proceedings against Ingabire and that would have a chilling effect. Then his concern was whether the judges were independent in the political context in which they operate. If the government denounces those on trial it sends messages to the judges and undermines the presumption of innocence. He was asked about the prosecution witness Witteveen and was not able to say whether he was independent on not.

496. Longman also looked at Ngoga's claim that there had been significant changes since *Brown and others* in 2009. The professor pointed out in his statement that the burden of showing torture rests on the defence in trials, there is evidence of pressure on judges and the sacking of judges, the power to appoint international judges which is relied upon by Ngoga had never been in-

voked and there is a hostile environment for defendants with their being denounced by prosecutors whilst the trial continues.

497. His conclusion is that "*as long as the government of Rwanda remains deeply undemocratic and continues to politicise its court system, and as long as genocide trials continue to follow the interests of the regime, genocide suspects – particularly those transferred from abroad – will not be able to receive a fair trial*". In re-examination he reiterated that there was a real risk the judiciary would not be impartial in the RPs case and he gave as an example the case of Ingabire. There was a real risk that defence witnesses would be too frightened to give evidence. He considered the autocratic nature of the GoR, intolerance of dissent and the lack of free speech as on-going and as to the rule of law, in practice the Rwandan government did not respect it.

498. On a more positive note, Longman reported that professionalism in the justice sector had increased and that the quality of justice had improved, it was just that the politicisation of the system had increased. Immediately after the genocide it had been quite chaotic as so many had fleed or been killed. The physical infrastructure was destroyed. Now 20 years later there are trained judges, magistrates and lawyers and they have gained experience. The international community has been involved in these changes.

499. He described however seeing manipulation in every high profile trial. He agreed though that a number of prosecutions had occurred of defendants who had been convicted firstly in Gacaca and were convicted in other courts abroad in, for example, Sweden and Finland after a re-trial.

500. Unfortunately Professor Longman's evidence had two drawbacks, the first that he had not been to Rwanda since 2006 as he did not feel safe returning and that he had never been to the Rwandan High Court and had only been to the Rwandan courts on two occasions. I had to agree with James Lewis QC that his evidence was generalised and did not give examples of how genocide trials in the Specialised Chamber of the High Court were not fair.

501. Another expert who had not been able to go to Rwanda for a number of years was Professor Reynjens whose evidence agreed with Longman's. In Reynjens' critique of the fair trial system he relied particularly on the case of Ingabire but he had not seen the judgment of the Supreme Court when he gave evidence. He was of the view that there were signs that the prosecution had manipulated evidence to secure a conviction. His view was that although Ingabire's was a political case, he did not see why someone would be treated better when tried for a more serious crime such as genocide. He was concerned there was gross manipulation by the GoR in some cases. He criticized the recent decisions made by the ICTR to transfer defendants and said it had placed too much emphasis on recent legislative changes, there was pressure on the ICTR to wind down and no other countries were willing to take these defendants.

502. In terms of the changes in law, he agreed that video-link would be an improvement but there was a problem of equality of arms. Furthermore even on

video-link witnesses would fear the GoR as they still have family in Rwanda and they would be concerned for them. He accepted that trial with an international judge on the panel would be an improvement.

503. Professor Reyntjens was critical of Dr Clark's evidence and pointed out that the GoR did not accept acquittals. He did not accept the statistics given by Dr Clark such as the acquittal rate and said acquittals were exceptional. Having said that Reyntjens agreed that the quality of the judiciary had improved tremendously. He made it clear in re-examination that he was not saying no one could have a fair trial in Rwanda.

The prosecution evidence and fair trial

504. For the prosecution part, they rely on various changes to the law, most of which have taken place since *Brown and others*. I have listed those at Paragraph 14 of this judgment and I will not repeat them here.

Prosecution expert evidence - fair trial

505. The GoR rely on Dr Clark their expert witness who had regularly worked in Rwanda and had been doing so for the last 11 years when he wrote his report in February 2014. In his months in the field, he had interviewed more than 650 individuals within the judicial system, including Gacaca judges but not I think any High Court judges (Clark Report February 2014, Paragraph 2). He had met with prosecution and defence lawyers, genocide suspects and survivors in the urban and rural areas. The GoR says he is a credible and well-informed contemporary expert (GoR Closing Submissions Page 34, Paragraph 132).

506. From his evidence it seemed he was initially an expert on the Gacaca system but had since looked at other levels of court and how they have coped with genocide allegations. He argues that the defence experts Professors Reyntjens and Longman have used highly selective evidence that do not reflect the standard of justice for suspects delivered through the courts (Paragraph 5).

507. He explains and I accept that seeing the suspects transferred or extradited and then prosecuted in Rwanda is significant for the GoR and the population. He also argues and I accept that the GoR has shown a marked dedication to "*reforming the domestic judiciary in order to facilitate international transfers and extraditions*". I have already accepted above that the Rwandan State is highly responsive to international criticism of the judiciary. He explains how the GoR has used the recent ICTR and UK High Court rulings as a checklist of reforms to improved the domestic system. I accept that this is the case (Paragraph 7).

508. Clark looks at executive interference in the judiciary from Page 22, Paragraph 44 of his report. He says there are strong reasons to reject the judges' findings in *Brown and others* and the reports of Professors Reyntjens and Longman. He points out accurately that all but one of the ICTR Appeal

Chambers' decisions rejected the argument that the executive would interfere in the Rwandan judiciary. In Munyakazi the Chamber was concerned that a single judge who at that time would try the case would be more susceptible to pressure and that resulted in the change in the Transfer Law allowing the President of the High Court to appoint three or more judges to those cases.

509. Clark accepted the concerns about the current political situation in Rwanda but considered it did not "*impinge on the delivery of justice for genocide suspects…we must recognize that the Rwandan judiciary to a large extent has a life of its own and must be evaluated in terms of judicial performance and concrete evidence from trials, rather than assessments of the broader political realm*" (Clark Report Page 3, Paragraphs 5 and 62). He recognised, however, that Bizimungu was an example of where the executive interfered with the trial but at the same time points out that there was an acquittal in a high profile genocide case that of Migago, the bishop of Gikongoro, in 2000.

510. Clark was rather brave in his evidence in these extradition proceedings when he maintained that the Bizimungu case was the only case of judicial interference. His evidence in front of this court ran counter to the High Court findings in *Brown and others.* It was clear he thought the High Court findings wrong. His present view is that the five RPs would have a fair trial. It is contended by Miss Malcolm QC for CMU that Clark is naïve in his consideration of the Rwandan judicial system

511. All the sources Clark interviewed in April 2010, which included critics of the judiciary could not cite any concrete examples of political interference in genocide trials. In evidence however, on 15th June 2015, he admitted that the view of many of those he interviewed, was that since 2010, on occasions, there has continued to be subtle executive interference with the judiciary. He reported having spoken to a Mr Loncorst from RCN Justice et Democratique who said he has more concerns about judicial independence than due process. Ms Tertskian of HRW who said her concern was that cases were "*stitched up*" in advance. Then there is the comment by Mr Rutaremera, the Ombudsman, set out above. Penal Reform International told Dr Clark that judges are not very free to decide cases.

512. Interestingly many of his respondents said that greater international involvement in genocide trials would help or had helped guard against executive interference. Other respondents considered that securing international defence counsel for high profile Rwandan suspects would help.

513. Unfortunately there are no concrete examples of interference provided by any of those Clark interviewed and he did not pursue the question perhaps as much as he could have done.

514. The other prosecution witness who was particular helpful in this regard was Witteveen. I have outlined his experience earlier in the judgment. In his first report dated 19th September 2014 he spoke about the independence of the judiciary. At the time of this report he had only been working full time within the NPPA as an Advisor for International crimes for three months but he had

spent a number of months in Rwanda investigating two criminal cases of genocide in Rwanda which included about 30 field missions of one to two weeks in length in Rwanda. He added to his initial statement in June 2015 when he explained in a second statement and then in testimony that there was no evidence that the judiciary were not independent when it came to genocide proceedings.

515. He explained that he was fully embedded within the NPPA, he has access to files and whenever there was a court session he tried to attend. He is not financially dependent on the NPPA as he is paid by the Government of the Netherlands. His report was based on his own knowledge and experiences and observations in Kigali. He had tried not to base his conclusions on secondary sources.

516. Witteveen explains in his first report of September 2014 that in the five transfer or extradition cases that were currently being tried in Rwanda none of the allegations they had made before transfer or extradition had come to pass. He did not consider that ill-judged comments made by politicians in Rwanda would be any worse than many judges face around the world. He also said he had never seen credible evidence since the Bizimungu case indicating that there was any interference with specific criminal cases and more specifically in cases of genocide, nor had he seen any loss of independence, neutrality or objectivity. He had had free rein in the NPPA and could say he had seen no evidence which would suggest that VB and the others would face other charges nor that they are accused of political crimes (Paragraph 26).

517. Florida Kabasinga, a Senior Legal Advisor within the NPPA's International Crimes Unit since 2013 gave evidence on 1st July 2015. She said that there was no political interest in seeking the extradition of the RPs to Rwanda. She explained that the Genocide Fugitives Tracking Unit investigates and follows up information about possible *genocidaires* and gave the very differing backgrounds of those before the International Crimes Chamber of the High Court. They included a teacher, a then member of the MRND political party and a pastor.

518. The other evidence the GoR relies on is that from the ICTR monitors. There are pages of these and interviews with defence lawyers, the accused, the prosecution, the prison governor or equivalent and the WPU. Importantly the monitors are present at all the hearings that took place in relation to the two ICTR transfer defendants.

Conclusions in relation to the independence of the judiciary

519. The Divisional Court *in Brown and others* in 2008 and 2009 when it considered the independence of the judiciary relied on the Bizimungu case allied with the conclusions about the state of the polity in Rwanda. The High Court also relied on the HRW report of 2008 and the evidence of Professors Reyntjens, Sands and Schabas and in particular on the acceptance by the GoR's expert Professor Schabas that there was probably executive interfer-

ence in the Bizimungu case to find evidence of specific positive incidents of judicial interference.

520. In 2014 to 2015, I must consider the implications of the trial of Ingabire which HRW found to be unfair. I bear in mind of course that like Bizimungu, Ingabire was a politician. She was planning on standing against President Kagame in the Presidential elections in 2010. Her case was not a transfer or extradition case. She was not tried by a Specialised Chamber of the High Court; Mutabazi another case relied upon by the defence, was tried by a military tribunal. Most if not all the examples of unfair trials in Rwanda are in relation to political opponents of the GoR.

521. The difference between her case and Bizimungu's is that there is no evidence of executive interference in her trial although there is other concerning evidence which I have set out above, evidence that led Amnesty to find that she had an unfair trial.

522. **T**he ICTR Referral Chamber and Appeals Chamber and courts in other countries subsequently and the expert called by the GoR in these proceedings have drawn a distinction between what might be termed political trials and non-political cases. None of those courts have accepted that there is evidence of executive interference in the judiciary trying allegations of genocide. They have implicitly accepted that there is interference with the judiciary in political cases.

523. I find that opponents of the GoR do not appear to have fair trials in Rwanda. The problem I have been wrestling with is whether the finding that the High Court does not try fairly those 'political' defendants means that these RPs will necessarily not be tried by independent and impartial judges sitting in this Specialized Chamber trying international and cross border crimes.

524. The various courts that have sent defendants back to Rwanda for trial and the GoR in this case too, rely on the argument that genocide cases are not political. The argument from the defence is to the contrary. The defence say the RPs had high profiles in 1994 and there is a current political will to have them convicted. In Munyakazi, a pre 2009 case and a defendant who was not returned to Rwanda, I noted that the ICTR Appeals Chamber described genocide cases as "*politically sensitive*" in the judgment at Paragraph 26.

525. I found that the RPs positions in 1994 were not that they were senior politicians on the national stage but within the local areas they were men of standing or importance in the community. In his affidavit Ngoga has explained the significance of the *bourgmestres*. Three of the RPs were *bourgmestres*. There is some limited evidence that one of the RPs was a member of the Akazu, I find if he was, he was not a high profile one and the final RP was a director of an important company in the local area.

526. I do not find there is credible evidence that the RPs are political opponents to the GoR in 2015 and I do not find there is any persuasive evidence that the extradition request is driven by political considerations.

527. I find that the trials of these RPs, if they are returned, nevertheless will be high profile. The expert witnesses, Dr Clark and Professors Reyntjens and Longman consider that they would be. Mr Ngoga agreed that this extradition case has a high profile in Rwanda and there was a strong adverse reaction in Rwanda when the High Court in London in 2009 overruled the 2008 district judge's order referring the case to the Secretary of State. I would anticipate that an extradition order made in this country would be widely reported in Rwanda and such media attention would continue through any trial in the High Court in Rwanda. The GoR will use the return of the RPs as examples to show that the State's justice system is recognised internationally as a system which can try defendants fairly.

528. What *Brown and others* lacked in 2008 and 2009 was the significant evidence of the trials of the five men transferred or extradited to Rwanda. This evidence has enabled me to distinguish between 'political' trials on the one hand and trials of those accused of genocide.

529. I have read the extensive monitors' reports and summarised them above. I have also been provided with extensive summaries of decisions given by the High Court in relation to the five transferred, in particular Uwinkindi. I have had the benefit of Witteveen's comments about the trials. I do not agree with the contention of Miss Ellis at her Submissions Page 32, Paragraph 74, that an analysis of the proceedings of the five transferred cases "*provides further evidence of a lack of judicial independence and impartiality in the face of deep unfairness to the defence*".

530. I rely on the fact that in all the many pages of monitors' reports there is no recurring theme of complaint about the judges' lack of independence. In relation to the decisions of the judges there is no evidence in those records of any partiality or anything untowards. I suppose it is arguable that interference might not be picked up by the monitors but a lack of independence or fairness would be. I appreciate the following comment relates to procedural issues only but I was struck by the even handedness of the judges when confronted with, for example, applications for adjournments by the defence. The ICTR monitors make it clear that any defence request for an adjournment is considered carefully by the court and reasonably dealt with (usually the adjournment is granted). Apart from the problem of representation, and it is difficult to know what the court could do about that, the court's approach seems to be fair.

531. I am concerned, of course, about the effect on judges of comments made by the President and ministers about the guilt of these RPs in the sort of autocratic State that I have found Rwanda to be. The GoR seems not to respect the presumption of innocence and that might put pressure on the judges if there was no international judge amongst them. I accepted however the evidence from Professors Longman and Reyntjens, for example, that the quality of the judiciary has been increasing gradually in Rwanda and I have heard nothing which suggests that they are not able to ignore comments made by the President and others in non political cases. Dr Clark's evidence was that the

most important developments had taken place since *Brown and others* and a number of reforms had been prompted by criticisms made by the ICTR and other jurisdictions.

532. The Divisional Court considered it was difficult to consider the independence of judges in the absence of a consideration of the State from which they come. I have set out my findings about the State at Paragraphs 221 onwards. I also, however, noted Dr Clark's evidence that while he accepted there may be justified concerns about political developments in Rwanda, they "*do not inherently impinge on the delivery of justice for genocide suspects…we must recognize that the Rwandan judiciary to a large extent has a life of its own and must be evaluated in terms of judicial performance and concrete evidence from trials…The Rwandan judiciary has displayed a marked dedication to ensuring the fair trial of extradited suspects and taken concrete measures to fulfil the "checklist" criteria*.". His view was echoed by Martin Witteveen who had observed a number of hearings and had investigated the independence of the judiciary. He had no concerns.

533. The 'sea changes' relied upon by the GoR which I have set out at Paragraph 11-29 inclusive at the beginning of this judgment, would be more significant if there was evidence they were affecting trials in practice. As far as the independence of the judiciary is concerned the only change which appears to have bedded in is the amendment to the Transfer Law in 2009 that allows three or more judges to be designated to try complex and important cases. All five of the transferred or extradited defendants in Rwanda either have been tried or are being tried by three judges in the Specialised Chamber of the High Court. I find their number, of course, makes interference less likely.

534. One of the new provisions relied upon by Mr Ngoga is the amendment to Rwandan law of 28th November 2011 allowing for international judges to come and try transfer and extradition cases alongside Rwandan judges. This could be at the request of the accused, his lawyer or the prosecution from Rwanda or elsewhere. The President of the Supreme Court would decide on the application. Although Ngoga said in his affidavit that there was no reason why the application would not be granted, Dr Clark thought it unlikely.

535. Rwanda is rightly proud of the improvements to its judicial system since the majority of judges and lawyers were killed in 1994. I am not so sure that an independent country like Rwanda would accept a non Rwandan judge coming in to try one of their genocide cases. I did not accept Ngoga's evidence and agreed with Dr Clark that Rwanda is a proud country and would no doubt feel patronized if they had to accommodate a foreign judge in these circumstances. The GoR would find such a move "*politically unpalatable because of a spirit of self-reliance and independence*" as Dr Clark put it. In any event there is no evidence that any of the returned accused have been aware of the change in the law or if aware that they have applied for an international judge, let alone one being granted. It must be said were a judge with international experience to sit on any of the RPs trials that would reduce still further any remaining concerns I have in relation to the independence of the judiciary.

536. There was no real reason for me to doubt the GoR's evidence that the acquittal rate is around 20 to 30% in the High Court whilst in the Gacaca Courts it had been around 25%. I accepted that of 238 High Court decisions that were reviewed by the Supreme Court, 219 were upheld (evidence conveniently summarized in the Prosecution Closing Submissions at Page 32, Paragraph 120). Unfortunately there was no information about the acquittal rate in genocide trials. Dr Clark, however, did report on a positive note that of a number of genocide defendants that HRW was concerned about in their 2008 report, Law and Reality, three including Biseruka and Twagrimungu were later acquitted.

537. I accept too that the judiciary are governed by a number of ethical codes as well as have annual performance evaluations and take an oath to discharge their duties responsibly. Reforms since 2003 ensure that candidates for the judiciary take an exam and have to have a law degree and six years' post qualification experience for the High Court. The three highest office holders in the Supreme Court and the two highest in the High Court are appointed by Presidential Order but this is approved by the Senate.

538. On the other hand, the evidence of the exiled past Prosecutor General and Vice-President of the Rwandan Supreme Court, Dr Gahima, was clear, a large number of current judges are active RPF members. He explained the official narrative is that all those who were involved in senior leadership are guilty of genocide. Although he left the county in 2004 he had been responsible for putting the list of judges together after the introduction of the new constitution and knew the way the system of appointments worked. He was a measured, credible and impressive witness and Dr Clark accepted he was a respected academic.

539. Edward Fitzgerald QC relies on an amendment to the Rwandan Constitution which he says may affect the independence of the judges and this is that since 2008 judges of the High and Supreme Courts are no longer appointed for life but are appointed for a determinate term which is renewable by the High Council of the Judiciary. This had not emerged by the time of the appeal to the Divisional Court in *Brown and others* (Appendix F, Paragraphs 80 onwards - Decisions on Transfer to Rwanda since 2006). I accept that security of tenure should ensure independence and impartiality but I find there is no evidence that the change to removal on the grounds of serious professional misconduct or incompetence is being used by the High Council of the Judiciary to remove judges for bringing in the wrong verdicts.

540. I noted on a positive note that transparency and fair decisions would be encouraged by the requirement that provided for all hearings to be in public. The requirement to give reasons for decisions is also protective so it was unfortunate that the defence were unable to find very many cases reported on the internet. Miss Ellis at Annex 1 to EN's Reply to GoR Submissions, sets out a chronology of requests made to the GoR in relation to statistics but more particularly judgments emanating from the High Court of Rwanda in genocide cases. There is fortunately a mass of material now in relation to the five transferred men, particularly in the Rebuttal Material produced by Ms Kabasinga.

Before that only four judgments were found by Miss Ellis and her team. I found it concerning that a witness for the GoR could find the judgments with apparent ease whilst the thorough research by the defence team could not.

541. I noted that ICTR cases are monitored and there is a mechanism for the return of the defendant in certain circumstances. Dr Clark was of the view that observation of cases by a wide range of bodies, such as HRW etc has a positive effect. It sends out a message that the judiciary must operate in a fair and transparent manner. I am sure that is helpful for all the parties to keep such cases in the international eye. I would feel more confident in this case if there were such a mechanism in the extradition arrangements with Rwanda.

542. Amongst the NGO evidence I was particularly concerned by the Bertelsmann Stiftung Transformation Index 2014 Report which covered a period from January 2011 to January 2013, I have set out what it says at Paragraph 190 of this judgment but I will repeat it here: although the judiciary is formally independent, "*in reality it is subordinated to the will of the executive in all politically sensitive matters*". It describes a biased judicial system which enables prosecutions for offences such as genocide ideology to take place and political verdicts result particularly in relation in trials of opposition leaders and critical journalists. The comments various political authorities think it appropriate to make in relation to on-going genocide trials lead me to have concerns that if returned these defendants would be facing the same.

543. The Divisional Court in *Brown and others* wanted evidence from genocide cases being tried in the Rwandan High Court. I have heard that evidence. The evidence of trials taking place is more current, contemporaneous and detailed than the evidence from experts and others who through no fault of their own have been unable to go to Rwanda for a number of years. Whether it was via the ICTR monitors' reports, through the judgments of the courts provided by Ms Kabasinga or through Mr Witteveen's evidence which was particularly helpful, I have been able to see how the judiciary involved in similar high profile genocide cases of transferred defendants are making their decisions.

544. Most significantly, Mr Witteveen had been a witness to some of these hearings. What he had not seen he had read about in the notes the legal officer of the Dutch Embassy had made. He had had a great deal of experience investigating allegations of genocide before his current tenure in the NPPA. He had not seen any credible evidence that any authorities had interfered specifically in cases of genocide, nor had he seen any evidence that judges had lost their independence, neutrality and objectivity.

545. To conclude, I am drawing a distinction between the way the Rwandan High Court tries cases with a political flavour and the way they try genocide allegations. This is based on the clear evidence I have seen about the approach taken by the Specialised Chamber towards the five transferred genocide cases. Having considered all the evidence, I cannot exclude a risk of interference but judging from the transferred defendants the highest risk is from the pressure exerted by GoR ministers' comments in public and in the press. I

consider any such risk would be reduced by a robust, able and experienced defence team with an ability to investigate the defence case and international monitoring of some sort. I consider that without both of these the RPs would be at a greater risk of judges behaving partially and being influenced by factors outside the evidence.

Defence witnesses - evidence

546. The finding of the High Court in 2009 was that neither the submissions from the GoR nor the finding of the lower court "*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…And the possibility of accusations of "genocide minimisation" is especially troubling. It preempts what is acceptable and what is unacceptable speech. But that must be inimical to the giving and receiving of honest and objective evidence*" (Paragraph 62).

547. The High Court found in the next paragraph that Mr Lewis' best case on the witness question "r*ests on the alleged availability of video-link facilities*". The High Court went on to say "*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*" (paragraph 63).

548. Inevitably my approach to defence witnesses has been coloured by the fact that Celestin Mutabaruka ("CMU") has nine defence witnesses he will be able to call on if he is tried in Rwanda. The defence have not really dealt with this point in their submissions but I question why it is that he has been able to persuade witnesses not only to come forward but to agree to give evidence at a trial whether in Rwanda or abroad whilst most defence witnesses for the other RPs are on the face of it not willing to give evidence. I cannot determine whether the different approach is due to the courage of CMU's witnesses, a less than robust approach taken by investigators or the RPs' family members out in Rwanda who are getting at witnesses behind the scenes.

549. CMU's defence witness statements are to be found in his Bundle 2. They give their names and explain where they live. They explain what he was doing in the genocide and just as in the case of EN, some of the witnesses say that in 1994 they were being protected by him in his home. A number of them say they will give evidence for him whether in Rwanda or abroad. What is striking of course is that they are not anonymous and although some have lost money as a result of talking to the defence investigator they are still willing to give evidence in any trial in defence of CMU.

550. The defence (not including CMU) raise the following issues when it comes to defence witnesses. Firstly they contend a number of potential de-

fence witnesses will be too fearful to give evidence in Rwanda. Secondly they submit that this is a reasonable fear in the circumstances of the political situation in the country. Thirdly they argue that none of changes put forward by the GoR will be sufficient to persuade these frightened witnesses to give evidence. If no defence witnesses are called then any trial would be in breach of Article 6 3, d, that of obtaining the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him and the defence argue there would be a real risk of the RPs suffering a flagrant denial of a fair trial.

551. The prosecution respond in their Closing Submissions, Page 20, Paragraph 70 onwards. They submit that the fears expressed by the witnesses are not linked to personal safety but to economic security, they are frightened about losing the support of survivors' organizations, they are concerned about job prospects or job security, or they are frightened of being arrested because of what happened to them in the genocide. They are not frightened of the GoR. The prosecution contend that their fears are not reasonable in all the circumstances.

552. In the Prosecution Closing Submissions Page 46, Paragraph 165 onwards, counsel say that there is an abundance of evidence that defence witnesses come forward to give evidence at every level of court in Rwanda. Defence witnesses have appeared at the ICTR without any problem and returned to Rwanda afterwards. The ICTR has never found that the Rwandan authorities have systematically engaged in witness intimidation. The prosecution rely too on the creation of the witness protection unit and the way witnesses can give evidence by deposition outside the jurisdiction, by video-link hearing or by a judge in a foreign jurisdiction hearing oral testimony.

553. In 2008 and 2009 the District Judge and the High Court agreed that both prosecution and defence witnesses had been attacked and killed. Diana Ellis QC in her closing submissions at Page 6, Paragraph 11 quotes from the ICTR Appeals Chamber decision in the case of Kanyarukiga. *"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*". That was a case where the ICTR refused to transfer the defendant.

554. Ms Ellis in her closing submissions at Pages 13 to 15, Paragraph 32 a. to i. lists a number of Rwandans who have been threatened in some way. The list contains a number of the people who feature in her Tables. The majority could be said to be either political opponents or at least critics of President Kagame's or men who used to work for him. There are two exceptions, the first the witness Professor Reyntjens and the second Eustache Nkerinka. Professor Reyntjens gave evidence that in May 2012 he had been invited to lunch with the Rwandan Ambassador to Belgium in a friend's attempt to broker peace between him and the regime. He had told the Ambassador that he had been refused a visa and even if he had a visa he wouldn't go as he would be

arrested and prosecuted for revisionism. The Ambassador had said "*maybe you wouldn't be wrong*".

555. Eustache Nkerinka was a defence witness in the current proceedings called in May 2014 over a Skype link. Mr Nkerinka explained that he had wanted to give evidence anonymously in 2008 but that now his mother who had remained in Rwanda had died he had nothing to lose. He was now living in Germany but involved in a party (called RNC) opposing President Kagame. After he had finished giving his evidence he contacted the defence to say that he had been threatened.

556. Miss Ellis contends that threats to people such as these encourage a climate of fear and discourage witnesses from coming forwards.

557. I have heard evidence from Scarlet Nerad who had gone to Rwanda twice for these proceedings, once in October/November 2013 and again in February to March 2014. She had also conducted field work in 2007 for the hearing in front of District Judge Anthony Evans. She gave evidence in the current proceedings on behalf of Ugirashebuja and Nteziryayo. Her evidence was that the witnesses were still concerned for their safety, in that prosecution witnesses were too frightened to change their evidence and potential defence witnesses were too fearful of giving evidence as they feared reprisals. Nerad gave examples of witnesses who now said they had been intimidated into giving evidence for the prosecution and amongst the defence witnesses there was only one who did not wish to give evidence unless their anonymity was guaranteed.

558. In relation to whether the position had changed since 2007, Nerad said unfortunately there was a new factor, witnesses were now frightened that the government was monitoring telecommunications. Professor Reyntjens pointed out that in August 2012 the Rwandan parliament passed a bill permitting the widespread interception of communications by telephone, email and internet (VB File 1, Page 14). The Professor also gave evidence that from December 2012 all mobile phone users had to register their phones with the authorities or have their Sim cards blocked.

559. The other change she found was that although the GoR "*continues to threaten and bring charges of genocide minimization and ideation to silence citizens, the more immediate threat between 2009 and the present was the use of outside judicial panels to bring false charges against citizens, find them guilty and sentence them without due process to lengthy prison terms*" (UG 1, Part 1, Page 5, Paragraph 20).

560. Nerad also found evidence that witnesses who had given evidence for the defence in Gacaca proceedings had suffered as a result. Potential defence witnesses had also now picked up on the regime's ability to target opponents abroad. It is hardly surprising that the well publicised killings, disappearances etc listed in the Tables have added to the witnesses' fears.

561. Nerad said that the defence witnesses she spoke to were all frightened of government reprisals if they gave evidence. This was informed by the fact that a number of witnesses they interviewed said they had been imprisoned or tortured by the soldiers as she puts it "*of the current government*" after the 1994 genocide. Five told her that their earlier treatment was the factor they considered when they decided whether to cooperate with officials or leave the country. The witnesses described the treatment they suffered. Ms Nerad saw a number of scars that were said to be as a result of torture and although she is no expert she thought the scars were consistent with what she had been told happened (UG 1, Part 1, Page 6, Paragraph 24). It would appear undeniable that revenge attacks took place in the wake of the genocide carried out by soldiers and others but how widespread it was is impossible to tell and such actions have never been investigated. The International Red Cross decided they had to bring in a registration process to record the names of prisoners to protect them from death and disappearance, but this was in 1995 and is 20 years ago now.

562. Edward Fitzgerald QC in his closing submissions at Tab 8, Page 6, Paragraph 6.7 picks on the example of one of his anonymous witnesses, SSS (CU Vol I, Tab 2, Page 34) which is fairly typical. She says that her husband was taken to prison straight after the genocide and was beaten regularly. She managed to get his identity recorded which she believes saved his life. Another of CU's witnesses, UUU (CU Vol I, Tab 2, Page 39) gives evidence of how he and others were treated in prison in Kigoma straight after the genocide. He gives an account of many prisoners disappearing and of finding the body of a particular prisoner with his crutches buried with him in a piece of land at the back of the prison. That witness says he is frightened of giving evidence.

563. The defence also rely on prosecution witnesses who now say pressure was put on them to incriminate CU. Ms Nerad gave evidence of AAAA, BBBB, NNNN and RRR and Mr Fitzgerald picks out the example of ZZZ (CU Vol I, Tab 2, Page 53) who says he was told what the statement would say and was asked to sign it. He refused and as a result lost a contract with the Mayor's office. He was then telephoned by someone who said that Mr Ngoga was an important man who wanted CU to be brought back to Rwanda and who needed ZZZ's evidence. ZZZ then left Rwanda with his family and was later beaten up by some men. He said he understood he could give evidence by video-link but would only do so if his identity was kept secret.

564. Nerad was most effectively cross examined by Mr Brandon for the GoR and her evidence undermined in a number of respects. She had said that the GoR had not provided the defence with some important Gacaca material whilst in fact they had in 2008 or 2009 (UG Volume 1, Page 4, Paragraph 15). She had said the GoR had mischaracterized the integrity of the proceedings, which reduced the import of a Gacaca verdict but had to admit in cross examination that this was not right. In her statement she made much of the acquittal at Gacaca of Ugirashebuja but it turned out it was a different sector and different witnesses with almost no overlap with the extradition request.

565. A more serious and in my view justified criticism made by counsel for the GoR was that cross-examination of the witness showed that Ms Nerad had a tendency to accept what she was told without questioning it. Her evidence was that in relation to various extradition cases the GoR had breached guarantees it had given prior to return of the defendant. When she was cross-examined however it turned out that the cases she was considering were deportation cases instead with no guarantees having been given. It was apparent that she had failed to read the documentation carefully enough before coming to her important conclusion that the GoR had breached the guarantees and therefore could not be trusted.

566. A second issue was that Nerad had not set out in any of the statements she had taken from the anonymised witnesses that they had been told of the various measures that could be taken to protect their identity and which would allow them to give evidence on the face of it, securely, in particular, anonymously. Although Nerad had not set out that she went through the various ways of protecting witnesses, from other evidence it was clear that they feared the authorities. Nerad described in re-examination the fact that to obtain statements from the witnesses they had to meet them in remote places, out of view and at different times. They were concerned they might be identified and charged with divisionism or harassed. She also gave evidence that the witnesses in general would be willing to disclose their identity to this court and the Crown Prosecution Service but not to the GoR as they were afraid of repercussions. Also in re-examination Ms Nerad said that when she discussed the fact that they should have confidence in the Rwandan courts protecting them and granting anonymity, their response varied but some immediately came back with what had happened in Gacaca.

567. Nerad also reminded the court of the 2012 Amnesty report which found that the Rwandan military is operating a series of hidden detention facilities where it holds people for months without bringing charges. The report documents torture. In 2013 Mr Ntaganda, an opposition party leader was beaten, starved and denied medical care while he was serving four years for "*disturbing national peace, divisionism and organization of illegal demonstration*". (Paragraph 33).

568. In particular she was asked about the exculpatory evidence given in the Rwoga sector Gacaca. She explained that those (defence) witnesses who would have relevant evidence to give about CU's position in the community would not be willing to give the same evidence in the High Court.

569. When Nerad asked CU/1 whether he would be willing for his name to be disclosed to the GoR, he started to undress and asked her if she wanted him to be tortured again. She saw his scars from the torture. She explained that CU/1 had made a significant statement against one of the RPs and had given contrary evidence in his defence statement. I was later shown photographs of his scars. As I have explained earlier in this judgment when he gave his evidence I found him to be a confused elderly man but I had no doubts that he showed signs of physical injury and had no reason to doubt he had been physically mistreated in the aftermath of the genocide.

570. CU/2 and CU/3 were two other witnesses who were fearful of giving evidence for CU. CU/2 had been a Gacaca judge when CU had been acquitted. He feared that he would be imprisoned and he said he was in fear for his life. CU/3 said that after the acquittal that some of the judges were arrested and he too feared giving evidence in Rwanda.

571. The main problem for the GoR is that evidentially, on the face of it, there is similar evidence of witnesses' fear as there was in 2009 before the High Court and conceivably the situation has worsened with witnesses' fears heightened by the GoR's perceived ability to abuse telecommunication networks. Of the 20 statements from new witnesses obtained in 2013 and 2014 in relation to CU's case, all of them have been anonymised because the witness says he or she is frightened of being identified. A further five more had given statements for CU in 2007 and they remain frightened of the GoR and of the consequences of giving evidence for the defence.

572. Counsel for CMU point out in their [Closing] Submissions at Page 17, Paragraph 61 that Caritas Nyiransabimana (CMU Bundle 2, Tab 2) says in her witness statement that as a judge after she had acquitted CMU in his Gacaca trial, she had been harassed locally. She had received unsigned, threatening letters saying that she should move away from Gatare with her family and her cows were stolen. She heard rumours that the judges who acquitted CMU would be called to the Office of the Prosecutor General but that apparently did not happen. The second witness is Silas Hitiyaremye (CMU Bundle 2, Tab 3, 2nd Statement) he says that after meeting with CMU's defence investigator the financial support for his son at College was cancelled. He blamed that on his involvement in CMU's case.

573. Diana Ellis QC at her Submissions at Page 40, Paragraph 91 summarises the difficulties and obstructions faced by the investigator Ralph Lake in Rwanda. He had been an investigator with the ICTR and contrasts that with the problems he had as a defence investigator for EN. He gave evidence in 2008 and 2009 and also in these proceedings. He had not been back to Rwanda since his investigation and therefore to some extent his evidence was limited.

574. In August 2007, he said the interpreter became upset after he was told off for bringing people to the National Gacaca Courts Service who defend *genocidaires*. Lake gave evidence too of the time he went to the prison in October 2007 to see four witnesses. He managed to get a letter of authorization to see four prisoners but when he got to the prison the date on the letter was wrong as was the date of the authorized visit. The Deputy Director let him see three prisoners nevertheless and they spoke to him. The Director of the prison arrived and said the Deputy would be in a lot of trouble if Kigali knew she had allowed him to see the prisoners. Lake was to say that the prisoners had not spoken to him.

575. The following day Lake returned and saw the three prisoners in the presence of the Director and the District Head of Intelligence. The prisoners

refused to speak to him and said they had said nothing to him the day before. Then bizarrely the Rwandan authorities obtained statements from the various individuals at the prison who said that he had been rude to the staff and had misrepresented his role to the prisoners.

576. I have no doubt at all that Lake's account is correct and that the various authorities in the prison were fearful of being blamed by Kigali for assisting the defence. It was of no little interest to this court that senior officials were prepared to lie to hide things from those in Kigali although I took into account this was in 2007.

577. He was cross examined by Ms Lindfield for the GoR and it became clear that he had no idea who was fixing up the interviews with witnesses for him. More concerning was the fact that he was clearly looking for exculpatory evidence only. I accepted too there were flaws in his methodology in particular his failure to show witnesses any earlier statements and his reliance on an interpreter who was not translating accurately.

578. In their Closing Submissions Tim Moloney QC and Ian Edwards relied on the evidence of Fernand Batard who gave evidence in March 2014. He had been in the police in France for 27 years and had ended his career as a Lieutenant Colonel. He had lived in Rwanda between 1986 and 1989 and had carried out investigations for the ICTR after the genocide. He spoke about his experiences of investigating two cases in Rwanda. In one case, he was told by a nun he was staying with that two men from the military service had said he was a dangerous denier. They asked her to tell them the identity of anyone he met. He thought he was under surveillance and it was not just curiosity that led to the questions from the security men. On another occasion, another witness Mr Kagango who worked with Mr Batard said he had been seeing two witnesses when he was pulled over by two armed policemen who asked him who he was meeting.

579. Batard accepted that thousands of witnesses had testified in Gacaca proceedings publicly and hundreds of defence witnesses had given evidence at the ICTR and returned to Rwanda afterwards. He also said that he had had experience of witnesses fabricating false accusations against defendants.

580. He explained that although he had not told CM's witnesses about potential immunity from prosecution for anything said in the trial, he had explained the WPU and giving evidence by video-link. The witnesses had never heard of witness protection, almost all of them were frightened of disclosing their identity to the Rwandan authorities.

581. I found that of the investigators and possibly because of his 27 years in the police force ending at a senior level, that Batard was the most objective of the investigators when he gave evidence. He explained that each witness had different concerns, he asked them all what they were frightened of. He explained that in his extensive experience Rwandans have a tendency to exaggerate, one time in two the witness might respond that the authorities could even kill him or her which was, as far as he was concerned, clearly an exag-

geration. He used to ask them if they had an example of that happening to a witness and they couldn't give one. He said it was an example of a collective belief. Then they would say they would be put into prison. He says the fear was very subjective. He described it like a child saying he is frightened of the dark, there was no reason for but it was very real to the witness. It turned out that although he had been told that one of the witnesses for CM had been imprisoned as a result of him being a witness in this case in 2007, when he tracked him down in fact there was no link. He was of the view that the fear of the witnesses was not well founded. His overall conclusion is that they are fearful but it may not be justified.

582. Mr Moloney and Mr Edwards rely on a number of witnesses in their CM Bundle 1 and 2 to show the fears their witnesses suffer from. An example is RW/04 in CM Bundle 1, Page 14. He said he was afraid to testify in defence of CM in any trial in Rwanda. He was afraid he would be delivered to the police and imprisoned without charge. He gave an example of a farmer to whom that happened who had to serve five years. That farmer said that two prosecution witnesses had made false accusations against CM. He was arrested and taken to prison. He was later acquitted by a special jurisdiction. RW/04 said after that no one would attend a hearing to defend CM. He went on to say he would not participate in a public hearing held in Rwanda, if his identity would be revealed to the authorities in Rwanda but he would agree to a video-link in a protected place.

583. Another anonymous witness is RW/14 (CM Bundle 1, Page 74) who is a Gacaca judge and member of the Gacaca Court of Appeal. This witness says "*testifying in his [CM] defence in Rwanda is equal to suicide*". He said that the IBUKA area president was going around recruiting people to accuse CM. He said that if they knew that he was going to testify for CM they would make him disappear. As to the WPU, he did not consider that they could oppose the will of IBUKA and protect the defence witnesses of those charged by IBUKA. He said if CM was brought to trial there would be inculpatory witnesses only. He would testify in a trial outside Rwanda on the basis of strict anonymity.

584. CM also relies on the witness Enos Kagaba who says he was abducted from the United States and taken to Rwanda. He gave evidence in these proceedings. It would appear that his asylum claim had been refused but the judge ordered he be deported to anywhere but Rwanda (CM Bundle 2 Page 122 onwards). That was appealed and during the appeal process he was returned to Rwanda. His evidence was that during his Gacaca trial in Rwanda the first defence witness gave evidence and was then arrested. That witness was placed next to him in handcuffs in court and all the others who had been lined up then refused to come forward. He was willing to give evidence because he was a prisoner already but had no knowledge of CM's activities in the genocide.

585. RW/01 was a witness who did not trust the witness protection programme and there were a number of others of the same view. A number of witnesses such as RW/11 made claims that false allegations are regularly made against defendants.

586. My view of CM's witnesses are coloured by the evidence of Batard who considered that although genuinely held the fears were exaggerated.

587. Witteveen also gives evidence about defence witnesses he interviewed as an investigation judge in Rwanda between 2008 and 2012 in relation to two genocide cases being prosecuted in the Hague. Although he had no problem finding willing defence witnesses, these were in relation to cases prosecuted outside Rwanda. I accept his evidence that the authorities in Rwanda gave every assistance to investigators from Finland, Norway and Holland but I could see a witness reacting very differently to the Rwandan judicial police conducting investigations in relation to a trial in Kigali. On the other hand he did not report that any of the defence witnesses who gave evidence to him had subsequent problems with the Rwandan authorities.

588. Witteveen was very clear in his evidence that the witnesses he dealt with were not frightened by what the GoR might do but by how the local community and defendant's family might react. Witteveen explained that there were some defence witnesses who were straightforward and some prosecution witnesses who were afraid. It depended more on whether they lived in Kigali or in the countryside. He considered there were times when witnesses influenced each other but he did not know of any example where they had been influenced by the authorities.

589. In terms of the five transfer cases there is not much information in relation to the defence case in the main because of a lack of effective defence representation. As at 30th July 2015, there was no budget providing for defence investigations in the case of Mugesera and no defence witnesses called. In Uwinkindi a handful of defence witnesses had been called but this was at a time when the defendant was unrepresented. The majority of Uwinkindi's defence witnesses lived abroad and although 876K RwFr had been paid to the defence in relation to finding and interviewing witnesses in Rwanda nothing had been paid towards the budget he provided for witnesses abroad. There were 38 defence witnesses based in ten countries abroad including New York. They had estimated a cost of US $64,925 to identify, locate, contact and interview the witnesses. In Bandora, Mr Witteveen said he had called 14 defence witnesses. In Munyagishari no funds for an investigator had yet been provided and no defence witnesses presented. Finally the case of Mbarushimana is yet to start but again there is no budget as yet for investigation.

590. In terms of the workings of the WVSU and WPU, the most one can glean is from the reports from the ICTR monitors. The monitors record conversations with the director of the WPU who explains they have set up safe houses and are ready to take the defence witnesses who require their protection. The director on one occasion said there had been witnesses who had used their facilities but they do not appear to be the defence witnesses in any of the transfer cases. It would appear that at the beginning of the monitoring of Uwinkindi's proceedings, the WPU was being set up but as time passed, the monitors were told that it had had its first clients. Unfortunately there was no evidence of this presented to this court.

591. In the five transfer cases the video-link system has not been used simply because the witnesses have not been identified as the funds have not been provided. I accept that the facility is available and would be used were the witnesses identified and marshalled to the appropriate facilities.

592. There is some unfortunate evidence of how protected witnesses have been treated in the justice system. In the controversial trial of Ingabire a defence witness AA was given protective measures because of fear for her personal safety. When her evidence was heard before the Supreme Court her real name was bandied about by all the parties, including Ingabire's lawyer, the prosecutor and the judge. The same witness' telephone number was given in open court by the prosecutor. It is particularly worrying that this should have happened in such a high profile case as Ingabire's. Mr Witteveen gave the example he witnessed in the Bandora case, when the defence lawyers and Bandora himself gave the real name of a protected witness.

Conclusions - defence witnesses

593. I accept that a number of witnesses in this case have told investigators that they are too frightened to give evidence in Rwanda. I find that they are frightened and are expressing their genuinely held views. Many of the witnesses are from rural backgrounds and are of relatively low educational attainment. The reputation of the GoR at home and abroad as I have found in Paragraphs 221-223 cannot be of assistance either but Witteveen's evidence of his experience, which I accept, is that the witnesses are more frightened of local repercussions rather than national ones although both are feared. The witnesses' fears vary from a concern that they will be killed or imprisoned and tortured to a fear of losing their benefits as genocide survivors. Some fear they may be charged with genocide minimization type offences or prosecuted for offences arising out of the genocide.

594. At the same time 14 defence witnesses have been heard in the transfer case of Uwinkindi and nine in the case of Bandora. Defence witnesses were heard in the Gacaca proceedings against the acquitted RPs. There is the example of the nine defence witnesses who gave evidence in the case against EN in Tare II when he was acquitted. There is also the nine defence witnesses in the case of Celestin Mutabaruka who are willing to give evidence in the Specialised Chamber of the High Court were he to be extradited.

595. It was said in the Uwinkindi Referral Chamber in 2011 that between 2005 and 2010 at the ICTR, 357 witnesses had testified for the defence and 424 for the prosecution and there was no evidence that witnesses who returned to Rwanda subsequently raised security concerns. The same Chamber considered the question of defence witnesses in the High Court in Kigali and even then without the protection of Transfer Laws, the ICTR noted that in most of the then 36 genocide cases tried in the High Court, defence witnesses were available. I noted that it was not disputed that thousands of witnesses have given evidence for the defence in Gacaca proceedings.

596. I noted that the ICTR in Munyagishari in June 2012 found that legal protection for defence witnesses was adequate on the basis of the Transfer Law and this was despite the court receiving statements from 16 witnesses who wanted to be remain anonymous and said they did not want to testify in Rwanda.

597. I find the following provisions would be provided by the judicial authorities in Rwanda for frightened witnesses giving evidence.

- A guarantee that defence witnesses could not be prosecuted for anything said or done in the course of a trial
- A facility to enable them to give evidence anonymously
- A facility to enable them to give evidence by video-link or by deposition in Rwanda or abroad. Video-link includes voice distortion and other methods of disguising a witness' identity
- The use of the WPU which is now fully functional which can provide a safe house, assistance with travel and other protective measures. It is independent of the GoR and is run by the Registrars of the High Court and Supreme Court.

598. There are many reports of witnesses being willing to give evidence in genocide trials in the High Court in Kigali. I consider that although there can never be any guarantee of safety at least some of the frightened defence witnesses are likely to give evidence for the defence were the defendants to be returned for trial. I do not accept that the defence in this case will be unable to marshall a sufficient number of defence witnesses if the defendants are properly represented with adequate assistance and the new provisions for video-link, anonymity, the WPU etc are explained to them which will enable them to give evidence in a protected environment.

599. I find that there is no real risk of a flagrant denial of fair trial in relation to the availability of defence witnesses as long as the RPs, if returned, are represented by able and effective representatives who are able to investigate and put together the case for the defence.

Fair trial - Defence lawyers and investigation of the defence case

600. Mr Fitzgerald QC in his Closing Submissions at Tab 4, Page 2, Paragraph 2.4, sets out his suggestion for the test to apply were I to find that defence counsel were incapable of providing effective representation. He submits that if there is a real risk that the defendants, if extradited, will be denied the effective representation of counsel in cases which so obviously call for effective and skilled representation by suitably experienced and resourced defence counsel, then that exposes them to a real risk of a flagrant denial of justice. He relies on *Daud v Portugal* (2000) 30 EHRR and two older cases. There is also a separate issue of the funding for defence investigations.

601. Mr Witteveen, the GoR witness whom I have treated as an independent witness, rightly points out that from an investigation and prosecution point of view genocide cases are the most complex and time consuming of criminal

cases. The Rwandan genocide took place 20 years ago yet the prosecutions rely almost exclusively on eye witness evidence.

602. There are many obstacles to any investigation and Witteveen names a few: "*failing and fading memories, source amnesia and source blending, trauma and stress that has impeded the quality of what witnesses remember, the inability of witnesses to provide basic information about the crime and the perpetrators, such as time, place and geography as well as any numerical information such as distances, numbers, heights etc. These inabilities are often credited to illiteracy and the lack of education of many witnesses as well as cultural backgrounds*". Another factor he mentions is the prevalence of perjuring witnesses. This has been described in academic literature and was touched upon by Professor Reyntjens when he gave evidence and there has been much evidence in this case of a witness saying one thing to one party and something very different to another.

603. Witteveen's important conclusions are at Paragraphs 61 onwards of his Additional Report. He emphasises that he does not say it is not possible to establish the truth in genocide cases but rather to underline the importance of high quality and professional investigations, applying internationally accepted standards. "*Part of this professionalism and these standards is the necessity to have defence attorneys who possess the knowledge, experience and the resources to conduct investigations for the defence, including the capabilities to conduct investigations abroad*".

604. The investigation he had carried out before coming to his conclusions in relation to the work of defence lawyers in genocide transfer cases, was that he had not only attended trials and read the notes of his legal colleague at the Dutch embassy who had attended almost all the hearings of the transferred defendants but he had spoken to the KBA, individual defence attorneys and the Director of the legal aid forum in Rwanda, he had also read all the monitors' reports on the transferred cases of Uwinkindi and Munyagishari and spoken to them occasionally, finally he had spoken to the monitor from the Office of the Prosecutor from the ICTR who had also attended court sessions.

605. In relation to Uwinkindi he found that between January and 8th June 2015 when Witteveen gave evidence for the GoR Uwinkindi had been "*without any defence*" (Additional Report Paragraph 21). In relation to Munyagishari he said that that trial was stalled due to his two defence lawyers refusing to accept the fee of 15 million RwFr and appearing (or not appearing as happened on 3rd June 2015) *pro bono*. What Witteveen found remarkable about Mugesera's lawyer is that he has maintained complete silence during the proceedings and throughout when 23 prosecution witnesses had given evidence although Mugesera addressed the court.

606. As to Bandora's trial which had concluded, Witteveen produced a critique of how the proceedings had been conducted at his Paragraph 40 of his Additional Report. The lawyers' witness handling was chaotic and clearly unprofessional (my comment not Witteveen's). Their questioning of their own witnesses was very short, irrelevant and repetitious and the protected wit-

ness' name was mentioned. I have already set out earlier the example given by Witteveen of the many opportunities left unused by the lawyers when they were questioning prosecution witnesses. He was equally worried that a limited number of witnesses were heard when many other names were mentioned. In Bandora too, there had been no attempt to ask MiniJust for a budget to investigate the defence case. I have commented earlier on all these proceedings

607. Witteveen pointed out that neither the defendants but more importantly neither did the majority of their lawyers have any trust in the GoR institutions. This had led to complacency or confrontational attitudes with defendants and their lawyers using any tactics to frustrate the trials, including obstruction (Paragraph 50).

608. Based on his research he had a "*deep concern on the status and quality of the defence attorneys acting for their clients in the genocide transfer cases… In the cases I witnessed, none of the defence attorneys performed at a level that meets any international standard. In summary: there is currently no defence, either officially or materially, in other cases the defence attorney act or acted substandard and even irresponsible.*" (sic) (Additional Report Paragraph 14). He said that the defence is by far the weakest link in the justice sector in Rwanda but pointed out that unlike the NPPA and the judiciary they had hardly received any capacity building from outside donors (Paragraph 51). This had led to "*an organisational immaturity and incapability dealing with genocide cases at this level*" (Paragraph 51). He explains that he had serious doubts whether defence lawyers in Rwanda were capable of conducting a "*robust and credible defence investigation aimed at establishing exonerating evidence*".

609. In cross-examination, Witteveen recognized that the skills of investigators are different to the skills of a lawyer (Tim Moloney's Analysis, Appendices to Edward Fitzgerald QC's Closing Submissions, Tab 5, Page 11, Paragraph 32). He was concerned that as the lawyers in Rwanda are commercial ones, they would not be able to accommodate such investigations in practice. Even if they are willing to do the work required they do not have the right skills, capacity, support or time to conduct intensive investigation required. In my view, this even more the case, when they are being paid 15 million RwFr for the whole case including appeals.

610. The trials of cases tried under the Transfer Law are accusatorial in nature. Witteveen points out the lack of an investigating magistrate who can look into the defence case in a neutral and objective manner and explains the importance of the defence to genocide cases where the only investigation to put an alternative scenario to the Judge in the case is carried out by the defence team.

611. Witteveen who has seen a number of prosecution files contends they are basic. A typical investigation takes about two weeks during which time about 10 to 15 witnesses are interviewed. The witness interview and proofing takes one to two hours per witness. After the transfer of a defendant, Witteveen has never seen any more investigations carried out by the police.

612. Another issue is that none of the Rwandan lawyers can cross-examine. My understanding from the evidence of Ms Buff, the ICTR monitor, is that the cases heard in the Rwandan judicial system outside the transfer system do not usually involve cross-examination of witnesses. Having considered the many undermining features of the defence case put forward for Dr Brown, it is crucial that any lawyers representing these RPs are able to ask prosecution witnesses questions about what they have said on earlier occasions.

613. I will look at the case of Uwinkindi in relation to defence resources in more detail below. In the GoR Rebuttal Material Bundle 1, Page 20, it is said that Uwinkindi has potentially 38 defence witnesses abroad.

614. In 2011 there were frequent references in the Uwinkindi litigation in the ICTR to defence investigations and its funding and in one particular passage the GoR in its *amicus* brief said that "*The defence, of course, is free to conduct their own investigations independent from the police investigation to develop new leads and information*" (Objective Material Bundle 4, Page 617). It is clear that at the ICTR at least the GoR recognised that defence investigations might well be required.

615. It is notable that from the earliest days of Uwinkindi's proceedings in Rwanda the defence were asking for investigators to investigate the defence case and to find witnesses, particularly abroad. In June 2012, Uwinkindi's defence counsel told the ICTR monitor that defence attorneys do not as a rule conduct their own investigations. They ask the judicial police to take statements from possible witnesses or ask the Court to call individuals to provide evidence as witnesses of the court. Ms Buff, one of the ICTR monitors, said that 74% of the defence witnesses who gave evidence in the 57 cases at the ICTR lived outside Rwanda.

616. The Rwandan High Court clearly did not know what to suggest in relation to investigation funding for Uwinkindi so it suggested the defence approach MiniJust. Certainly the prosecution considered in July 2012 that funding may well be made available but nothing happened. On 11th October 2013 (GoR Rebuttal Material Bundle 1 Page 27), the High Court ruled that no investigators should be appointed but that Uwinkindi's counsel should find witnesses on his behalf.

617. It was quite clear to me that the Rwandan courts' approach to genocide cases in non transfer cases in the past had been to hear evidence from prosecution and any defence witnesses (particularly prisoners) who lived in Rwanda. As Witteveen says the usual Rwandan legal system is inquisitorial in character and it is only in relation to the transfer cases that Rwanda has chosen an accusatorial system. The judicial system is not used to genocide cases being thoroughly tested either for the prosecution or the defence in the accusatorial manner. I have certainly not seen any sign in any of the monitors' reports that earlier testimony of the witnesses is disclosed and then examined in evidence.

618. The GoR in its submissions urges this court to find that their witness Witteveen did not have all the available material concerning the defence in the limited sessions he observed. I have set out above my view that he did much more than just observe a few sessions in court. I am asked to find that what he saw had alternative explanations. That point is covered in the paragraphs above and below. Counsel for the GoR contend that Witteveen expressly acknowledged that his concerns, did not meet the high threshold of Article 6. That was not my understanding of his evidence, which is that he was placing the facts at my disposal and leaving this court to apply the Article 6 test.

Conclusions

619. There have been thousands of genocide trials in Rwanda at all levels of the judicial system and at present it would seem that that country can ill afford to put in the sort of resources required to investigate properly each case, especially for the defence but probably not for the prosecution either. One of my concerns is whether it is appropriate that this court should look at the prospects of a fair trial using as a benchmark the very high standards expected in the European context. I suspect that by Rwandan standards, the five transferred defendants are having a fair trial. They are occasionally represented and whether they are or not, can address the court. They can ask questions of the prosecution witnesses and although they cannot call defence witnesses from abroad at least they can call some witnesses from Rwanda. The authorities may well question with some justification why it should be that defendants transferred from abroad should have the resources to defend themselves that local defendants lack. I remind myself that defendants in Gacaca proceedings did not have lawyers and were tried by people of integrity with little or no legal training in the local communities. I agree with Mr Witteveen in the conclusion in his first report that with genocide allegations impunity is not an option. Nevertheless my responsibility is to conclude from the evidence whether if returned there would be a real risk of a flagrant denial of justice in relation to the prosecution of these men.

620. Witteveen was an objective witness who unlike any other had witnessed the trials of the transfer cases and considered the monitors' reports. Although of course counsel for Rwanda are right when they say he had seen only a limited number hearings but he had read the notes provided by his colleague as well as all the other evidence in relation to the conduct of the trials. The evidence he gave about how shocked he was by what he had witnessed of the defence representation of Bandora was striking and vivid. He had such "*deep concern*" and "*profound doubts*" (cross-examination 9.6.15) about the quality of defence representation that he felt duty bound to draft his Additional Report and wanted to give the court a true picture of what was going on. One can only imagine what a difficult situation he must have found himself in.

621. On a more positive note, I also saw some evidence in the ICTR reports, in the early days of Uwinkindi's proceedings, that the defence lawyers even with their pay continually being fought over, seemed capable of arguing the points that they should, usually procedural ones. It is the preparation and presentation of the defence case which thus far has been such a failure.

622. Witteveen does not blame the defence community in Rwanda for their lack of experience or ability but rather points out that whilst the prosecution (NPPA) and the judiciary have received extensive help in capacity building from donors, the Rwandan Bar Association has received virtually none.

623. I feel reluctant to consider the rates of pay fixed by the President of the Kigali Bar Association who after all knows the local conditions and what the cost of living in Rwanda is, which this court does not. Nevertheless I did consider that the officers of the KBA who negotiated the rates of pay for the defence lawyers with MiniJust did not understand the demanding nature of even an adequate defence approach to such cases and had never considered the amount of preparation required. It was clear from MiniJust's approach that it had completely underestimated the time it would take to defend such cases when it had decided on the original fees of 30K RwFr per hour per lawyer. MiniJust was concerned this was open to abuse and since then it has gradually reduced the fees which has led to the disputes. It is mark of the lack of professionalism of the lawyers that they have allowed the disputes to overshadow the work that should have been taking place to defend the transferred men who face such serious charges with long sentences if they are convicted.

624. I have said above that the early lawyers in Uwinkindi were clearly able to argue procedural points; Ms Kabasinga in the Rebuttal Material provided the brief curriculum vitae of the two later lawyers appointed for Uwinkindi. In the Supreme Court, Uwinkindi argued that one of the two new counsel had been found by another court not to have the ability to plead a genocide case whilst the second lawyer had no relevant experience. I take into account that they may not have included their experience of genocide cases in their cvs but on the face of it I had to agree with Uwinkindi they did not seem to have the experience that is needed in such cases.

625. At the end of 63 days of evidence in this case, I have seen the sort of work needed to be carried out to investigate alleged genocide cases. If the cases of VB and EN are typical of such cases, and I have no reason to think they are not, there is much important evidence, potentially undermining of the prosecution case, that can be gleaned from Gacaca proceedings and other cases where the prosecution witnesses have given evidence.

626. In VB's case, instructed lawyers and investigators have poured over a mass of Gacaca material to find out what witnesses have said on earlier occasions, some of these witnesses were defendants in trials. Although VB has carried out some of this work, the other RPs if returned to Rwanda will have to do so too. Another example, this time not in the case of VB but in the case of CMU, is the witness Sabine Hategekimana who accepts lying before the ICTR in another case. Proper investigations into that matter will have to be undertaken which will include obtaining statements taken by ICTR investigators.

627. The importance of defence preparation and investigation is shown by the example found in the case against VB where witnesses transpose accusa-

tions against one man to the RP. Miss Malcolm contends a similar situation has arisen in the case against CMU, in that whereas Alfred Musema is accused of orchestrating killings at Bisesero, the same witnesses now suggest CMU is the perpetrator. Miss Malcolm and Mr Weeks have produced schedules which analyse the evidence of two ICTR witnesses, Kabagora and Ntagara in their submissions. They show a number of differences in their accounts at different times. All these investigations I accept will have to take place conducted by lawyers or investigators who have experience, knowledge, application and the appropriate funding.

628. This leads to the second concern I have in relation to these RPs which is the lack of funding for the identification and locating of witnesses in particular abroad. Without such funding and without defence counsel with the ability to identify, locate, contact and interview such witnesses themselves or without an investigator to do it for them, it is difficult to see how Uwinkindi or any other defendant will have a defence case to put before the court.

629. In August 2015 a new law was passed allowing for applications for defence funding for investigations in genocide transfer cases. Uwinkindi had raised this as a problem at the ICTR in 2011 and in the Rwandan High Court in 2012. It took four years for the law to be changed and I suspect it had a lot to do with Uwinkindi's ability to refer his case back to MICT. This change of course opens the way for funding to be granted. It is too early to say how this will be applied in practice. I noted that the Uwinkindi budget for investigations abroad was US $ 64,595 (about £43,000), a vast sum. Any investigation budget for witnesses abroad inevitably will dwarf amounts spent on the lawyers and the investigations in Rwanda. In the cases of these five RPs some of the investigation work has been done and it may well be the costs will be lower, nevertheless the GoR will have to spend a great deal on investigations and it remains to be seen whether they will commit that sort of money to defence cases.

630. From all the evidence I have read and heard I concur with Witteveen's Final Conclusions in his Additional Report, he is certain that the facts in genocide cases can be established but "*only under the condition of high quality and professional investigations, applying internationally accepted standards. Part of this professionalism and these standards is the necessity to have defence attorneys who possess the knowledge, experience and the resources to conduct investigations for the defence, including the capabilities to conduct investigations abroad*". He has profound doubts that the defence lawyers assigned to the transfer cases can do that. His solution is still to extradite but to provide a lawyer with the right experience to work alongside Rwandan lawyers who would be provided with appropriate funds to conduct investigations. In his view (and in my view) "*it ensures the necessary adequate defence capabilities for the defendant that meets the required standard and guarantees not only procedurally fair trial but also a fairness to the trial*". Unfortunately this court does not have the power to order extradition on conditions and I am applying a different test.

631. I find that if extradited, as things presently stand, the defendants would be denied the effective representation of counsel in cases which so obviously call for effective and skilled representation by suitably experienced and resourced defence lawyers. It is too early to say that sufficient funding for defence investigations in relation to witnesses abroad will be provided. These defendants are legally aided in this country and will be indigent in Rwanda. I have seen in this case what the effective representation by counsel can achieve. Without such representation and funding, the High Court in Rwanda would be presented with the prosecution case and the RPs would find it impossible to present their side of what happened. I find the RPs would be exposed to a real risk of a flagrant denial of justice and a breach of Article 6.

Article 8 - Dr Brown and Mr Ntezilyayo

632. A three step approach to Article 8 was suggested by Baroness Hale in *HH v Deputy Prosecutor of the Italian Republic Genoa; F-K v Polish Judicial Authority* [2012] 3 WLR 90. The court should ask firstly whether there would be an interference with the right to private and family life, secondly whether the interference is according to the law and pursues one of the legitimate aims in Article 8.2, thirdly whether the interference is necessary in the sense of being proportionate to the legitimate aim. The court should weigh the nature and gravity of the interference against the importance of the aims. It is in short a balancing exercise which will vary according to each RP. In *HH* Lord Justice Judge at Paragraph 132 reminded the courts of the importance of the fulfillment of our international obligations.

633. The importance of the balancing exercise set out in HH was underlined by the Lord Chief Justice in the recent extradition appeal of *Celinski & Ors* [2015] EWHC 1274 (Admin). He suggested that the District Judge in an extradition case ought to list the factors that favoured extradition and then the factors against, the judge should then set out the conclusion backed up by reasons as to the result of the balancing of the factors.

634. The evidence in relation to Article 8 is to be found in Dr Brown's defence statement in the first bundle at p127 onwards. He has been married since 1989 and has two adult children. His parents still live in Rwanda. On 14th July 1994 he and his family left Rwanda and went via other countries to Kenya where he worked as a doctor. His wife and children moved to London in 1998 and he joined them in 2000. At some point after 2004, to make it easier for his children, he changed his name from Bajinya to Brown. Until his arrest in December 2006 before the first extradition proceedings he was working with a charity training refugee nurses and midwives. If he were to be extradited he would leave his wife and children behind and lose his work in this country. He would be locked up on remand probably for three years and if convicted will receive a thirty year or life sentence of imprisonment. Dr Brown's argument is that it cannot be proportionate to extradite him when he can be tried in this country.

635. As far as Mr Ntezilyayo is concerned, his family circumstances are dealt with at Paragraph 207 Page 73 of the Closing Submissions. The RP and

his wife have five children aged between 12 and 21 including a 12 year old who has quadriplegic cerebral palsy. Dieu Merci suffers from sever learning difficulties and has significant physical problems. He needs constant attention not just medical but also from his mother and father. He is not independently mobile and suffers from epileptic seizures and has global developmental delay, his care is made more difficult by his size and strength. EN plays a central role in lifting him in and out of bed, the wheelchair or an exercise frame, carrying him up and downstairs, containing him when he has temper tantrums and playing with him. He has to be fed, washed daily and checked on through the night. The parents also have to look after the other children's needs. Apart from when he was in custody for two and a half years during the first proceedings and a few weeks in these proceedings EN has been a constant carer for his children.

636. The evidence of Dr Helps a Clinical Psychologist was obtained and is to be found in EN bundle 1 at tab 2 p182 onwards. She reports on the impact on the children of their father's extradition and gives a view on what is in the best interests of the children. The expert has interviewed the children. The children are all beautifully brought up, kind and helpful, they are very bright and hard working. The oldest is away at University. They were all adversely affected by their father's time in custody and felt really sad without him. The children helped their mother care for their brother with disabilities. Naturally they are "highly anxious" as the expert explains (EN Bundle 1, Page 202, Paragraph 96) at the prospect of their father being removed again. The older three girls are acutely aware of the risks to their father should he be returned to Rwanda. The family tries to maintain a positive outlook which hides anxiety and distress. The expert was concerned that they had no way of expressing their fears but on the contrary internalized their feelings.

637. The expert explains that incarceration in this country would be easier to handle for the family as they could visit and maintain contact by letters and telephone. This would not happen were he to be extradited to Rwanda. He would then be less able to give emotional support to his family. Dieu-Merci would be unlikely to be fit enough to visit Rwanda. All the children would suffer what is termed "ambiguous loss" where the parent's position is unclear, as opposed to loss through death etc. Dieu-Merci would show his loss through very difficult responses that the family would find difficult to manage. Dr Helps is particularly concerned about the effect of extradition on Mrs Ntezilyayo. She thinks her defences would crumble into a breakdown and that might mean she would be unable to meet her children's needs and the worst case scenario would be that they might need care provided by the local authority.

638. Counsel for EN argue that he should be treated as a sole carer in view of the particular caring responsibilities he shares with his wife. He has been involved in the care of his children except for when he was in custody. The physical care for Dieu-Merci is particularly arduous. The court should take into account also the fact that Rwanda refused to allow the British authorities to investigate and then if appropriate prosecute the RPs in this jurisdiction.

639. The factors in favour of extradition are the nature of the offences, they are the most serious offences in the criminal range; another factor is that we have a treaty with Rwanda to bring suspected *genocidaires* to account, if there can be a fair trial in Rwanda then depending on other factors, the RPs ought to be returned for a trial.

640. The factors against extradition are that if extradited the RPs concerned will be separated from their families for a very lengthy time if not forever unless their families follow the RPs out to Rwanda. I have taken into account the factors raised by counsel for VB at Paragraph 158 Page 38 of their Closing Submissions. I note the delay, the first request was in 2006 some 12 years after the genocide, this delay was not of the making of the RPs. I note too that had Rwanda agreed the RPs could have been tried in this country and the separation from their families avoided. As the expert explained imprisonment in this country would maintain family links and support.

641. The son of EN has severe disabilities and is very vulnerable and I accept that EN cares for his son alongside his wife. There are three other children whose care he shares (the oldest daughter is away at university). I accept the evidence from Dr Helps that the family left behind will find it much more difficult to care for Dieu-Merci. I accept too the emotional harm that will come to this family were EN to be removed. I have to keep in mind that the children's welfare is a paramount consideration when I come to make a decision.

642. There is no doubt that extradition in the circumstances is an interference with the rights to a family life of the families of VB and EN. The family of EN will be particularly affected by the departure of the RP. They are a close family with a very disabled child who depend on EN for physical care and for emotional support. It is a concern that EN's wife may have a breakdown if EN is extradited. I find it is in accordance with the law and pursues a legitimate aim. I find it is necessary and proportionate to the aim of bringing suspected genocidaires to trial in their country of origin, the country where most if not all the prosecution and defence witnesses are resident.

Conclusion

643. The Article 8 argument fails.

Forum – Brown

644. Alun Jones QC for VB argues that Rwanda has prevented an investigation and prosecution in this jurisdiction and VB could and should have been prosecuted in England and Wales. Counsel argues at length between Paragraphs 30 and 49 in his Closing Submissions that the courts here could try this case. He explains the 2010 change in the law at Paragraph 50. In Paragraphs 51 onwards he explains that the GoR refused to co-operate with the CPS after the 2009 judgment of the High Court. In a letter dated 13th October 2013 Ms

Hemming of the CPS told Frank Brazell and Partners (in VB file 8 at p3100-3) that the Rwandan Prosecutor General had told the CPS that they were not prepared to "*cede jurisdiction to the UK authorities*" (p3101) and would not provide copies of their evidence to the police. The CPS continued that without the co-operation of the Rwandan Authorities an effective investigation could not be carried out and therefore no prosecution in the UK was possible.

645. Mr Jones says in Paragraph 56 (p14 of his submissions) that the letter from the CPS implies that the GoR has other evidence which has not been provided to the court. That is not my reading of the letter. More importantly Mr Jones relies on the considerable delay and effect on VB of not having a trial in this jurisdiction which may have been completed in 2009 when he would have had a chance to be exonerated.

646. I have been trying to decide under which category this argument falls. Mr Jones QC has placed it in a section of his submissions entitled "Forum" but this is not a forum argument under section 83A of the EA which reads as follows:

83A(1) the extradition of a person ("D") to a category 2 territory is barred by reason of forum if the extradition would not be in the interests of justice.
(2) For the purposes of this section, the extradition would not be in the interests of justice if the judge-

(a) decides that a substantial measure of D's relevant activity was performed in the United Kingdom; and
(b) decides having regard to the specified matters relating to the interests of justice (and only those matters), that the extradition should not take place.

647. My approach to this must be that I would never decide that a "substantial measure of D's relevant activity was performed in the United Kingdom". Therefore it seems to me that this is not a forum argument within the meaning of section 83A of the EA. It sits more comfortably as an argument to be taken into account when I come to consider abuse of process, passage of time, Article 3 and Article 8.

648. I accept that VB is a UK resident and the acts would have constituted the offence of genocide if they had been committed in the UK. Those preconditions for prosecution here are met. I do not understand that this is disputed by any of the parties. I find that these allegations of genocide and related charges could be tried in this jurisdiction particularly since the change in the law in 2010 when a new section 51A of the International Criminal Court Act 2001 came into force. If VB and the RPs are not extradited they could be tried in this jurisdiction. The RPs make it clear they wish to be tried here.

Abuse of process – Dr Brown, Emmanuel Ntezilyayo and Celestin Ugirashebuja

649. These arguments are put forward as residual arguments if the other arguments fail. I will deal with them shortly.

650. *R (Government of the United States of America) v Bow Street Magistrates' Court* [2007] EWCH 2256 (Admin) ("*Tollman*") sets out the steps the magistrates' court should take when determining an abuse of process argument. The first step in the *Tollman* guidance is for the court to require the defence to identify with particularity the conduct alleged to constitute the abuse. The second step is to consider whether the conduct, if established, is capable of amounting to an abuse of process. The court, thirdly, must consider whether there are reasonable grounds for believing that such conduct may have occurred and finally if there are then the request for extradition should not be acceded to unless the court is satisfied that such an abuse has not occurred.

651. Lord Phillips CJ at Paragraph 82 adopted Bingham LJ's characterisation of abuse as set out in *R v Liverpool Stipendiary Magistrate, ex parte Ellison* [1990] RTR 220, 227 for use in extradition proceedings: "*If any criminal court at any time has cause to suspect that a prosecutor may be manipulating or using the procedures of the court in order to oppress or unfairly prejudice a defendant before the court, I have no doubt that it is the duty of the court to inquire into the situation and ensure that its procedure is not being abused*".

652. The defence have set out what they say is the abusive conduct of the GoR.

653. Alun Jones QC sets out his submissions at Page 39, Paragraph 160 onwards in his submissions. As he puts it, it is a '*residual submission*' if all else fails. His first argument is that the GoR has fabricated the case against VB. That argument fails as I have found in relation to *prima facie* case in the Appendix to this judgment.

654. Mr Jones' second argument is that the CPS has a conflict of interest in that they dropped an extradition case in relation to a European Arrest Warrant issued by Spain for General Karake. He suggests he does not understand how they could give dispassionate advice as to the conduct of the proceedings against General Karake whilst at the same time representing the GoR in these proceedings. Mr Jones has not developed this point further and there is no evidence before me that the CPS has not acted perfectly properly. I find the conduct alleged by Mr Jones is not established. There is no abuse.

655. A final point that he raises is that the failure to allow the CPS to prosecute VB in the United Kingdom in relation to these genocide allegations is an abuse of the process of the court. The allegations arise in Rwanda and the prosecution witnesses live there, there is more of a connection to that country than this. I do not find an abuse.

656. Miss Ellis argues at Appendix 3, Page 5, Paragraph 18 that the GoR has failed to provide the exculpatory evidence and contradictory statements that her investigator has found and that it has acted with a lack of candour and abused the process of the court in not doing so. I do not accept without more that submission. The failings of the GoR to find this inconsistent material is much more about a failure to investigate rather than an intention to hide exculpatory material from the defence. As Mr Witteveen said in his evidence

the prosecution investigators spend very little time on an investigation and clearly have a different approach to the one adopted in Holland and this country. This has I suspect a lot to do with the number of genocide cases the NPPA has to deal with. In this jurisdiction, such a charge is exceptional, in Rwanda it must have been the bulk of the work of the prosecution and the courts for a number of years reducing gradually as time passed.

657. Edward Fitzgerald QC for Mr Ugirashebuja argues that the GoR has interfered with the Gacaca acquittal of CU and quashed the acquittal unlawfully, the acquittal was lawful where there was jurisdiction to try him and there was substantial overlap of criminality with the extradition request and it would be an abuse for his extradition to take place.

658. Mr Fitzgerald deals with this argument at Appendix 2 to his Closing Submissions. The factual background is that CU was tried by the Gacaca court in Kigoma and acquitted after hearing prosecution and defence evidence on 18th November 2008. The papers relating to the proceedings have been exhibited by CU and are to be found in CU Volumes II and III. It includes a summary of the evidence heard. The reason for the acquittal is set out: "*The evidence given makes it clear that he did not call meetings to instigate killing and that he was not involved in any killing in that area of Rwoga*".

659. On 29th November 2008 one of the Gacaca prosecution witnesses appealed the acquittal to the Gacaca Court of Appeal. On 7th December 2008 the Court of Appeal dismissed the appeal but annulled the verdict. The Court gave reasons for its decision. The Court of Appeal said the bench had no competence to try the case; court procedures were not respected in the sense that the accused was summonsed as a person whose address was unknown whilst in fact his whereabouts were known and "*the fact that he was being prosecuted by the justice of the country he is in and facing possible extradition to the country in which he committed the offences thus annulling the court verdict of the sector court*".

660. Mr Fitzgerald criticizes that Gacaca Court of Appeal for not giving further reasons or not citing any provisions of law. That in my view shows a misunderstanding of the duties and responsibilities of that type of court. He also points out that CU/2 who was one of the Gacaca judges said in evidence to this court that the Gacaca court had jurisdiction to try the case and the court knew CU was in England and knew of the existence of court proceedings there. After the acquittal the judges were questioned by the Prosecutor's office and some judges were suspended. CU/3 also confirmed that the Gacaca court had jurisdiction to try CU's case. Mr Fitzgerald argues that the tenor of CU/2 and CU/3 evidence is that the quashing of CU's acquittal was not lawful and was at as a result of state interference because it was dissatisfied with his acquittal.

661. Article 2 of the Organic Law 2007 has the High Court as the competent court to conduct first instance trials in relation to transferred cases (GoR Annex Bundle 3, Tab H, Page 828). Article 24 of the same law says that this Organic law applies where there is transfer of cases to Rwanda or where trans-

fer or extradition from other states is sought. The Organic Law 2007 came into force on 16th March 2007. Mr Fitzgerald points out that Dr Clark agreed in evidence that Article 2 did not apply in pending extradition cases, nevertheless I find there was no clear expert evidence on the interplay between Article 2 and 24 (if there is any) or more generally. I cannot say that Article 2 would not apply in pending cases. There was no evidence about how it was interpreted or applied in practice by the Gacaca courts.

662. Mr Fitzgerald points out a circular, issued three days after the acquittal was nullified, held that courts should not try suspects abroad. I am not going to speculate but it is perfectly possible that the circular followed on advice that had been given in advance of being set down in writing. The Gacaca system was not a formal system, it was manned by persons of integrity who had no legal training and were not assisted by lawyers. The brief reasons the court gave for the nullification were adequate bearing in mind the type of lay court it is. I will not give such weight to the evidence of CU/2 and CU/3 that would enable me to find the Gacaca Court of Appeal nullification was unlawful. I also accept the evidence that a number of Gacaca findings were overturned by higher courts for similar reasons as were given in the case of CU; just one example in this request is that of EN who had his conviction annulled.

663. In terms of the overlap between the Rwoga Gacaca hearing and the Kigoma allegations, there was essentially only one witness against the RP in Rwoga, that of Moise, much of whose evidence appeared to be based on what he had been told. I accept the GoR's submission that Moise was said to be an alcoholic. In Rwoga the community refused to accept the truth of his evidence. None of the 16 witnesses relied on in this request were witnesses against CU in the Rwoga Gacaca hearing. I noted that Ms Nerad said the Rwoga Gacaca hearing related to different allegations in a different section made by different witnesses but I do find there is some small overlap. I do not find there are reasonable grounds for believing the conduct alleged by CU may have occurred. I do not find an abuse in these circumstances

664. Applying the principle of *Tollman* I find that the conduct if established is capable of amounting to an abuse of process but that there are no reasonable grounds for believing that the conduct suggested by the defendant in fact occurred. In view of my findings there has been no *Tollman* type abuse of the process of this court.

CONCLUSION

665. In view of the conclusions I have drawn from the evidence and submissions I have heard I discharge Celestin Mutabaruka under the double joepardy provisions of section 80 of the Extradition Act and the other four requested persons under section 87 of the Act. I do not found the latter four's extradition (and Mr Mutabaruka's if I am wrong about double jeopardy) is compatible with their Convention rights within the meaning of the Human Rights Act 1998. I will not be sending their cases to the Secretary of State under section 87(3) of the EA for her decision whether the RPs are to be extradited.

Deputy Senior District Judge Emma Arbuthnot
Deputy to the Chief Magistrate
22nd December 2015