205. The conclusion by the SDJ that this process involved a "competition in stubbornness" (paragraph 457) must be seen in that light. The SDJ went on to conclude:

> "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 [Mugesera's attorney] 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."

206. For our part, we have seen no satisfactory answer to these conclusions from the GoR.

207. SDJ Arbuthnot dealt more swiftly with the case of **Mbarushimana**. This Defendant was extradited from Denmark, arriving in Rwanda on 3 July 2014. He was presented with a list of counsel which was different from, and much shorter than, the list which formed part of the contract between the Ministry of Justice and the RBA. Over the ensuing year he had a number of hearings before the High Court. He was still in dispute as at June 2015 and was then not yet represented. SDJ Arbuthnot was unable to reach a conclusion as to whether the lack of representation was the fault of the government or the Defendant. She did observe that the judges in the case appeared to be dealing with this case in a fair and sensible way, granting adjournments. Counsel for Ugirashebuja made submissions in relation to this defendant and were able to add, from open source material in July 2016, that the prosecution had commenced opening arguments in the case but Mbarushimana had not accepted assigned counsel and appeal to the Rwandan Supreme Court was pending. This case is clearly the least significant of those considered in detail by the judge.

Fair Trial: Other Defence Evidence

208. Between paragraphs 467 and 492 of the judgment, SDJ Arbuthnot summarises a number of witnesses for the Respondents. We have already analysed the evidence of Dr Gahima and Dr Rudasingwa. The judge heard from Philippe Larochelle, an ICTR defence advocate who had defended in a Rwandan genocide case in Canada ending in 2013. The Court found coordinated fabrication by the prosecution witnesses. The

scale of the case (and by implication the scale of such cases as these Respondents) was indicated by the activity of that defence team, which consisted of three lawyers and three investigators who had met more than 500 potential witnesses around the world. Mr Larochelle indicated that witnesses were intimidated on a wide scale, the intimidation ranging from speeches during annual commemorations of the genocide to police harassment. The defence had to conceal the identity of their witnesses. The Canadian prosecuting authorities were concerned at Rwandan involvement with prosecution witnesses.

209. Mylene Dimitri gave unchallenged evidence. She was defence counsel in different proceedings in Canada. She stated that the defence witnesses in her case were not assisted by the WPU. All arrangements for witnesses' travel from Rwanda were made by the defence team. Witnesses had to be collected from their villages in Rwanda and concealed from the authorities in transit. Witnesses were very frightened for their jobs, their family and their future. After giving evidence, four refused to return to Rwanda and disappeared. One who went back to Rwanda was visited by the authorities. Another had to face a *gacaca* retrial and "was locked up for genocide offences of which he had been earlier acquitted".

210. The witness John Philpot had worked extensively for the ICTR and had been critical of the Rwandan government. He was no longer able to go to Rwanda for fear of his own safety. Mr Philpot was asked about the story of the American attorney Erlinder, who had been held after arriving in Rwanda to assist Ingabire in her defence. Mr Philpot was apprehensive that this would prevent other foreign lawyers coming to Rwanda to provide robust defence representation.

211. Christopher Black was another defence lawyer at the ICTR. As a result of his actions he had received threats and was no longer able to go to Rwanda. He had received a formal warning from the Canadian Security Intelligence Service that Rwandan authorities wanted to kill him "and were going to try to do so".

212. Judith Rever is a Canadian journalist who has researched war crimes alleged to have been committed by the RPF. Whilst working in Belgium in 2014 she had been warned that the Rwandan embassy in Brussels posed a threat to her safety. During her time in Belgium the Belgian authorities had provided her with 24 hour security as a consequence of this threat.

213. The statement of a witness anonymised as EN-O was read into the evidence. He or she is a Rwandan attorney who refused to reveal their identity, on the basis that at the least they would lose work and at most 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". S/he, too, spoke of fear on the part of witnesses of the government and of repercussions if they came forward.

214. Under this rubric, SDJ Arbuthnot touched on some of the evidence from the Appellant's expert, Dr Clark. He confirmed that he had spoken to the Minister of Justice Busingye and the Minister confirmed to him that executive interference in trials has continued. This conversation was in general terms and, as SDJ Arbuthnot put it, "unfortunately Dr Clark did not obtain more information".

215. Minister Busingye was scheduled to give evidence to the Court. He never came. SDJ Arbuthnot observed, however, that he did attend Westminster Magistrates' Court (the same Court) in relation to the arrest on an EAW of General Karenzi Karake in June 2015. SDJ Arbuthnot leaves hanging in the air the question why the Justice Minister was able to appear on a specific EAW but was unable to appear as scheduled in this case. It was Mr Busingye who, as President of the High Court at the time of the *Brown* case in 2008, told others that judges of his Court had been subject to attempts at influence by the executive (see *Brown*, paragraph 86).

216. Dr Clark also spoke as to his conversation with the previous Minister for Justice, Mr Karugarama, who also confirmed that politicians might ring judges concerning the outcome of cases, but said "they just ignored the call". Dr Clark went on to recite the evidence of another past President of the High Court, Mr Cyanzayire, who described the justice sector as "very prone to corruption". The Ombudsman, Mr Rutaremara, had commented that "in recent years there were far fewer complaints of political interference in trials" and Dr Clark cited the statement of Minister Busingye that since 2004, 40 judges had been dismissed for corruption or serious misconduct. However, there was no specific evidence to show how this related to genocide cases. As SDJ Arbuthnot said, "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 corrupters" (judgment, paragraph 483).

217. In a short but striking passage, SDJ Arbuthnot dealt with anonymised evidence from those who had acted as judges in *gacaca* hearings. The question, considered later, of the quality of their evidence, is a separate matter. Here, it is the response of the state to their unwelcome conclusions which matters:

> "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."

218. Professor Reyntjens stated that there was "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". His most recent example concerned falsified evidence against a UN coordinator said to have been organised by representatives of the Rwandan presidency. He dated that to September 2012, the significance of which is that it considerably post-dates the 2010 *Brown* judgment.

219. The Judge heard other allegations that evidence had been fabricated by Rwandan prosecutors. In paragraph 487/488, she cited the example of evidence from Peter Robinson, a former US federal prosecutor, now "an eminent and respected criminal defence attorney". Dr Clark provided a transcript of Robinson's account made at a seminar in 2010, evidencing pressure by the Rwandan prosecutor in a case on a potential witness for the defence. The threat was said to come from Rwandan military

intelligence as well as the prosecutor and consisting of an assurance that if he testified for the defence "he would never be let out of prison".

220. In dealing with this evidence, SDJ Arbuthnot accepted that the judiciary was not independent until 2004, that there was a period of reform from about 2008 (in respect of which she cited Dr Clark and Professor Reyntjens) and she went on to consider the expert evidence of Professor Reyntjens and Professor Longman. The Judge recited that evidence between paragraphs 493 and 503. Both professors looked at the core claim by the GoR that there had been significant changes since the *Brown* decision. Professor Longman accepted (paragraph 498) 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". He described seeing "manipulation in every high profile trial". SDJ Arbuthnot did not reject this evidence, but noted that Professor Longman's account had two drawbacks, namely that he had not been to Rwanda since 2006 as he did not feel safe, and that he had never been to the Rwandan High Court: his evidence was generalised. Equally, Professor Reyntjens considered that there was gross manipulation by the GoR in some cases and was critical of the recent decisions by the ICTR to transfer defendants. The ICTR approach:

> "…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."

221. Professor Reyntjens did agree that the quality of the judiciary had improved "tremendously" and he was not saying that "no-one could have a fair trial in Rwanda" (judgment, paragraph 503).

222. In paragraphs 505-513 of her judgment, SDJ Arbuthnot touched on the evidence of Dr Clark for the Appellant on the fair trial issue. Dr Clark had more recent experience in Rwanda than Professors Reyntjens or Longman (for the reasons they have explained). He had interviewed extensively individuals within the judicial system, including *gacaca* judges but no High Court judges. Dr Clark emphasised the importance of extradition and prosecution for the Rwandan government and SDJ Arbuthnot accepted from him that the GoR had shown "a marked dedication" to reforming the domestic judiciary. Against that background, Dr Clark set out to repudiate the findings in *Brown* and the reports of Reyntjens and Longman. He relied on the stream of ICTR Appeal Chamber decisions, and advanced the position that the Bizimungu case "was the only case of judicial interference" (judgment, paragraph 510).

223. Dr Clark's evidence about interference with the judiciary appears to us to have been rather ambiguous. As the Judge recited in paragraph 511, none of the sources interviewed by Dr Clark in April 2010 could cite concrete examples of political interference in genocide trials. However, in giving evidence before the Court in June 2015, Dr Clark agreed that the view of many of those he had interviewed was that there was continuing "subtle executive interference" with the judiciary. A number of individual witnesses to that effect were cited. A safeguard which many of his respondents considered would be helpful was the instruction of international defence counsel for high profile Rwandan suspects. However, despite the change in the Rules, it appears that had never happened. Moreover, in paragraph 513, SDJ Arbuthnot observed that although there are no concrete examples of interference provided by Dr Clark "he did not pursue the question perhaps as much as he could have done".

224. SDJ Arbuthnot then turned once more to the evidence of Martin Witteveen. We deal below with the question of the incomplete account of Witteveen's views which was before her. For the present we consider what Witteveen material she did have. SDJ Arbuthnot noted that at the time of Witteveen's first report in September 2014 he had been working full time within the NPPA for only three months, but he had previously spent a considerable period in Rwanda investigating two criminal cases. Witteveen's broad conclusion was that there was no evidence the judiciary were not independent when it came to genocide proceedings (judgment, paragraph 514). He did not consider that "ill-judged comments made by politicians in Rwanda would be any worse than many judges face from around the world" (judgment, paragraph 516). He, too, said he had never seen interference with specific criminal cases since the Bizimungu case and had not seen a loss of independence, neutrality or objectivity. He did not consider these respondents to be accused of "political crimes" (judgment, paragraph 516).

225. After touching briefly on the evidence of Ms Kabasinga and on the ICTR trial monitors, SDJ Arbuthnot gave her conclusions in relation to the independence of the judiciary in paragraphs 519 to 545 inclusive.

226. These paragraphs are carefully expressed and nuanced and are the subject of both appeal and cross-appeal. Mr Knowles QC for the GoR submits that insofar as SDJ Arbuthnot has found that there is a risk of interference in trials, she overstates the matter. He also submits that there is internal contradiction within these paragraphs, in particular between 531 and 545. The Respondents, on the other hand, submit that SDJ Arbuthnot was insufficiently robust in her findings and that the material before her should have led her to consider there was a much higher risk of executive interference with justice in genocide cases such as these.

227. What is certain is that the findings expressed in these paragraphs are the essential basis upon which the judge reached her final conclusions as to the very great importance of effective defence representation which in turn led her to find against extradition. Because of their length and importance, and so that this judgment can be read comprehensively, we attach these paragraphs from her judgment as Annex 3 to this judgment.

228. The starting point for the judge's thinking is that there is established evidence of executive interference in "political cases" (paragraph 522). The problem with which the judge was "wrestling" is whether that approach will affect these genocide cases (paragraph 523). The various Courts that have sent defendants back to Rwanda for trial have done so on the basis that genocide cases are not "political". Although she noted the significance that three of the Respondents were *bourgmestres*, and Brown/Bajinya allegedly a member of the *Akazu*, she found that he was not a "high profile" member of the *Akazu*. The Judge did not find there was credible evidence that the Respondents were "political opponents to the GoR in 2015". Nor was she persuaded that the extradition request was driven by political considerations (paragraph 526). She did accept that the Respondents, if returned, would be "high profile" defendants, and that seems established. She concluded that 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" (judgment, paragraph 527).

229. The Judge concluded that she could rely on the monitors' reports from the five transferred cases as demonstrating, in relation to those decisions, that there was no recurring theme of complaint about the Judge's lack of independence or of partiality. She stated that she considered it "arguable that interference may not be picked up by the monitors, but the lack of independence or fairness would be" and said that she herself "was struck by the even handedness of the Judges when confronted with, for example, applications for adjournments by the defence" (judgment, paragraph 530). She accepted that there were continuing comments 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 accept 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" (paragraph 531).

230. The Judge noted the "sea changes" relied upon by the GoR but concluded these changes "would be more significant if there was evidence they were affecting trials in practice" (judgment, paragraph 533). The only change which appears to be actually put in practice was the amendment to the Transfer Law of 2009, allowing three or more judges to try complex and important cases. The Judge noted (paragraphs 534, 535) that Dr Clark thought it unlikely that any application for an international judge to come and try a transfer or extradition case, pursuant to the legal amendment of 28 November 2011, would be granted since it would be unacceptable to Rwanda - "politically unpalatable" as Dr Clark had put it (paragraphs 434-5).

231. Whilst the Judge could accept the acquittal rate of 20 to 30 per cent in the High Court, as advanced by the GoR, there was no information about acquittal rates in genocide trials. SDJ Arbuthnot considered carefully the evidence of Dr Gahima and (as we have noted above) accepted that he was a measured, credible and impressive witness, described by Dr Clark as "a respected academic". The Judge also noted (paragraph 539) that the change of security of tenure to appointment for a determinate term ran counter to the normal principle that security of tenure should ensure independence and impartiality, but she found that "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" (paragraph 539). The Judge noted that these cases would not be monitored, by contrast to those transferred from the ICTR. Such a mechanism would be a reassurance were it to exist (paragraph 541).

232. Having noted the evidence that although the judiciary was formally independent, it was in reality "subordinated to the will of the executive in all politically sensitive matters" (as described by the *Bertelsmann Stiftung Transformation Index 2014 Report*), the Senior District Judge moved from a more general picture to the specific picture of the genocide cases and focussed on the evidence of Witteveen, which she described as "particularly helpful". Mr Witteveen had been a witness to some of these hearings and had read a great deal about them from the notes of the legal officer

of the Dutch embassy. She relied upon his evidence that he had not seen "any credible evidence that any authorities had interfered specifically in cases of genocide" (paragraph 546).

233. SDJ Arbuthnot reached her conclusion on this aspect of the case in paragraph 545:

> "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."

Our Conclusions on Independence of the Judiciary

234. After careful consideration, we reject the submission of both sides that the judge was wrong on this issue. We reject firmly the submission of the GoR that the judge should unequivocally have stated the judiciary was independent and that there was no risk of bias or interference in these cases, because they are not "political". The clearly authoritarian nature of the regime; the long and continuing history of the influence of political will over the justice system where the case is perceived to matter; the evidence of Gahima and others; the evidence of threats arising from criticisms of the regime, not in a political context but in the context of the justice system; the "Osman" warnings; the experiences of witnesses who gave evidence in genocide cases unfavourable to the prosecution, whether in Rwanda or abroad: all these point to a high level of risk of pressure within the system.

235. In our view, the fact that the ICTR has sent a number of cases back to Rwanda is important, but not conclusive. It is not clear that the ICTR had access to the amount and quality of evidence which was before the Court below, or is available to us. Moreover, the ICTR took the decisions in those cases in the knowledge that there was a procedure for revocation, and therefore an escape route if matters were shown to have gone wrong. There is no such escape route for the English Courts. Moreover, it seems an inevitable, but important, context for the decisions of the ICTR that, if trials were not to continue indefinitely before the ICTR, prolonging its existence far beyond the planned end-point for that jurisdiction, then the only destination for such cases (apart from other foreign Courts) would be Rwanda. We should not be understood to mean that the decisions of the ICTR were influenced by improper considerations. However, it would appear to us that this must inevitably have represented an important institutional consideration and the source of some momentum towards transferring cases to Rwanda. So far as other decisions in other jurisdictions are concerned, it is clear that the GoR has advanced the decisions of the ICTR with a

powerful rhetorical flourish: if the ICTR has agreed to transfer cases, who are you to refuse? In an unpersuasive piece of advocacy, Mr Lewis QC for the GoR did so to us.

236. Another matter relevant to this conclusion arises from the "sea change" advanced by the GoR. It is a definite advance that three judges can sit in such cases. However, what is to be made of a change of law permitting a foreign judge to sit in such cases, which on the ground of national pride is never expected to be put into practice, as conceded by the GoR's own expert? At best this is an empty gesture, at worst an attempt to beguile.

237. The strongest points in favour of reposing confidence in the independence of trials are: (1) the general view that the judiciary are better trained and are possessed of integrity and (2) the eyes of the world will be on these cases if the Respondents are returned. The GoR has, objectively, a real interest in their trials proceeding fairly. We consider those to be positive factors worthy of consideration. However, they are moderated by one or two other considerations. Firstly, as the experts conceded and the judge recognised, any pressure behind the scenes will likely go undetected: indeed will be virtually undetectable. Secondly, objective self-interest may be a poor guide to official or political action in an authoritarian state. Short term political considerations, or a show of power, or mere prejudice, may easily supersede.

238. We also bear in mind the concerns of Martin Witteveen, as expressed in his memorandum of 18 June 2015, of which SDJ Arbuthnot was unaware, as we mention below. He expressed himself there to be unsure of the independence of the Rwandan judiciary ("To an extent … I even question the independence of the judges").

239. For these reasons, we incline to the view that the judge's conclusions on this issue veer towards being too sanguine as to the prospects of independent and unbiased trial. However, we do not go so far as to say she was wrong. Her decision was reasonable, based on the evidence before her, but the evidence before us has itself shifted the balance.

240. However, the great emphasis she placed on effective defence representation becomes entirely comprehensible. Given the risk of pressure or bias, in order to prevent a flagrant denial of justice, it is indeed vital that defendants charged with genocide-related offences are represented well, so that all necessary material is gathered and presented, that prosecution cases are fully challenged and proper arguments presented. The weight SDJ Arbuthnot places on representation and advocacy in this context is entirely correct. Without such representation, convenient verdicts will be easy to reach. With such representation, judges who wish to be fair will be given the material which may compel a correct but unpopular outcome.

Fair Trial:

Defence Witnesses

241. This topic is dealt with by SDJ Arbuthnot between paragraphs 546 and 592 of the judgment, with her conclusions set down in paragraphs 593 to 599. We are able to deal with this subject rather more briefly than the last. This topic really concerns whether witnesses will be too frightened of revenge or repercussions to appear in genocide trials, for the prosecution and perhaps particularly for the defence.

242. The Senior District Judge summarised the evidence given in both directions. As we have already indicated, there was a good deal of evidence to suggest that witnesses would be fearful of coming forward. The SDJ began by observing that the Respondent Mutabaruka already has nine defence witnesses whom he says he will be able to call if tried in Rwanda (paragraph 548). She noted there is no particular explanation as to why these witnesses are willing, if it is true that there is a general fear. The Appellant submits that there is much evidence that defence witnesses do come forward to give evidence at every level of Court in Rwanda, as they have done in cases before the ICTR. The ICTR has never found that the Rwandan authorities have systematically engaged in witness intimidation (paragraph 552).

243. In the earlier proceedings, the District Judge and then the Divisional Court agreed that both prosecution and defence witnesses had been attacked and killed, a point relied on in her submissions by Ms Ellis QC. She went on to point in the Tables to a number of the individuals threatened but, as SDJ Arbuthnot observed, the majority of those would appear to be political opponents or critics of President Kagame (judgment, paragraph 544). We have mentioned before that Professor Reyntjens was concerned he could not safely return to Rwanda. His concern crystallised in a conversation with a Rwandan ambassador in May 2012, when the Professor told the ambassador he would not return to Rwanda as he was afraid he would be arrested and prosecuted for revisionism. "The ambassador had said 'maybe you wouldn't be wrong'" (judgment, paragraph 554).

244. One witness who gave evidence before the Magistrates' Court in May 2014 (Eustache Nkerinka) reported that he was threatened after giving his evidence in this case.

245. In paragraphs 557 to 569 of her judgment, SDJ Arbuthnot dealt with the evidence of Scarlet Nerad. This witness gave a number of examples of witnesses concerned with their safety: prosecution witnesses too frightened to change their evidence and potential defence witnesses too fearful of assisting at all through concern as to reprisals. She also advanced evidence that witnesses who had given evidence for the defence in *gacaca* proceedings had suffered as a result. Ms Nerad gave evidence of four prosecution witnesses who now say pressure was put upon them to incriminate Mr Ugirashebuja. On the same point, Mr Fitzgerald QC gave another example from the papers. However, the Judge observed that Ms Nerad had been "most effectively cross-examined" producing a number of concerns about her evidence. In relation to proceedings against Ugirashebuja, it emerged that the acquittal of which Ms Nerad had spoken arose in relation to events in a different sector with different witnesses from those concerned within the extradition request. More seriously, the Judge found that Ms Nerad had a tendency to accept what she was told without question. A number of the instances of concern about evidence arose in deportation cases where no guarantees had been given, and thus the level of concern may have been inappropriate. It also became clear that Ms Nerad had not set out in any of the statements she had taken from anonymised witnesses that they had been told of various measures which could be taken to protect their identity, such as anonymisation, video linking and so forth.

246. SDJ Arbuthnot observed that:

> "The main problem for the GoR is that evidentially … 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 …" (Judgment, paragraph 571)

247. Other examples of fearful witnesses were given, for example by the investigator Ralph Lake. The Judge accepted his account that various authorities in a specific prison were fearful of being blamed for assisting the defence in the provision of evidence. Senior officials were prepared to lie to hide things from those in Kigali in relation to these events, although the Senior District Judge took into account these events took place in 2007 (judgment, paragraph 576).

248. The Judge was impressed with the evidence of Fernand Batard, whose evidence is summarised in paragraph 578 to 581 and 586. Batard was an experienced investigator who had carried out investigations for the ICTR following the genocide. He 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" (paragraph 579). Batard explained that each witness had different concerns and would be expressed differently. They were often very subjective. His overall conclusion was that witnesses were fearful, but the fears may often not be justified.

249. The Judge also rehearsed the evidence of Martin Witteveen on this topic. He had experience of recruiting defence witnesses to give evidence about cases, but outside Rwanda. He gave evidence that the Rwandan authorities gave assistance to investigators from Finland, Norway and Holland. His contribution was to suggest that in his experience witnesses were not frightened by what the GoR might do, but they were often concerned by how the local community and defendant's family might react. 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 (judgment, paragraphs 587/8).

250. It is of particular interest that in relation to the five transferred cases, the judge found there was "not much information in relation to the defence case in the main because of a lack of effective defence representation". In Mugesera no defence witnesses were called. In Uwinkindi a handful of defence witnesses had been called, but at a time when the defendant was unrepresented. The majority of his defence witnesses lived abroad and no budget had been set aside for finding and interviewing witnesses in Rwanda or for preparation of witnesses abroad. In Bandora, on the evidence of Mr Witteveen, the defence had called 14 defence witnesses. In Munyagishari no funds for an investigator had yet been provided and no defence witnesses presented. In Mbarushimana the case was not yet begun, but there was as yet no budget for obtaining defence evidence. 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." (judgment, paragraph 591).

251. It was on the basis of that conspectus of the evidence that SDJ Arbuthnot reached her conclusions on this issue, which are set out in paragraph 593 to 599.

252. The Judge accepted that a number of witnesses have said to investigators they were too frightened to give evidence. She found they were expressing genuine fear. Many such were from rural backgrounds or of relatively low educational attainment. The Judge noted that "the reputation of the GoR at home and abroad … cannot be of assistance either", but she noted Witteveen's evidence that witnesses may be more frightened of local repercussions rather than national. The witnesses are afraid of a range of outcomes, from death, imprisonment, and torture to prosecution. The fact that some defence witnesses have been heard in Uwinkindi and Bandora, and others have agreed to give evidence in Mutabaruka's case, was of significance. The Uwinkindi Referral Chamber in 2011 had found that "in most of the then 36 genocide cases tried in the High Court, defence witnesses were available" but the Judge was able to note no detail of the numbers.

253. In paragraph 597 the Judge found that the following provisions would be provided by the judicial authorities in Rwanda for frightened witnesses:

- 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 she found to be 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.

254. The final two paragraphs of her conclusions read as follows:

> "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."

Our Conclusions Regarding Defence Witnesses

255. The GoR naturally supports the conclusions here, save for the pointer to the Judge's later conclusions, adverse to the GoR on adequate representation. The Respondents all submit the Judge's conclusions were over-optimistic and failed to accord sufficient weight to the evidence, particularly as to the delays, as well as the reputation of the Rwandan state, to the evidence of such witnesses as Professor Longman, and to the very limited extent to which defence evidence in transferred cases – high profile cases such as these – has been actually presented in Court in Rwanda.

256. In our view the matter needs a little analysis. The entry point must be: to what degree are these cases "high profile", and likely to attract attention of the authorities? What kind of attention is it likely to be? We have addressed this issue already in the previous section. Given the level of investment in these proceedings, we see it as inevitable the cases will be high profile, but a restraining factor may be the desire to gain international credibility by demonstrating fair trial.

257. That response will probably have a significant impact in two ways. Firstly, it is likely to restrain direct threat or intimidation. That may be so, but it is far from certain, for the reasons we have given above concerning decision-making in authoritarian regimes. Secondly, it is likely to mean that the safeguards designed to induce witnesses' fears, and listed by SDJ Arbuthnot in paragraph 597 of the judgment, are indeed put in place. They are steps which are verifiable by monitors and by reporting, but in particular by effective defence legal teams.

258. As recognised by the judge, it is inevitable that witnesses will be fearful. That is not the issue. The issue is whether the fear can be overcome to a degree sufficient to avoid a flagrant denial of justice through the absence of witnesses or the distortion of their evidence, and to do so in these cases, which even if not "political", must to some degree be regarded as "trophy" cases by the Rwandan authorities.

259. Here again we conclude that the Senior District Judge did not fall into error: her conclusion was reasonable, based on the evidence before her. Here too, our own view is that she was somewhat more sanguine or confident about the outcome than we would have been. But, she heard the evidence, she had well in mind the high bar required by the law, and her conclusion was within the reasonable range.

260. However, it is vital to understand the nature of her conclusion here. She was deciding that conditions could be put in place so that identified witnesses, at least in sufficient numbers, could be reassured, brought to Court and give their evidence under conditions which meant the evidence would not be distorted by fear. To that end, the safeguards identified are vital. So also is the presence of adequate representation, "able and effective representatives … to investigate and put together the case for the defence". The judge was stating that such representation was necessary to overcome the fear of witnesses who were identified, but she was also stressing the interlocking nature of her findings overall. The closer we have considered her conclusions, the deeper our respect has become for the underlying logic in her thinking.

261. It must also be emphasised that her conclusion here is emphatically not that witnesses will be found to be deployed: that is a question still outstanding. Here she concludes that witnesses, once found, may usually be got to give their evidence.

Fair Trial:

Defence Lawyers and Investigation of the Case; the "Witteveen/Arguin Debate"

262. As we have indicated, it was this critical point which brought the Judge to her conclusion adverse to extradition. It is also this area which has produced the most important further material, the additional material from Witteveen and the report from James Arguin. We intend to look at the material which was before the Court below, the judge's conclusions, the dispute about the introduction of further material, and then our conclusions. We emphasise the fact that SDJ Arbuthnot had the opportunity to see and assess Mr Witteveen, which we have not. Nor has any Court been able to see and assess Mr Arguin.

The Witteveen/Arguin Debate

263. For convenience we have characterised the differing points of view expressed by Mr Martin Witteveen and Mr James Arguin as the "Witteveen/Arguin debate". It is unfortunate that material parts of that debate have taken place "on paper" and not across the floor of a courtroom where the differing viewpoints could be tested. Most particularly, the debate was not conducted before the SDJ. This Court is left with the difficult task of evaluating the competing viewpoints.

264. We will give our conclusions in due course, but a broadly chronological narrative of how the expert debate developed is of importance.

265. The expert evidence relied upon by the GoR in the extradition proceedings in 2008/2009 was provided by Professor William Schabas. As the Divisional Court observed on a number of occasions, he was the only expert called in those proceedings who was prepared to say that the Appellants (as they were in those proceedings) would have a fair trial in Rwanda. To that extent his evidence was "of great importance for the GoR's case" (*Brown*, paragraph 108). Whilst his general distinction as an expert was not in issue, there is no doubt that the Court took the view that his evidence on that occasion was flawed and his status "as a dispassionate expert" was substantially undermined (*Brown*, paragraph 118).

266. In those circumstances it is not surprising that the GoR chose to rely upon different expert evidence in the present proceedings. As already indicated, two experts relied upon were Dr Clark and Mr Witteveen. Given Mr Witteveen's significance, and the fact that Dr Clark is not a lawyer or a judge, we consider his background and experience in a little more depth.

267. Mr Witteveen is a Dutch legal practitioner. His first report, dated 19 September 2014, detailed his background. He said that it involved two careers, one in his national jurisdiction from 1984 until 2004 and the second in the international sphere. In his national jurisdiction, all of his work, certainly since 1989, was as a prosecutor in the Court Prosecutor Service, mostly in the field of organised crime. In 2004 he moved into the international arena and, in the first instance, became an Investigation Team

Leader in the Office of the Prosecutor of the International Criminal Court in The Hague. His work over the next four years largely centred on investigations into alleged war crimes and crimes against humanity in Northern Uganda. He conducted a good number of field missions in Uganda and had primary responsibility for "witness protection, organisation and networking."

268. In 2008 he became an investigation judge (not a trial judge) in The Hague District Court for International Crime. He described his role as follows:

> "As investigation judge I conducted pre-trial investigations in criminal cases of international crimes for which the district court in The Hague is competent. During the pre-trial investigations, I heard numerous witnesses, mostly abroad during which the prosecution and the defence team were present and had the opportunity to examine the witnesses. During these years, I conducted investigations into two criminal cases of genocide in Rwanda, one criminal case against the leadership of the Tamil Tigers in the Netherlands, one criminal case of an Afghan general allegedly involved in atrocities during the 80s in Afghanistan as well as various cases of human trafficking around the world. I have conducted approximately 30 field missions to Rwanda, each mission one to two weeks in length …"

269. He remained in that position until 2012 when he was given permission by the authorities in the Netherlands to work for a Rule of Law Mission of the EU in Palestine, the purpose of which was to assist the Palestinian prosecution "in capacity building". He worked in that way until 2014.

270. Witteveen's main report of September 2014 contained a detailed analysis of what occurred in the two Rwandan cases to which he referred when describing his background. They concerned Yvonne Ntacyobatabara and Joseph Mpambara. Each was of Rwandan descent, the former becoming a Dutch citizen and the latter having been granted fugitive status in the Netherlands. Each was tried by The Hague District Court. Between October 2008 and March 2009 Mr Mpambara stood trial for war crimes and torture. He was found guilty of torture and sentenced to 20 years' imprisonment. That sentence was increased to life imprisonment on appeal in July 2011 when certain matters in respect of which he had been acquitted were replaced with convictions. So far as Ms Ntacyobatabara is concerned, her trial took place between October 2012 and March 2013 when she was convicted of incitement to genocide and sentenced to the maximum sentence available, namely, 6 years and 8 months.

271. Mr Witteveen conducted the pre-trial investigations as investigation judge in each case. That involved hearing witnesses and conducting other investigations. In relation to Ms Ntacyobatabara, he heard 72 witnesses, the "vast majority" of whom were heard in Kigali with the assistance of the NPPA. Eighteen of the witnesses were defence witnesses, four of whom were heard in Kigali. Those heard in Kigali were heard in a meeting room in the High Court, although one defence witness was, at her request, heard in a hotel room in Kigali. In relation to Mr Mpambara, Mr Witteveen heard 32 witnesses during the appeals phase, almost all of whom were "victim

witnesses" and were heard in Kigali. Three witnesses were defence witnesses and since they were already convicted of various offences by the ICTR (and thus serving sentences in UN prisons), they were seen where they were serving their sentences.

272. What Mr Witteveen concluded about this aspect of his experience was as follows:

> "In summary, the assistance rendered to me by the [National Public Prosecution Authority] NPPA during the Investigations and hearings in Rwanda, was complete, professional, of high standard and absent of any undue influences or interferences. The circumstances under which I could conduct hearings and other investigation activities created the best possible conditions in which I could pursue truth finding in these complex cases, which enabled the trial judges in the district court in The Hague to adjudicate the case and render their judgment. The NPPA has set a high standard and were exemplary for how other countries could also cooperate in these matters."

273. He enlarged on this evidence in his oral evidence, but there can be little doubt that his account suggested that the Rwandan authorities cooperated with the Dutch prosecution authorities in enabling those proceedings in The Hague to take place. That was his direct experience. He reported on (and gave evidence about) information he had received from other sources concerning the attitude of the Rwandan authorities.

274. From 24 June 2014 Witteveen was assigned as an adviser on International Crimes to the NPPA in Rwanda. He was assigned to deal with genocide cases. His time in this capacity was funded by the Dutch government. The initial assignment was for one year and renewable thereafter. He served for only one year in this position.

275. In his oral evidence he said that within the NPPA there are two separate units, one being the GFTU which conducts investigations and tracking of fugitives and deals with international matters such as preparing extradition requests, and the other being the International Crimes Unit ('ICU') which litigates in court. Although he was based in an office in the GFTU in Kigali, and the ICU was based in the headquarters of the NPPA about one mile away, he said that he was "fully embedded within the NPPA" and had full and unlimited access to anyone he wished to speak to. The Head of the GFTU at the material time was Mr John Bosco Siboyintore, to whom we have referred previously and with whom Mr Witteveen worked closely.

276. We should add also that since 2011 Mr Witteveen has served on the board of an NGO called International Justice Mission ('IJM') which aims to help national authorities in fighting violent crime (including human trafficking and bonded labour) through developing criminal investigations. Mr Witteveen's essential viewpoint is that of someone who has investigated and prosecuted very serious crimes in the international sphere. His first report ends with the ringing words "Impunity is not an option". This echoes the well-known ethos of the ICC articulated in the expression that it is engaged in "a global fight to end impunity".

277. By the time Mr Witteveen wrote his first report for the present proceedings he had been permanently based in Rwanda for less than three months, although he had been involved in the field missions and investigations referred to above. Mr Witteveen's first report was supportive of the proposition that the Respondents would receive a fair trial if returned to Rwanda. Since Witteveen was not in place until June 2014, the report could not have been available when the proceedings before the SDJ commenced on 3 March 2014. Mr Witteveen's first report was disclosed at some stage and he was scheduled to give evidence on 8 June 2015. Shortly before that (on 3 June 2015) he produced an 'Additional' report in which he raised his concerns about the quality of the defence representation available in Rwanda. Both reports formed the focus of his evidence and cross-examination before the SDJ on 8-10 June 2015. As is already apparent, it was the Additional Report and the evidence he gave concerning defence representation that was critical to the SDJ's decision on the fair trial issue.

278. It emerged subsequently that, after Mr Witteveen had drafted the Additional Report, he sent it to his former NPPA colleague, Mr Siboyintore. He (Mr Siboyintore) suggested that it should not be submitted to the SDJ and that he (Mr Witteveen) should await seeing what questions were asked in Court. However, Mr Witteveen clearly disagreed, and decided that he should submit the Additional Report to the Court "after considerable thought". He acknowledged subsequently in his memorandum that expressing the opinion set out in this Additional Report would "backfire" on him.

279. That was the state of the documentary evidence when Witteveen gave evidence orally in the Magistrates' Court. SDJ Arbuthnot placed great importance on his additional report. She singled out for quotation paragraphs 61 and onwards of that additional report on the necessity for high quality and professional investigations and stated:

> "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." (Judgment, paragraph 603)

280. Witteveen's experiences in the Uwinkindi and Munyagishari cases, his contacts with the monitors from the ICTR, and his close reading of the notes with his legal colleague at the Dutch Embassy gave him a clear view. Uwinkindi had been "without any defence" (additional report, paragraph 21). We have looked at these cases above, but Witteveen's views on them all deserve to be considered together. In relation to Munyagishari, his trial was stalled due to his defence lawyer's refusal to accept the latest financial terms. Witteveen found it remarkable that Mugesera's lawyer had maintained "complete silence" during the proceedings and throughout the evidence of 23 prosecution witnesses (judgment, paragraph 605). As to Bandora's trial, which was concluded, Witteveen described the lawyer's handling of witnesses in such a way that led the Judge to describe it as "chaotic and clearly unprofessional … Their questioning of their own witnesses was very short, irrelevant and repetitious and the protected witness' name was mentioned". Bandora's lawyers had made no attempt to get a budget to investigate the defence case (judgment, paragraph 606). Witteveen pointed out to the Judge that neither the Defendants, nor the majority of their lawyers,

had "any trust in the GoR institutions" which led to complacency or confrontational attitudes (amended report, paragraph 20; judgment, paragraph 607).

281. The Judge was impressed by Witteveen's description that the defence was "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".

282. In cross-examination, Witteveen accepted that the skills of investigators are different from the skills of lawyers, but expressed his concern that the lawyers in Rwanda, as commercial practitioners, 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" (judgment, paragraph 609). The Judge went on to express her own view that that was "even more the case, when they are being paid 15 million RwFr for the whole case including appeals" (judgment, paragraph 609).

283. Witteveen explained to the Court the importance of establishing a defence in genocide cases, given their importance and scope, where the only investigation as a basis for putting an alternative scenario to the Judge comes from the defence team. His experience of prosecution files was that they were "basic". A typical investigation took two weeks, during which time about 10 to 15 witnesses are interviewed. Witteveen confirmed that he had never seen any more investigations carried out by the police after the transfer of a defendant (judgment, paragraph 610/11).

284. SDJ Arbuthnot was concerned by the reports of Ms Buff, the ICTR monitor. Outside the transfer system cases, cases in the Rwandan judicial system did not usually involve any cross-examination of witnesses.

285. The Judge linked the evidence from Witteveen and Ms Buff to the evidence concerning the Defendant Uwinkindi, noting that "from the earliest days of Uwinkindi's proceedings in Rwanda the defence were asking for investigators". They were not provided. Ms Buff also informed the Court that in the ICTR cases, 74 per cent of the defence witnesses who gave evidence lived outside Rwanda, pointing to the importance of evidence gathering outside the country (judgment, paragraph 615).

286. Presenting the problem to the Rwandan High Court achieved no solution. The Court referred the request for investigation funding to the Ministry of Justice. Nothing happened. Eventually on 11 October 2013, more than a year after the request, the High Court ruled that no investigators should be appointed, but that Uwinkindi's counsel should find witnesses on his behalf (judgement, paragraph 616).

287. The Judge recorded the submissions of the GoR in respect of their own witness's evidence. The GoR essentially treated Witteveen as a hostile witness. They submitted to her that he did not have all of the available material concerning the defence in this litigation due to the "limited sessions he observed". The Judge rejected this, being confident that he had done much more than observe just a few sessions in court. Again the GoR submitted that there were alternative explanations for Witteveen's observations. The Judge rejected that. Finally, counsel for the GoR submitted to the Judge that Witteveen had expressly disavowed that his concerns met the high threshold necessary for proper objection under Article 6. The Judge firmly

rejected that submission: Witteveen was placing his evidence at the disposal of the Court and leaving the Court to decide if the evidence and his opinions based on the evidence met the Article 6 test (judgment, paragraph 618).

288. SDJ Arbuthnot then expressed her conclusions on this issue carefully in paragraphs 619 to 631 of her judgment. Given the importance of these conclusions in the case, we reproduce those paragraphs here:

> "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 accusations 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."

289. Shortly, we will look at the process by which the further views of Mr Witteveen and the views of Mr Arguin emerged. That further material we take into account in our overall conclusions. Before doing so we should make it clear that, given the material before SDJ Arbuthnot, we do not consider that her conclusions set out above were in error. If no more material had emerged we would have affirmed those conclusions.

290. What did not emerge during the evidence Mr Witteveen gave, (as we have said) between 8-10 June 2015, was that he entertained other reservations about what was occurring in the trial system in Rwanda. He sent a Memo headed 'CONFIDENTIAL – NOT FOR DISTRIBUTION' to Mr Arguin, the Chief of the Appeals and Legal Advisory Division of the MICT. It was dated 18 June 2015 and was thus composed

in the week following the testimony given before the SDJ. It also emerged from a further memo from Witteveen of 1 June 2016 that the Memo of 18 June 2015 was prompted by comments made by Arguin to Siboyintore on Witteveen's Additional Report, which Witteveen saw when he returned to Rwanda. Witteveen has said that he knew Arguin dealt from Arusha with the referral cases, though he had never seen him in Rwanda. Witteveen felt that Arguin should know his (Witteveen's) opinion in relation to the handling of genocide cases once they reached Rwanda. That was the background to the formulation of the Confidential Memo of 18 June 2015.

291. The process by which Mr Witteveen's additional concerns became known is of significance. The Respondents are concerned that the full level of concern was never disclosed when it should have been. For that reason, we analyse the sequence of communications.

292. In Mr Arguin's report of 22 May 2016 he says that he forwarded Witteveen's June 2015 memorandum to the NPPA. He did not indicate precisely when he did so or to whom, but the inference to be drawn from his report is that it was done soon after it was received. Indeed, he subsequently confirmed that he sent it to Siboyintore and to Ms Kabasinga (to whom we have referred previously), as soon as he received it in June 2015.

293. On this issue we received material and submissions post-dating the hearing before us. Ms Kabasinga was then the Senior Legal Adviser to the NPPA's ICU. She told Mr Siboyintore as recently as January this year (2017) that she did indeed receive the email from Mr Arguin, to which the memo was attached, on 19 June 2015. We have seen an undated witness statement from 2017, made by Ms Kabasinga, in which she says that she received an email from Mr Witteveen on 28 May 2016, with his additional statement or report attached. Her account is that she replied to him informing him that she would not read his further statement "because I was a witness in the proceedings and did not feel it was appropriate". She also confirms that she received Witteveen's email with his memo of 19 June 2015, on the day it was sent to Arguin, because Arguin forwarded it to her. She did read this, although she is unclear when she did so. She forwarded this to Richard Muhumuza, then Prosecutor General of Rwanda. This was because she regarded it as the duty of such an expert as Mr Witteveen to "raise concerns internally and suggest solutions". She says she never discussed that with Mr Siboyintore. It does not appear that she took any action about it or sought to discuss it with Siboyintore at the time. Siboyintore has said that he did not see the memo at all until 6 December 2016, during the course of the proceedings before us. He has signed a witness statement dated 24 January 2017 confirming that he did not see the memo until December 2016. His account is that he has searched, but can find no record of having received the relevant email from Mr Arguin in June 2015. He is unable to explain why it was not received. He accepts that he was in regular contact by email with Arguin.

294. Siboyintore has said in his statement (reiterating something said earlier by him to the CPS) that Mr Witteveen's memo "crossed [his] mind when [he] was reading the report that [Mr Arguin] had provided in support of the Dutch Appeal Case" and that he (Siboyintore) "developed a curiosity to know what Witteveen, a former colleague at our Office and a friend, had written in his confidential memo". He has said that Mr Arguin "shared" with him his report dated 22 May 2016 and that he (Mr Siboyintore) emailed Mr Arguin on 7 June 2016 asking if he would "share with me" the

confidential memo. Mr Siboyintore has exhibited a copy of that email, sent to Mr Arguin's personal email address, to his recent witness statement. However, Siboyintore has said that Arguin did not reply to the email or send him the memo and, as we have said, that he did not see it until 6 December 2016 during the course of the proceedings before us. Mr Siboyintore does not suggest that he pursued Mr Arguin further about the memo despite the request he made in June 2016.

295. This catalogue of events is, to say the least, surprising. Whatever may be the precise sequence, it means that an important document, with real potential implications for extradition proceedings of genocide suspects to Rwanda generally, attached to an email sent by Arguin to the Head of the GFTU, was not received by him (or drawn to his attention by the Senior Legal Adviser to the ICU to whom it was also sent) at the time it was sent. It also seems clear that when he became aware of it a year later, his email to Mr Arguin requesting a copy was ignored – and the request was not followed up. The critical further doubts of a vital witness were not communicated and not disclosed.

296. The decision of the SDJ was not promulgated until December 2015. The impact of Mr Witteveen's Additional Report, and of the evidence he gave, was not known for several months. We understand that Mr Siboyintore was present in court when the evidence was given. Nonetheless, it requires little imagination to appreciate that what Mr Witteveen said would not have been welcome to anyone or any body whose objective was to have genocide cases transferred for trial to Rwanda.

297. Witteveen's evidence was given shortly before his contract was due for renewal. In his further memorandum of 1 June 2016, Witteveen tells us that in June 2015 the Prosecutor General (Mr Ngoga) "was very positive" about his work and was preparing for the extension of the contract. Ngoga expressed his disappointment at Mr Witteveen's leaving (which appears to have been a decision taken by Mr Witteveen himself). However, according to Mr Witteveen, by September 2015 Mr Ngoga had become "very critical" of the way he had functioned. Ngoga wrote a letter to the Dutch Embassy in Kigali in that vein. It is hard to see what could have prompted such a change of view save for the memorandum of 18 June. This has given rise to serious concern. Writing on 1 June 2016, Mr Witteveen said this:

> "Three different sources in Rwanda have strongly advised me not to return to Rwanda for my safety, if I would be granted a visa at all. These sources say some Rwandan authorities have called me a traitor."

This introduces a very worrying note into these proceedings.

298. We now return to what Mr Witteveen said in his Memo of 18 June 2015 to Arguin. It was not seen by the CPS until 11 July 2016. It runs to 48 paragraphs. Because of the importance of Witteveen's evidence, we think that we have no alternative but to quote a number of those paragraphs verbatim. Before we do so, it is to be noted that in the first paragraph of the Memo he indicates that he is ending his one-year contract in a few days' time and that he had submitted "a lengthy assessment report which contains dozens of recommendations how the work of the GFTU can be improved." He summarised his view in paragraph 3 of the Memo as follows:

> "In summary, I support extraditions to Rwanda and, based partly on my own experiences in Rwanda, dating back to 2008 as well as experiences of others, dismiss allegations that government authorities intervene in cases, unduly influence witnesses, genocide cases are political of nature and defendants run security risks after being transferred. It is my observation that Rwanda has a functioning justice system for genocide transfer cases. However, based on my observations during my year in Rwanda, in my additional expert report, I have criticized the quality and performance of the defence attorneys in the five cases I observed. It is my assessment that in four of the five cases there is either no defence, formally or materially, and/or the defence is of substandard quality."

299. He continued thus:

> "4. It was my deliberate choice in the additional expert report to focus on the quality of the defence in the transfer cases and not criticize government authorities. First because I see it as the first and foremost reason for an impediment to fair trial in these cases. Secondly, no one else will present this view because no one has an interest.
>
> 5. Remarkably, none of the defence attorneys in court in London questioned me about the role of government authorities in respect of the functioning of the defence attorneys in the transfer cases. Some came very close but at the end did not ask the right questions. Still there are observations, I made, which I believe are relevant. The purpose of this memo is to describe them. The main caveat is that many observations are objective facts but the inferences I make can be questioned, although are difficult to refute. It is my profound conviction that, in order to know the realities in Rwanda, one will have to dig a little deeper into the layers of truth. I have only scratched the surface, which is still much more than what others have been doing who judge on the functioning of the justice system in Rwanda, especially those in other jurisdictions, whose sources are mainly Rwanda government sources."

300. Having made the observation that "in four of the five cases there is no defence and that the defence attorneys in Bandora were substandard and did not present an effective defence", he ventured the following views:

> "7. I do maintain my opinion in my additional report and my testimony in court that I am convinced that there are no defence attorneys who can perform a credible defence investigation, certainly not abroad. This is not necessarily a criticism to the attorneys, but an obvious fact as lawyers not very often have the knowledge, expertise, experience and skills to perform such an investigation. That is why defence teams hire qualified investigators. But under Rwanda [case] law, a defence

> investigator cannot be appointed and the lawyers will have to personally conduct this task. It is totally unrealistic.
>
> 8. More importantly, I have little doubt left that, if these qualified lawyers exist in Rwanda, you will not see them in the transfer genocide cases. Simply because these lawyers will challenge both the authorities in general as well as the court. These lawyers will not accept everything the Minister has determined in his policies, they will fight for sufficient resources to perform a credible defence investigation, they will delay proceedings with their motions and filings before the court. And this is not accepted. Consequently, they will be removed from the case as happened in Uwinkindi and will happen soon in Munyagishari. More 'cooperative' lawyers will be appointed."

301. He went on to say that the 4-year history of what happened in Uwinkindi demonstrated that Rwanda was not "ready for these cases, certainly not in respect of defence issues." He elaborated thus:

> "Even after four years, there are no final policies, regulations and, very important, an organization that executes these regulations professionally. Even as we speak, drafts of contracts with defence attorneys are discussed, clauses are taken out or taken in, the fees issue has not been concluded definitely and defence attorneys are moved out of the case and replaced. One court orders that the defendant be submitted a list to choose his defence attorney, another court now finds that there is no right to choose a lawyer from a list when indigent and rules the RBA needs to appoint a lawyer. Whether this is a purely legal decision or is motivated by the need to speed up trials and sideline lawyers who are critical who have to be sidelined as non-cooperative is an open question. The decision of the Minister to keep the execution of legal aid to himself is in my view not a very wise decision as it makes the whole thing too political. It is him against the defence lawyers. The usual language that everything is solved now and the defence attorneys can concentrate on their cases, no longer suffices."

302. He expressed concerns about Ministerial influence in Uwikindi by asking the following question:

> "When the Minister unilaterally ended the contract with the attorneys in the middle of the crucial part of the trial and considering he had already rejected a budget proposal submitted by the defence to conduct an investigation abroad, what else could the defence attorneys do and bring it to the court?"

303. He repeated his concerns that the good and competent lawyers that exist in Rwanda will not become involved in genocide cases and said this:

> "… the competent, experienced lawyers … who have operated in the ICTR theatre, will not be seen in these cases."

304. Given the position he had taken in his initial report and his evidence the next few paragraphs in the Memo make concerning reading:

> "17. The next thing I am worried about is the influence the Minister and the Ministry has had on the proceedings. To an extent that I even question the independence of the judges. (Emphasis added.) I have seen a number of events that I believe are a real concern in this respect.
>
> 18. First of all I believe it is clear that the origin of the recent difficulties in the proceeding is with the Minister. I believe it was him personally who decided that the proceedings were taking too long and the cases should be concluded. Based on the minutes of the meetings with the defence attorneys and other documents, there can be no doubt he decided to act. A question of course is: what were his motives and why he didn't leave it to the judges. He claims it was the limited budget and the fact that it got depleted by the defence attorneys delaying tactics. But I put that into question. Based on his legal aid policy, promulgated in September of 2014 he had budgeted 100.000.000 Rwandan Francs each year for four years for hiring lawyers for the transfer cases. If he pays each defence attorney 1 million a month, he can hire eight lawyers for these cases to stay within the budget. If the Minister spends 15 million Francs in a case and the case takes five years, he spends 3 million Francs per case per year. To spend 100.000.000 in a year he needs 33 cases, while there are only five. So, his assertion that he depleted the budget is not very convincing.
>
> 19. Secondly, the Minister has always blamed the defence attorneys for the delays in court. But the reality of course is that the judges decided on postponements during all these years. Sometimes these postponements were triggered by requests of the defence attorneys, but not always. In Uwinkindi the composition of the chamber changed in 2014 leading to an additional postponement. Many times the courts have been extremely indecisive in matters that should not take long to decide. Has the Minister started to get critical to the judges?
>
> 20. Whatever the reason, there has been a clear pattern since the end of 2014 where the judges started to accelerate the proceedings. Firstly in Uwinkindi of course where the judges have quickly rejected every motion and request by the defence and decided to proceed with the case without defence. When the defence attorneys decided to appeal the decisions of the High Court in January, I was told that the High Court would wait for the Supreme Court's ruling, as they did in the past. But I found out end of February that the High Court had changed its

> position and was now proceeding with the case. To my surprise they went on hearing witnesses, both prosecution witnesses as well as defence witnesses without any presence of defence attorneys. The judges had taken three years to take their time in deciding all kinds of preliminary matters and now, all of a sudden, they finished the witnesses in just a couple of days and without defence attorneys.
>
> 21. Then the court decided to close the case by requesting the prosecution to present its closing arguments. When the day, which was set for that, arrived, the prosecution requested a postponement of two weeks or so as they had not finalized the preparations. The postponement was given and when the next date arrived, the court decided to postpone the case till the Supreme Court had ruled in appeal. I have tried to find out why the court had changed position but I couldn't get a clear answer.
>
> 22. What had changed was that the President of the MICT had decided to put a full chamber of the deferral request. This immediately sparked tension in the prosecution in Rwanda and I have no doubt this also caused the change in position of at least the Prosecution fearing they would be criticized of hearing witnesses without any defence. *If the court had not allowed the prosecution a slight delay in their closing arguments, Uwinkindi's case would have been closed. Clearly, the recent decision to have the new defence attorneys represent Uwinkindi and the possible re-hearing of the witnesses have come under pressure and was by no means a voluntary step*."

305. We have highlighted the passage at the conclusion of Witteveen's paragraph 22 because Mr Tim Moloney QC, on behalf of Charles Munyaneza ('CM'), placed reliance upon it.

306. Mr Witteveen referred to the Bandora case as another example of the speeding up of a case where a defendant was represented by lawyers where, he observed, there was no such hastening where defendants are unrepresented. His conclusion was as follows:

> "In conclusion: I believe there are clear indications that external factors have brought the judges of the High Court, at least in Uwinkindi and Bandora, to speed up the trial at the cost of credible defence. It will never be known whether the judges received an instruction to speed up or whether they did not need an instruction and knew what to do. The change in position in Uwinkindi is clearly the result of the MICT decision, not of a respect for defence rights."

307. We would, of course, observe in passing that speeding up the legal process, even in cases involving allegations as serious as genocide, cannot of itself be an indication that there is something inherently unfair in that process: attempting to speed up criminal trials is something with which we are familiar. If, however, such judicial

drive is derived from something other than efficiency, that is a different matter. After expressing the conclusion to which we have referred, Mr Witteveen poses the question of "what could be behind this speeding up of proceedings and removal of attorneys". He expresses concern that the perception of "the justice system" is that defences to allegations of genocide should be controlled and limited to such an extent that it impedes a fair trial. He expressed himself thus:

> "Some of these issues have been raised during the referrals in Munyagishari and Uwinkindi before the ICTR but rejected as unfounded or speculative. I believe they might be true after all."

308. He explained why in the following paragraphs:

> "31. Generally, all defence attorneys claimed it is very hard to defend genocide defendants especially from abroad as society in general but their family, partners, clients and the like in particular do not accept they defend a defendant on genocide. They tell they lose clients. This seems relevant as private lawyers make their income on commercial cases rather than criminal cases. You wonder what will happen to defence attorneys who will be successful and get their clients an acquittal.
>
> 32. In the contracts that the defence attorneys signed there was a clause to the effect that the Minister could unilaterally end the contract in case the defence attorney openly criticized the Minister or the Ministry. This clause has been removed now from the new contracts offered by the Ministry but they may still be valid under the existing contracts such as in Bandora. Apart from what the clause says and whether the clause is valid or not, I continuously sense that defence attorneys are conscious not to criticize. The clause does not make much difference.
>
> 33. In Mugesera, the defendant was given the opportunity to comment on the prosecution witnesses presented in the case. Mugesera said that one victim witness had been lying and called the witness a liar. The prosecutor in the case immediately reprimanded Mugesera that he could not call the witness a liar. The judge joined in criticizing Mugesera and used softer language to make Mugesera clear he could not use this kind of language to qualify the witness. Apparently victim witnesses do not lie.
>
> 34. In the case of Bandora the defence attorneys said it was a shame that the prosecutor had brought witnesses to court who testified they were forced by the prosecutors to wrongfully accuse the defendant. Again, the prosecutors objected to the wording "a shame" and again, the judges, more softly joined in

> law; rather, it is a hybrid system that retains elements of both civil and common law practices."

341. He elaborated on this under a sub-heading of 'The conduct of the trial' as follows:

> "37. Another aspect of Rwanda's hybrid legal system relates to the conduct of trials. Rwandan judges play a much more active role in questioning witnesses than in most common law systems. Although the Transfer Law applicable to referred and extradited cases allows for cross-examination of witnesses, it does not specify how cross-examination will be conducted. In keeping with its civil law traditions, many Rwandan judges conduct the questioning of witnesses, generally after seeking input from the prosecution and defence on the types of questions that should be asked. Increasingly, Rwandan judges are providing counsel with more leeway to conduct their own cross-examinations as has been seen in all of the transferred cases, including Uwinkindi and Munyagishari.
>
> 38. It also is not uncommon in Rwandan judicial proceedings for the accused to play an active role in the conduct of their defence. Accused persons are not restricted to merely watching the proceedings and listening to the arguments of their counsel as they are in many common law systems. Instead, accused persons are free to directly address the judges and respond to points made by the prosecution or testimony of witnesses. Counsel are present during these submissions and, when necessary, intervene to make any clarifications or additions that may be required to protect their client's interests.
>
> 39. Several of the criticisms Mr. Witteveen cites arise from his misimpression that trials in transferred cases are purely accusatorial in nature. He criticizes the adequacy of investigations without acknowledging the role of the judicial police in collecting both inculpatory and exculpatory evidence. He criticizes what he regards as the active role judges play in questioning witnesses without recognizing that this is a common feature in many civil law jurisdictions and without acknowledging Rwanda's efforts to expand the role of counsel in conducting cross-examinations. He also criticizes the accused's ability to make direct submissions without recognizing that, in Rwanda, this is a hallmark of the right to direct one's own defence. All of these criticisms contribute to Mr. Witteveen's overall assessment that Rwandan defence counsel are ineffectual but none of them adequately accounts for the essentially hybrid nature of Rwandan trial proceedings. Any assessment of fair trial rights in Rwanda must recognize this fundamental distinction."

342. Before indicating Witteveen's response, we observe that we consider it would be surprising if Witteveen, with all his experience of criminal proceedings, both within

the civil system that operates in the Netherlands and in other international jurisdictions, misunderstood what he was watching, when he attended the various parts of the proceedings in Rwanda that formed the focus of his Additional Report. Witteveen's brief response was that Arguin's attempt "to save these defence attorneys, e.g. how they sit in silence next to their clients, by pointing at the hybrid system of Rwanda's justice system and the lack of any cross examination or defence, suggesting it could all be part of their strategy, which we are unaware of" was "unconvincing". He said:

> "The question is not whether the Rwandan justice system is accusatorial or hybrid as [Mr Arguin] explains, but whether there is a balanced system where evidence for the defence and alternative scenarios for the prosecution case are presented …."

343. He referred back to those parts of his Additional Report which reflected on the inability or unwillingness of the defence to challenge the prosecution case in the accusatorial system that he said applied to the transfer cases that the SDJ accepted.

344. It is to be recalled that SDJ Arbuthnot considered that this general criticism of the defence in these cases was borne out by the material from one of the monitors, Ms Buff, whose reports she described as "detailed and impressive".

345. As indicated, Arguin said that Witteveen had wrongly questioned the role of the judicial police. Arguin said this:

> "30. … Under Rwandan law, the judicial police are required to gather evidence both for and against the accused. While the judicial police are not investigating judges, they nevertheless perform the same function as investigating judges in other civil law jurisdictions. Like investigating judges, the judicial police are charged with preparing a dossier for each case that includes all of the evidence - both inculpatory and exculpatory - relating to the charges.
>
> 31. The judicial police also must consider requests from the prosecution and defence to conduct any additional investigations the parties may deem relevant. These investigations may be conducted either in Rwanda or abroad and the information generated from these additional investigations will be added to the official dossier. If the judicial police decline to conduct additional investigations requested by the defence, the defence may request the court or prosecutor to order them to do so.
>
> 32. The dossiers compiled by the judicial police are substantial. In the *Uwinkindi* and *Munyagishar*i cases, the dossiers included the complete ICTR investigation files plus additional materials obtained by the judicial police in the course of their supplemental investigations. These dossiers each contained several thousand pages of documents, including dozens of witness statements. The dossiers prepared in relation to other

> transferred cases are likewise substantial. The *Mugesera* dossier, for instance, includes over 1,280 pages of documents obtained in Rwanda, plus two compact discs prepared by Canadian authorities in relation to *Mugesera's* extradition that contain approximately 5,000 additional pages of material. *Mbarushimana's* dossier is not yet complete but already contains approximately 500 pages, including documents obtained during the Danish extradition proceedings. The *Bandora* dossier was nearly 500 pages long. Although the size of a case file does not alone guarantee a competent investigation, the substantial dossiers compiled by the judicial police in transferred cases cannot fairly be described as "limited" or "rather basic" as Mr. Witteveen suggests.
>
> 33. One difficulty observed in relation to the cases referred to Rwanda for trial was that the accused and some of their counsel ignored the role of the judicial police. They attempted to bypass the judicial police by seeking independent defence investigations, without first demonstrating that the judicial police were unable or unwilling to conduct the investigation. The High Court rejected these requests not because it did not respect the right to an effective defence but because investigations in Rwanda are usually conducted by the judicial police."

346. Witteveen responds to this at some length. We will endeavour to summarise. He describes the judicial police as "one of these misnomers in Rwanda's judicial system" and says that "there is nothing judicial about the judicial police." He asserts that there is "just the Rwanda National Police, the RNP, with a regular Criminal Investigation Division ... [and that prosecutors] generally, do not instruct or oversee police investigations." He continued thus:

> "For genocide investigations the NPPA uses police officers from the RNP who are physically located in the … GFTU, headed by Mr. Siboyintore. This gives the NPPA a slight advantage from the position where the RNP investigates genocide cases from their own offices."

347. Based upon his personal experience in the GFTU, Mr Witteveen said that the quality of the police investigators was "variable" and that most "were limited in their skills and experience" and that there had been a regular turnover of staff. He said that "critically" the prosecutors who litigated cases in Court "had no contact with the investigators whatsoever" and simply had to work with whatever was submitted to them. He then adds the following:

> "<u>I have never seen, read or heard that any investigator collected or was even interested in collecting exculpatory evidence or was instructed to do so</u> [emphasis added]. They were pressured to produce a genocide investigation in the timeframe of one or two weeks at best and collect as many incriminating witnesses' statements as they possibly could. [Anecdotally], I know they

> dismissed or ignored exculpatory evidence when they encountered it."

348. His response to the assertion that the files contained many documents was as follows:

> "… I have seen many files produced by investigators but none was more than some tens of pages with witnesses' statements no longer than two to five pages per statement. When the transfer cases contain hundreds of pages of documents and statements, it is because the jurisdiction that seeks to transfer defendants to Rwanda for trial, produces these documents and statements for Rwanda's use. It still puzzles me whether the prosecutors, who litigate the cases, use these foreign made documents."

349. He concludes by saying that Arguin's reliance on the role of the judicial police "is the best example how he [Arguin] uses a theoretical framework, based on law and regulations, to present a reality, while the reality is totally different." He says that the suggestion that defence attorneys can refer defence witnesses to the judicial police to be heard on their behalf "cannot be taken seriously" and that he does not believe that "a defence witness will ever accept to be heard by Rwandan Police officers."

350. We will return to our conclusions about this in due course, but we should refer to another feature of Arguin's criticism of Witteveen. It relates to defence investigations. Arguin says that a practice direction issued by the Chief Justice on 6 August 2015 "preserves the role of the judicial police in criminal investigations and clarifies the procedure to be followed when an accused seeks to conduct investigations beyond those conducted by the judicial police." He described the position as follows:

> "To obtain public funding for defence investigations, the accused must first submit an *ex parte* request to the High Court, which examines the reasonableness of the request, taking into account among other things the availability of alternative means of obtaining the evidence by video-link or phone call. Once the High Court is persuaded that the request is reasonable and in the interests of justice, it will issue an order to the Ministry of Justice to extend the required funds. In addition, the practice direction provides guidance on the types of expenses that will be covered, e.g., economy class tickets and daily subsistence allowance."

351. Arguin suggests that the practice is "similar to procedures used by other jurisdictions, including the ICTR, to control the expenditure of public funds [and] avoids situations where the defence make sweeping requests for additional investigations that are little more than fishing expeditions." He refers to what happened in Uwinkindi as illustrative of the problem and said that "no jurisdiction in which I have [practised], including the ICTR, would have approved [the] request to essentially travel the world to meet unspecified witnesses without some threshold showing establishing the relevance or need for the evidence."

352. Witteveen does not appear to respond to this directly, but he repeats his view that the system in Rwanda is such that there is “insufficient time and money to develop any credible defence” and that Arguin’s position “does not describe a reality”.

353. Arguin attacked Witteveen’s contentions about the independence of the RBA. He says that the RBA is established as an independent entity under Rwandan law and is responsible for maintaining a list of qualified advocates and ensuring discipline within the profession. The RBA maintains a list of those it considers qualified to represent those made the subject of transferred cases. The flat rate fee each would receive is 15 million Rwandan francs (which we understand to have been around £12,500 at the time of the judgment below.). This fee is said to be free of tax and does not prevent the taking on by the advocate of other cases. It excludes the cost of various administrative services and of any additional investigations that may be permitted under the Chief Justice’s Practice Direction. He says that there are 68 counsel who have more than ten years’ experience and he mentions specifically the advocate assigned to the Uwinkindi case, Mr Joseph Ngabonziza, a former judge of the Rwandan Military Court, who has experience of defending those accused of genocide and related crimes.

354. He also says that the independence of the RBA is demonstrated by its objection to a provision in a draft legal aid contract that “appeared to authorise the removal of counsel for criticising the government.” Its objection, he says, was sustained and the offending provision removed.

355. Witteveen responds by repeating what he had said in his original report and memo and says this about the deletion of the contractual provision to which we have referred:

> “[Arguin] defends the Bar Association by pointing to the fact the Ministry deleted a provision in the contracts with the defence attorneys which prohibited them to openly criticize the Minister and the Ministry, which [he] attributes to the Bar Association. I do not understand that. It was the Bar Association [that] has accepted this and other shameful provisions in the contracts in the first place. It was external pressure and critics that made the change.”

356. Arguin, a member of the prosecution team in Uwinkindi, says that Mr Witteveen’s concerns about what happened in that case are misplaced. He describes the conduct of counsel (Mr Gashabana) in the absenting of himself from the trial over the legal aid structure as representing “gross misconduct”. The Court was right to sanction him and to adjourn the proceedings until the RBA had appointed a replacement. Any problems thereafter were entirely due, he said, to Uwinkindi’s failure to cooperate with the successor counsel. He drew attention to the decision of the MICT which was that Uwinkindi had “unjustifiably refused to cooperate with his newly appointed counsel.” Arguin said this:

> “In light of the record established by the MICT trial chamber, Mr. Witteveen's assertion that Uwinkindi was "without any defence" since January 2015 is plainly mistaken. Counsel always was available to assist Uwinkindi; he simply refused to

> accept their services. Nevertheless, counsel did their best to protect his interests and obtained appropriate relief from the trial chamber, including re-opening the examination of prosecution witnesses and obtaining more time for trial preparation, including review of the case file Uwinkmdi refused to provide counsel. Regrettably, these events occurred after Mr. Witteveen submitted his report and, thus, were not available to guide his assessment of the competence of Rwandan defence lawyers, whose performance must, of course, be assessed on an individual not collective basis."

357. Witteveen's response was as follows:

> "66. [Arguin] tries to defend the court in its position to oust the defence attorneys in Uwinkindi in January 2015 and continue with the trial proceedings and hearing all the witnesses in just a day or so, including defence witnesses, without Uwinkindi being represented. [He] all blames it on the defence attorneys and Uwinkindi and presents it as if every court would have handled the case like it was handled.
>
> 67. I contest that. I do not state that the situation was easy, but I remain that it was indicative of the questionable situation as I have tried to describe it. To finalize the case without defence attorneys and to hear all the witnesses, including defence witnesses, in a day or two, without any defence attorney present is not defendable. The case would have been concluded by the court if the Prosecution would not have requested to reverse the situation under pressure of the scrutiny of the international community and the motion for deferral in Uwinkindi in the MICT which had been assigned to a full chamber.
>
> 68. The best indicator that the wrong decision had been taken and the court lost its sense for fair trial rights, is the fact that it was the Prosecution who took the initiative to reverse the situation and apparently, there was no mechanism within the court to do that. I have tried to describe in my Memo to [Mr Arguin] why I believe the Court did not apply common sense themselves and what caused the court to proceed with the case as it did."

358. His final words in his response were as follows:

> "69. At the end of the day, I ask the question why the cases in our respective jurisdictions must be transferred Rwanda. Even when that is the preferred option, but if there are questions about fair trial rights and other questions, if cases are not transferred to Rwanda, it does not mean those cases will not be adjudicated. Each of our jurisdictions are competent to try these cases and we have the resources and the experience to do that.

> 70. My expert opinion has been developed over time, after I got to know the situation in Rwanda. More importantly, my opinion is highly influenced by the fact that in these cases, defendants are charged with genocide, without doubt the most serious crimes of all crimes the world has come to deal with. For each of these defendants, there is much at stake and each defendant is facing a lifelong imprisonment.
>
> 71. If that is the situation, does that not oblige us apply the utmost care and consider whether we should try these cases in our home jurisdictions?"

Our Conclusions on this Debate

359. This debate is only one part of what we have to consider in these appeals. However, it is an important part of the picture. We have set out much of the debate because it needs to be publicly understood and because our analysis of it may be of significance. Our task is to see what impact, if any, it has upon the question of whether the SDJ was wrong to reach the conclusion she did, bearing in mind that she did not have the benefit of considering this material. If Arguin's report was accepted in its entirety, there would be support for an argument that she ought to have decided the case differently. If, however, the broad thrust of Mr Witteveen's position in the debate is reliable along with his concerns, together with those the SDJ heard and accepted, then they support the conclusion that there is a risk of a flagrant denial of justice if the Respondents were returned to Rwanda.

360. As the principle in *Wiejak v Olzztyn Circuit Court* prescribes, we begin from the starting point that the SDJ's findings of fact should be accepted. She arrived at the material findings of fact by substantially accepting the evidence of Witteveen. Whilst, of course, we have to look at the position afresh given the availability now of Arguin's views, it would be wrong to ignore the fact that the SDJ found Witteveen a compelling and reliable witness. Had she seen his further written contributions, we think it likely that she would have seen what he said as further evidence of his objectivity. For our part, we would accept that what he has said has required courage. It would be a wholly unjustified conclusion to accept Mr Lewis's contention that his words were those of an embittered man. Our reading of what he has said suggests that what he has said has been said more out of sadness than anger or embitterment.

361. The additional material from Witteveen appears to us to add to his authority. He has been able to establish his experience, and has a closer knowledge of how the system has actually operated in Rwanda in recent times than any other expert. Moreover, he has given evidence which was clearly difficult given his position. It has made his continued connection in the area problematic, putting the matter neutrally. Yet in breaking with the obvious constraints of his being an employee (in effect) of the Appellant, he has not taken an extreme position in opposition to the GoR. Rather he has maintained a nuanced and balanced position. The Courts expect clarity, reason and moral courage in an expert witness. It appears to us that Witteveen has shown those qualities here, responding to his growing acquaintance with the facts and his developing understanding of the true problems facing Defendants in Rwanda in such cases.

362. Given that we have not heard from Arguin, we are hesitant about rejecting in its entirety what he has said, particularly given that other Courts have acted upon it, albeit they too have reached their conclusions without his evidence being tested. However, as we have observed, he does come to the issues that have been raised from a particular viewpoint. We find it difficult to accept that his approach has not been influenced to a degree by that viewpoint. It is noteworthy that he could have been put forward as the GoR's witness in these proceedings. He was not.

363. We have considered Arguin's views with care, without of course having been able to form an assessment of him ourselves or in his case having the benefit of an assessment from the Senior District Judge. We take the view that his knowledge of the situation on the ground in Rwanda is simply not demonstrated to the extent of that of Witteveen's. We are concerned that there is a tone of defensiveness about some of his views. We are inclined, from the content of his report compared to the thrust of the evidence about the transferred cases and their progress, to accept that Witteveen is right: Arguin is relying on the theory of how things should be, rather than giving us a picture of how they really are.

364. Therefore, we accept the picture painted by Martin Witteveen, augmented not weakened by the material which has become available since the hearing below.

Conclusions on "Fair Trial"

365. We have addressed the critical issues sequentially in the necessary detail, and indicated our responses. The threads can be drawn together in a relatively straightforward fashion.

366. It is very highly desirable that those accused of genocide, where a proper *prima facie* case exists, should be tried in the country where those appalling criminal acts took place. We fully recognise that as a very important objective. Trial in international Courts, or the Courts of another country, represents second best, for all manner of reasons.

367. We also recognise fully that there should be no impunity for those guilty of such terrible crimes as are alleged here. Impunity should be avoided by any possible means within the law.

368. The "high bar" set by the law, as we have analysed it above, reflects those principles. If the objection to extradition were merely that the quality of criminal process was less than perfect, less than desirable, then such objection, whether viewed as a moral question, or judged against the test set by the law, would mean that extradition would proceed. However, whether viewed as a moral question or tested by the law, if the extraditees were to return to face trial which represented a flagrant denial of justice, then the case is altered. And the judgment on that question cannot be distorted by the desirability of trial in the country where the events took place, much less by such questions as Rwandan national pride, or the aim of building capacity or improving justice in Rwanda, much less of relieving international institutions of a longstanding expensive burden. We think it unlikely that returning defendants to face charges in an inadequate criminal justice system would tend to improve matters there: rather, it would be likely to reduce the pressure to change and improve.

369. In any event, such considerations are irrelevant either way. The question is more basic. If there is a real risk of a flagrant denial of justice, that means there is a real risk of the innocent being convicted. To extradite in the face of such a risk, even if motivated by a desire to repatriate the criminal process to the country where it should properly be conducted, would be no more and no less a wrong than it would be to permit a serious miscarriage of justice here.

370. As we have stated above, the evidence suggests that Rwanda has, if anything, become more of an illiberal and authoritarian state than was the case in 2008/2009. As was SDJ Arbuthnot, we are struck by the fact that these renewed requests from the GoR, relying on improvements in the legal system, come from a state which, in very recent times, has instigated political killings, and has led British police to warn Rwandan nationals living in Britain of credible plans to kill them on the part of that state.

371. We are also struck by the conjunction of hostile remarks by President Kagame and others, made during the currency of criminal proceedings, and the reported threats to Professor Reyntjens, Professor Longman, to other lawyers and now to Martin Witteveen, in other words threats not confined to political opponents, but affecting experts and lawyers critical of the criminal justice system in Rwanda. We are not in a position to evaluate these threats in detail. However, the deaths and disappearances which have been established, set beside the detention and mistreatment of defence lawyers such as Peter Erlinder, mean that there is sufficient material to show a real risk of political pressure and political interference in the justice system in Rwanda. It is for these reasons that we have concluded that the view of SDJ Arbuthnot on this issue is not "wrong" but may be, if anything, rather too sanguine, particularly in the light of the new material available to us.

372. We have to consider carefully if these cases are such as to attract such pressure on intervention. The GoR argues that they are not to be compared with the cases such as that of Ingabire and others: straightforward political opponents of President Kagame. We accept the distinction, but we must consider how far it operates. We understand the argument that it is in the best interests of the Rwandan authorities to conduct, or permit these trials to be conducted, fairly, since that is the best means to ensuring future extradition of those who have fled. Yet the evidence is not encouraging that that objective reasoning is sufficient to guarantee the outcome. We consider that there is a risk, unless clear conditions of guarantee are established, of interference and pressure in these cases. These Respondents are not in general active political opponents of the regime. We address the individual arguments below. However, they are high-profile defendants, as all agree. They are, with one exception, people with involvement in authority during the period of the genocide. It is easy to see how, even if not regarded as first-rank political targets, one or more of them might be subjects of real interest to the authorities and thus the focus of pressure on the judiciary.

373. As to the independence of the Rwandan judiciary, we note carefully the context. The evidence suggests that judges are not appointed unless they have party membership of the RPF. Their appointments have moved from being indefinite to appointment for definite terms. The Rwandan executive can achieve the dismissal of serving judges: it has done so in recent times in respect of around 40 individual judges. We are not in a position to say whether the suggested misconduct or corruption was established in these cases: it may be so. But the capacity of the executive to get rid of judges is

established. In such circumstances, there can be little doubt that judges will feel exposed.

374. The evidence is that judges in the past have ignored or resisted pressure. However, as will be obvious, there will rarely be evidence when judges have acceded to pressure. There are many indications that judges would wish to act independently, but there are also indications, including those illustrated by the later Report and Memorandum of Witteveen, when the conduct of trials has been disturbing. Our conclusion here, once again, is that SDJ Arbuthnot is not "wrong". However, some of the material we have seen was not available to her. Our view is that the evidence points to some risk, depending on the evidence before them and the safeguards in play, that judges might yield to pressure from the Rwandan authorities.

375. We have concluded, likewise, that SDJ Arbuthnot was broadly correct in her conclusions as to the preparedness of witnesses to appear. It seems likely that there will be a high degree of apprehension, and that some would simply decline to appear. However, there is evidence that many witnesses have appeared in genocide trials, in the *gacaca* and conventional Courts. We consider that the advent of the WPU should improve conditions for witnesses, and it is to be hoped that will communicate itself to them. However, this must be a qualified conclusion, depending heavily on the actual conditions of trial, and on the critical issue of the defence capacity to fund, proof and deploy the witnesses in the first place.

376. We do not consider the judicial police to be a credible mechanism for obtaining and deploying defence witnesses. The overwhelming evidence, despite any theoretical function, is that they are not organised or tasked to perform that role, and nor do they do so in practice. We touch on this theme again below, when considering defence capacity.

377. Which point brings us to the critical point in the judgment of SDJ Arbuthnot. The closer we have read the evidence in this case, the firmer has become our agreement with the judge below that defence capacity is the vital element, the capstone, of the case. Whilst in the context of our court system adequate representation is of course important, other safeguards in the system such as responsible unbiased prosecution, witness protection, unchallenged and complete judicial independence taken together, mean that inadequate defence may be compensated for and a reasonable quality of justice delivered overall. Even in that context, it is well established that miscarriages of justice will occur, where defence representation is inadequate. However, in the context of Rwanda, with the difficulties and weaknesses we have identified, the presence or absence of effective defence is absolutely central. We are completely of one mind with the judge below on that point.

378. For the reasons we have identified, and need not repeat, the arrangements for defence in Rwanda are clearly inadequate. They would be inadequate even if the remainder of the criminal justice system was acceptable and the concerns which arise were not present. In an authoritarian state, where judicial independence is institutionally weak and has been compromised in the past, where there is established fear by witnesses, not all of which can be effectively countered, the existing arrangements are quite insufficient to ensure a reasonable fairness in the proceedings. The story of the existing post 2009 genocide cases, the "transferred" case, gives rise to real concern. We cannot rule out a degree of tactical complaint and manoeuvring by those

defendants, but objectively the conditions are such as to give ample opportunity for complaint. Here as in other aspects of the case, we pay great regard to Martin Witteveen. We consider that SDJ Arbuthnot was right to rely on his evidence, and that evidence is heavily fortified on this issue by material coming too late for her consideration but which is before us. We cannot find reassurance from the evidence of James Arguin.

379. Focussing on the correct legal test, we have considered carefully whether the problems identified are sufficient to establish a real risk of a truly serious or flagrant denial of justice. We find, as matters now stand, that they are sufficient to do so. We also find, with the remarks of Lord Phillips in *RB (Algeria)* in mind, that the result of such a fundamental breach of the principles of a fair trial might be likely to lead to serious miscarriages of justice, in this context where, in the one completed transfer case, there has been a conviction for genocide, leading to a prison sentence of 30 years, itself regarded as lenient.

380. For these reasons, subject to points we indicate below, the appeals will fail.

381. It also follows that, in relation to ECHR Article 6 and the "fair trial" issue, the cross-appeals also fail.

382. We turn below to considerations affecting individual Respondents. Before we do so one further matter arises in respect of the "fair trial" issue. We have emphasised more than once the desirability that those facing a *prima facie* case should be tried in Rwanda, if this is possible within the law. In brief submissions, Mr Knowles has raised the prospect that further or additional undertakings by the Appellant might allay the concerns of the Court. There are precedents for doing so: see, for example, the approach taken in *Florea v Romania* [2014] EWHC 2528 (Admin) and *Giese v Government of the USA* [2015] EWHC 2733 (Admin). Given the seriousness of the offences alleged here, we are prepared to permit the Appellant a final opportunity to seek to assure the Court that credible and verifiable conditions will be in place, to overcome the legal bar to extradition upheld above. It should by no means be assumed that such assurances will successfully overcome the bar to extradition given the historical failure of the Appellant to cooperate in prosecutions in England, the serious concerns articulated earlier in this judgment, the length of time that has passed and the inherent difficulty of being able to rely on assurances. However, it seems to us right that the opportunity should be afforded to the Appellant to persuade us that satisfactory assurances can be given. Given the very long history here, there can be no question of any long delay before the matter is finally resolved.

383. On the facts of this case, any successful future assurances or guarantees would have to be detailed, formal and underpinned with significant diplomatic weight. They would have to include at least (1) adequate funding for investigation and development of defence cases and for representation in Court by experienced and properly resourced advocates, (2) assurance of admission to the Rwandan Bar for suitably qualified and experienced foreign lawyers as defence counsel, where desired, and (3) inclusion of at least one non-Rwandan judge in any trial, such judge to be suitably experienced and independent of any connection with the Government of Rwanda (for example an existing judge of another relevant international Court or tribunal).

384. As we have indicated, we intend to give the Appellant the opportunity to consider such detailed further undertakings, dealing with those points we have identified and any others considered appropriate. The Appellant must indicate by 4pm on Friday 18 August 2017 whether they wish to take up this opportunity. If so, detailed proposals must be filed and served by 4pm on 8 September 2017. The relevant Respondents, in respect of whom other bars to extradition have not been established, may if they choose respond in writing by 4pm on 29 September 2017. If such submissions are made, we will consider them on paper and if necessary reconvene a hearing to address the matters raised.

Cross-appeal by Vincent Brown/Bajinya

385. As indicated above, five grounds of appeal were advanced on behalf of Brown/Bajinya against the reasoning of the SDJ. During the course of argument two of those grounds became subsumed in two of the other grounds and so three substantive matters fall for consideration.

Ground 1 – Section 81, Extradition Act 2003 – "extraneous considerations"

386. Extradition may be barred by reason of the existence of "extraneous considerations": section 79(1)(b). Such considerations are defined in section 81 which is set out in Annex 1.

387. The test for establishing whether a bar under section 81 is made out is whether there is a 'reasonable chance' or 'reasonable grounds for thinking' or a 'serious possibility' that such events will occur: *Fernandez v Government of Singapore* [1971] 1 WLR 987, as applied in *Hilali v Central Court of Criminal Proceedings No.5 of Madrid and another* [2006] EWHC 1239 (Admin). It is contended that this is a lower threshold than establishing a real risk of a "flagrant denial of justice", which is the test under Article 6.

388. Whilst the tests may be phrased differently, we are not persuaded that the operation of the test under section 81 will result in any significant difference of outcome, certainly in this case, and, as did the Divisional Court in 2009, we consider that the issue can be subsumed within the general Article 6 considerations.

389. For completeness we should say that the factual foundation underlying Mr Jones's argument lies in the allegation made against Brown/Bajinya (substantially contested by him) that he was a member of the *Akazu* and a close associate of President Habyarimana (see Annex 2, paragraph 9, below). It is said on Brown/Bajinya's behalf that this accords him "high political status" and means that he is being pursued for extradition because of his "political opinions" and/or would be prejudiced at his trial because of those political opinions. The nature of the case against him is summarised at paragraph 5 above (where paragraph 44 of the SDJ's judgment is repeated). That case mirrors the allegations made in the request for his extradition.

390. As we have indicated, the Divisional Court in 2009 saw any issue of the nature arising under section 81(1)(b) as one that was subsumed within the Article 6 issue: see paragraphs 23 and 32 of the 2009 judgment, paragraph 32 reading as follows:

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

391. Nonetheless, Mr Jones submits that the conclusions of the Divisional Court on the fairness of any trial concerning Brown/Bajinya are relevant to this discrete issue upon which he seeks to rely. He draws attention to the Divisional Court's reliance on what Professor Reyntjens said in his report when he said that Brown/Bajinya "cannot expect to receive a fair trial in Rwanda given the nature of the charges against him and the political dimension to them" and that he is "said to have been a close associate of President Habyarimana".

392. We have accepted that the 2009 decision is a starting-point for consideration of the issues in the present proceedings, though not strictly binding as such. The SDJ considered the issue in the light of the evidence before her and that was the correct approach. She summarised the argument advanced on Brown/Bajinya's behalf in this context as follows:

> "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."

393. Her conclusion (which covers similar arguments advanced by other respondents) can be found in the following paragraphs of her judgment:

> "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. …
>
> 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 … 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 with-in 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 with-in 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."

394. Mr Jones submits that her conclusions that there was no evidence of prejudice against Hutu and no reasonable chance of prejudice due to political opinions were "unsustainable". He also draws attention *inter alia* to what he says was the unchallenged evidence of Professor Reyntjens concerning the relevance of membership of the *Akazu*, the agreed note of which was as follows:

> "Calling someone part of *Akazu* is something special – means that those who say it consider them as being party or privy to the central organisation of the genocide. Although this would not be fair to a number of people who I would consider part of the *Akazu* but played no part in the genocide. Calling a person a member of *Akazu* is a serious indictment."

395. He had said in his report, echoing what he had said in the earlier proceedings, as follows:

> "In my opinion, the present Rwandan judicial system, embedded as it is in the Rwandan political system, is not capable of putting into effect the guarantees necessary in the present case. [VB] cannot expect to receive a fair trial in Rwanda given the nature of the charges against him, the allegation that he is a leading Hutu activist and the political context in which the charges are formulated. There is no prospect that a judge, operating under the current arrangements in Rwanda, will be able to act independently of the current pervasive RPF control. His or her decision will be subject to the will of the Rwanda government."

396. In the same passage of evidence as that referred to above, Professor Reyntjens was asked if he was saying that Brown/Bajinya cannot have a fair trial in Rwanda because he was a member of the *Akazu*. His response was:

> "I have never said that no one who is extradited can possibly have a fair trial. I have expressed concerns about fair trial in this case and other cases. It is simply impossible to say that there is any certainty that these men or anyone extradited will not have a fair trial, but I have said likely will not have fair trial."

397. The Appellant makes the observation that Professor Reyntjens did not say that Brown/Bajinya was "at particular and specific risk of an unfair trial by reason of allegedly being an *Akazu*", but that he relied simply on his general opinion that the Respondents will not get a fair trial.

398. The evidence of Mr Witteveen is also of relevance in this context. This passage of cross-examination by Mr Jones reveals his view:

> Q: It is alleged he was a member of the Akazu. If there is an allegation that a person is a member of the Akazu, does that not point to Government of Rwanda as having regarded this man as having been in a very important political position?
>
> A: Yes, I think so.
>
> Q: Doesn't it point to their current attitude to him, that they identify him as such? Doesn't it point to them regarding his former activities, as important?
>
> A: Yes, I think so.
>
> Q: In your view, ought a court to take that into account in assessing whether Brown/Bajinya can have a fair trial?
>
> A: I don't understand your position. Everything is important to consider but as I have explained I do not see why a fair trial, with all comments I have made, would not be achieved, and why a high quality attorney would not be able to investigate properly.

399. As it seems to us, the decision of the SDJ, reflected in the paragraphs of her judgment quoted above, was not wrong in the light of the evidence to which we have referred briefly save that it may also have been a little more sanguine about how alleged membership of the *Akazu* would be perceived by the GoR than we would be in the light of the additional material we have seen. Simply asserting, as does the Appellant, that the issue of whether Brown/Bajinya was a member of the *Akazu* is a matter of fact is an insufficient answer to the point advanced on his behalf. However, what Mr Witteveen was saying in the passage to which we have referred is that with high quality representation the significance of the allegation that Brown/Bajinya was a

member of the *Akazu* could be dealt with fairly. In the light of what is now known about Mr Witteveen's enlarged views, the added precaution of the addition of an independent judge to the panel would, in our judgment, be necessary to operate as an additional safeguard.

400. At all events, having analysed this ground of cross-appeal, we do not see it as adding anything to our analysis under Article 6.

Ground 2 – section 82 – the passage of time

401. Mr Jones submits that the SDJ was wrong to reject the argument that it would be unjust and oppressive to extradite Brown/Bajinya, relying on section 82 (see Annex 1). A large part of this argument is based upon what, in his Skeleton Argument, Mr Jones had characterised as "the forum argument" which, in short, is that the allegations of genocide against Brown/Bajinya should have been investigated and, if appropriate, tried in this country, an option that has been available since 2010.

402. The SDJ's decision can be found in the following paragraphs of her judgment:

> "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 82 …."

403. The Divisional Court in 2009 dealt with the position concerning the passage of time until then: see paragraphs 137 to 138. We do not think that there is any need to add to that analysis and Mr Jones' principal target was not in relation to that period, but to the period since.

404. In his Skeleton Argument he contended thus:

> "The further delay since the 2009 judgement has been caused entirely by the requesting state's refusal to allow the Metropolitan Police to investigate the allegations with a view to prosecution in the UK. The Judge failed to consider at all the failure of GoR to cooperate with the UK without meaningful explanation, in contrast to the various jurisdictions with which it was contemporaneously willing to assist in ensuring prosecution of Rwandans under universal jurisdiction in the foreign state."

405. The position is that as from 2010 it would have been possible for Brown/Bajinya (and others accused of genocide) to be tried in the UK: section 70, Coroners and Justice Act 2009. Brown/Bajinya has wanted to be tried, if he is to be tried, in the UK. Representations were made to the CPS by him and on his behalf on this basis and our attention has been drawn to various communications relating to this. However, a quotation from a letter from the Head of the Special Crime and Counter Terrorism Division dated 17 October 2013 is sufficient to confirm the position:

> "Following the High Court decision in 2009 that Dr Brown and three others should not be extradited and the introduction of the amendments to the International Criminal Court Act made by Section 70 of the Coroners and Justice Act 2009 an investigation was commenced in 2010 by the Counter Terrorism Command of the Metropolitan Police into alleged war crimes committed by Dr Brown and the three others. A Letter of Request for mutual legal assistance was sent to the Rwandan Authorities by the CPS to establish if the Rwandan Authorities would assist the Metropolitan Police in their investigation. The CPS received a reply from the Prosecutor General stating that the Rwandans were not prepared to "cede jurisdiction to the UK authorities" and would not provide copies of their evidence to the police. Without the co-operation of the Rwandan Authorities an effective investigation could not be carried out and therefore a domestic prosecution in the UK is not possible."

406. It is contended by Mr Jones that the GoR has been taking an unreasonable stance in relation to the possibility of prosecution in the UK, particularly in light of its co-operation with other countries that have taken jurisdiction for dealing with offences of genocide. The domestic jurisdictions in Holland, Germany, Finland, Sweden, Belgium, France, Canada, the United States of America and Norway have each undertaken the prosecution of Rwandan genocide cases under the principle of universal jurisdiction. It is argued that it is to be inferred that the GoR co-operated in those cases. No reason for the decision of the GoR not to co-operate in the prosecution of Brown/Bajinya and others in the UK has been given. Ms Ellis, on behalf of EN, has argued that "such a vehement rejection of a similar request by UK authorities suggests that particular political importance has accorded to this case by the executive for reasons other than the interests of justice." It is also argued that there is no concept of "ceding jurisdiction" to a domestic Court. Mr Jones referred to the CPS "Guidelines on the handling of cases where the jurisdiction to prosecute is shared with prosecution authorities overseas." He says that the title of these guidelines "recognises correctly that jurisdiction is not something inherent in one state, which it can "cede" to another state." States, he submits, "have concurrent jurisdiction over crimes such as genocide."

407. We accept that, strictly speaking, Mr Jones is right about that, but any prosecution that is to be presented fairly requires both the prosecution case and the defence case to be deployed properly. If the GoR will not co-operate in providing the evidence for the prosecution case, that overall objective cannot be achieved. Views may differ about whether the GoR is acting reasonably in taking that position in this case or whether there is a political motive behind it, but it is that country's entitlement to argue that Brown/Bajinya (and the others) should be tried in Rwanda where, all things being equal, it would be best and most advantageous for the trial to take place. Equally, as Mr Knowles says, if the GoR cooperated with the UK authorities, ultimately the decision about whether to prosecute would be left to the independent prosecuting authority (the CPS) in the UK and would thus be out of the control of the Rwandan authorities.

408. Mr Jones has sought to place this aspect of Brown/Bajinya's case under the heading of "delay" on the basis that the GoR's stance means that any putative trial in Rwanda would not be complete for three or more years after his extradition (say, in 2018), such a timescale being consistent with those transferred cases presently progressing through the Rwandan High Court, whereas any trial in the UK could have been completed much earlier.

409. We accept that it is at least arguable that the position taken by the GoR will add some period of delay before any trial in Rwanda would take place if extradition is ordered, compared with the position had there been proceedings in the UK, but it is not clear how significant any such delay would be: there would have been considerable preparation before any trial in the UK was ready and arrangements made for witnesses from Rwanda and elsewhere to attend.

410. However, at the end of the day, the question is whether the passage of time renders it unjust or oppressive to extradite Brown/Bajinya. We consider that the SDJ's rejection of this argument was not merely one to which she was entitled to come, but was indeed correct.

Ground 3 – no sufficient case to answer – section 84(5)

411. The issue raised is whether "there is evidence which would be sufficient to make a case requiring an answer by [Brown/Bajinya] if the proceedings were the summary trial of an information against him": section 84(1) and (5).

412. The SDJ summarised the position as she saw it thus:

> "110. In 2009 [District Judge] found a prima facie case against [VB] and this finding was accepted by the Divisional Court. I accept [Mr Jones'] argument that the evidence is not entirely the same as it was in 2007-8. The [judicial authority] 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 lesser 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."

413. Mr Jones challenges that decision and submits that on a proper analysis of the evidence, no reasonable tribunal, properly directed, could convict and the SDJ would have so concluded if the correct legal test had been applied. He submits that the evidence taken as a whole is so weak, inherently unreliable, mutually and internally inconsistent that no reasonable tribunal, properly directed, could convict.

414. The SDJ had been presented with an Appendix to the closing submissions on behalf of Brown/Bajinya running to some 175 pages in which the evidence concerning his alleged involvement with the genocide was analysed in close detail. The SDJ herself scrutinised this analysis in 133 paragraphs. She considered all the evidence, including the evidence adduced by Brown/Bajinya, and her conclusion, as set out in paragraph 133 of the Appendix to her judgment was as follows:

> "My overall conclusion is that this is a weak case against [VB], that all of the witnesses who say they saw him instigating and encouraging killings have been undermined to a lesser or greater extent but that the true weight of the case cannot be judged without hearing the witnesses give evidence and be tested in cross examination. I find there is a prima facie case against the RP. I do not find the evidence is worthless. What I

> do find though is that for Dr Brown to have a fair trial he will need to have an experienced defence team including an investigator to be able to marshal a great deal of material for cross examination of the prosecution witnesses and many reluctant witnesses for his defence."

415. Ultimately, an issue such as this involves the making of a judgment about the state of the evidence as it appears to the decision-maker to be. We do not consider that the SDJ's assessment of the state of the evidence can be said to be wrong. Indeed, reflecting on her analysis of the evidence, it seems to us that her judgment was entirely correct: there are weaknesses in the case against Brown/Bajinya which, if exposed competently, may well lead to sufficient doubt about his alleged involvement to result in an acquittal. However, that is for the trial, not for the tribunal considering extradition. Nonetheless, it adds emphasis to the need for a competent defence team to ensure that Brown/Bajinya has a fair trial.

416. We do not consider that the SDJ was wrong to reject this submission or to reject the submission based upon the alleged fabrication of evidence against Brown/Bajinya. If that was the case, it will be revealed by a competently presented challenge to the prosecution case and a competently presented defence case.

Ground 4 - extradition incompatible with Convention rights - section 87(2)

417. This ground was not abandoned as such, but the considerations arising were said by Mr Jones to be subsumed within the "extraneous considerations" issue dealt with earlier.

418. We say nothing further about this. In our view, Mr Jones was correct to say that the issues could be dealt with satisfactorily under that heading.

Ground 5 - The Forum argument

419. The points made under Ground 2 concerning the implications of the GoR's non-cooperation with a prosecution in the UK were made as a separate ground of cross-appeal, but were subsumed in the argument under Ground 2. We need say nothing further about those points.

The Cross-Appeal of Charles Munyaneza

420. Mr Moloney indicated that he would adopt the arguments of Mr Jones on matters raised in the cross-appeal of Munyaneza. Those matters have been dealt with previously and there is no need to repeat our overall conclusions save to emphasise that, in our view, the SDJ was entirely right in relation to the issue of whether there was a *prima facie* case in respect of Munyaneza.

The Cross-Appeal of Emmanuel Nteziryayo

421. The Skeleton Argument of Ms Ellis and Ms Evans deal with a number of points raised in the cross-appeal on behalf of Nteziryayo. Some raise broadly the same issues as those raised by Mr Jones on behalf of Brown/Bajinya (although sometimes labelled

somewhat differently) and we propose to concentrate on those that raise mattes that are specifically raised by Nteziryayo.

“Political trial”

422. Our general response to the suggestion that the SDJ was wrong to approach these cases on the basis that they do not come within the category of “political” cases has been dealt with previously. The summary of the allegations made against Nteziryayo appear in paragraph 5 above. They include the allegations that he was a *bourgmestre* (which is not disputed as a matter of fact) and that he was a member of the MRND, both suggested to be matters that would mean that his “political affiliation” would be such as to make him a target of an unjustified claim that he was a party to the genocide.

423. In paragraph 93 of her judgment the SDJ said this:

> “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 [who said] 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.”

424. As indicated elsewhere, whilst we think this is somewhat too sanguine a view, albeit not wrong, it is something that could be addressed by a competently presented defence case before an independent tribunal.

“Worthless evidence”/no *prima facie* case

425. Ms Ellis submits that the evidence upon which the GoR would seek to rely is “demonstrably worthless” and would, in any event, be such that on a proper analysis no reasonable tribunal properly directed could convict Nteziryayo. She relies, in particular, upon what she says are “the irreconcilable differences between the statements presented for the extradition proceedings with statements from a number of the same witnesses, which are totally exculpatory and were provided, sometimes under oath and voluntarily, many years earlier.” In other words, the suggestion is that these witnesses have changed their accounts subsequently to accommodate the desire of the GoR to convict Nteziryayo.

426. She submits that since the Divisional Court case in 2009 the evaluation of the case against him should change. Her submission and the response of the SDJ can be discerned from the following two paragraphs of the SDJ's judgment:

> “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” …. [Ms Ellis

> and Ms Evans] 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."

427. It will be apparent that Ms Ellis challenges that conclusion.

428. Appendix 3 to Ms Ellis' submission to the SDJ contains a formidable and persuasive "deconstruction" of much of the evidence relied upon in support of the extradition of Nteziryayo. As the SDJ said, a number of the witnesses are "undermined". It contains also a good deal of evidence which, at face value, supports Nteziryayo's case that he was not involved in any of the genocidal acts alleged against him.

429. As with Brown/Bajinya, we consider that the view taken by the SDJ reflected a "judgment" on the evaluation of the evidence, both prosecution and defence, that was open to her. What is required at a trial, if it takes place, is an effective defence on Nteziryayo's behalf which is capable of exposing the suggested weaknesses of the prosecution evidence and advancing the strengths of the defence evidence in front of a tribunal that is not susceptible to influence by the GoR.

430. We consider that the SDJ was correct to reject this aspect of the case advanced by Nteziryayo notwithstanding the persuasive nature of much of the material relied upon on his behalf.

<u>Double jeopardy</u>

431. The rule against double jeopardy is set out in Annex 1: section 80 of the Act.

432. The nature of the argument advanced and the SDJ's response can be seen from the following paragraphs of the SDJ's judgment in which she quotes from Mr Ngoga's affidavit (see paragraph 45 above):

> "71. …. 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."

433. We will return to that reasoning below, but news of these developments emerged at or about the time of the hearing before the Divisional Court. The hearing took place in December 2008 and the judgment was handed down on 8 April 2009. The Divisional Court said this:

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

> trial issue it would have been necessary to explore the implications of these gacaca proceedings in more detail.
>
> 147. Further material relating to the gacaca proceedings and also to a number of other issues that had been raised during the hearing was supplied to us after the hearing had concluded. It is unnecessary to refer to that material since none of it casts any doubt on our conclusions … in respect of the principal issue in the appeals."

434. The chronology of the events set out in the SDJ's judgment is at first reading a little confusing. We will set out again what we understand to be the chronology, but it has to be said that some of the material emanating from Rwanda about these events (particularly about the *gacaca* trial that led to a conviction and the appellate process thereafter) is itself confusing:

> September 2007 – May 2008: extradition proceedings before DJ Evans
>
> 6 June 2008: decision of DJ Evans in favour of extradition
>
> 1 August 2008: Secretary of State's decision to extradite
>
> ? August/September: appeal to Divisional Court launched
>
> 9 October 2008: first day of *gacaca* trial in Tare II (*in absentia*)
>
> 16 October 2008: second day of *gacaca* trial in Tare II
>
> 23 October 2008: third day of *gacaca* trial in Tare II at which EN was acquitted of all charges (setting up road blocks and distributing guns)
>
> 30 October 2008: a further *gacaca* trial took place in Tare I at which EN was convicted on the basis of the evidence of one witness (the charges were of massacring Tutsi at Nyamigina, setting up roadblocks with police, inciting people to commit genocide and issuing identity papers on the basis of ethnicity).
>
> 15 – 18 December 2008: five of the *gacaca* judges in Tare II were interviewed and asked about the reasons for EN's acquittal. The interviews were conducted by prosecutors from the NPPA and a Public Investigator from the Head Office of the Parquet General of the Republic in the GFTU. There is evidence that the judges were imprisoned during this period.
>
> 18 December 2008: *gacaca* court of appeal for Tare II annuls the acquittal, the following reasons being given:
>
>> "After considering that the Defendant is being prosecuted in the ordinary jurisdiction, 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 ordinary jurisdiction that had started to prosecute it."

22 December 2008: *gacaca* court of appeal for Tare I annuls the conviction, the following reason being given:

> "After considering that the Defendant is being prosecuted in the ordinary jurisdiction, the Gacaca Court of Appeal has ordered that the verdict given by the Sector Gacaca Court be annulled, with the case to follow the normal process in the ordinary jurisdiction that had started to prosecute it."

435. We are told, and it has not been disputed, that during the first extradition proceedings in 2007/2008 it was said on behalf of the GoR that none of the Respondents would be the subject of *gacaca* proceedings at any time, an assurance reflected in what the Divisional Court recorded Professor Schabas as saying.

436. The Divisional Court in 2009 questioned whether these events afforded an indication of something "more sinister" than simply an instance of the "left hand not knowing what the right was doing". That is not, strictly speaking, the issue before us, but it is very difficult to resist the inference that steps were being taken by the prosecuting authorities in Rwanda to shore up its position vis-à-vis Nteziryayo either because of the recommendation for extradition or because of the known existence of a pending appeal to the Divisional Court. In the submissions made to the SDJ on Nteziryayo's behalf, Ms Ellis and Ms Evans contended that:

> "had it not come to the attention of [the Divisional Court] in December 2008 that the *gacaca* proceedings had taken place, then, had the extradition application been successful, Nteziryayo would have been taken to prison on his return as a convicted prisoner."

We think there is some force in that submission.

437. However, the issue for double jeopardy purposes is whether, as Ms Ellis submits, the SDJ was wrong in law to hold that the acquittal and conviction had been annulled lawfully. If neither had been set aside lawfully, they would still be effective and, it is argued, Nteziryayo would still stand convicted of the charges which reflect those for which his extradition is sought in these proceedings.

438. The contention advanced by Ms Ellis is that, according to the provisions of the relevant law, the *gacaca* courts had jurisdiction to try 'leaders' charged with genocide as a result of an amendment to the Organic Law in May 2008. To that extent, within Rwandan law, she argues that the proceedings that led to Nteziryayo's acquittal were valid. If that is correct, the rule against double jeopardy bites and Nteziryayo should not be extradited. Furthermore, if we understand the argument correctly, since the *gacaca* proceedings are plainly not Article 6 compliant, there could be no basis for extraditing him to serve the sentence imposed. If both acquittal and conviction have

been lawfully annulled, there is no impediment to extradition on the basis of double jeopardy.

439. The GoR places reliance in this context on Article 2 of the Transfer Law 2007 which, so far as material, reads as follows:

> "Notwithstanding any other law to the contrary, the High Court of the Republic shall be the competent court to conduct on the first instance the trial of cases transferred to Rwanda as provided for by this organic law …."

440. The GoR has sought to argue that by virtue of this provision there was no jurisdiction to try Nteziryayo in the *gacaca* jurisdiction and, accordingly, the Appeal Courts were correct to annul both decisions because it was the High Court that had the jurisdiction in his case, not the *gacaca* courts. Ms Ellis submits that Article 2 on its face is only relevant to someone who has been "transferred" to Rwanda and that since Nteziryayo had not been "transferred" in October 2008, he was not subject to Article 2. Strictly speaking, an order for his transfer (by way of extradition) had been made, but its operation was suspended pending the appeal to the Divisional Court which, in due course, quashed the order.

441. Ms Ellis argues that the SDJ was wrong to say that there was no evidence that the *gacaca* rulings were not annulled lawfully: she says that it is plain, as a matter of Rwandan law, that the reason given by the Appeal Courts for annulling the rulings was flawed.

442. In this respect, we consider that Ms Ellis's argument is correct. The evaluation of the issue of double jeopardy in Nteziryayo's case does not depend on determining whether there was evidence that showed the lawfulness or otherwise of the annulment: it depended on interpreting the provisions governing the *gacaca* courts to which we have referred. In our judgment, the *gacaca* court did have jurisdiction to determine Nteziryayo's guilt or innocence according to Rwandan law at the time and, accordingly, the *gacaca* Court of Appeal had no power to declare that the acquittal was a nullity through lack of jurisdiction.

443. That being so, either through the operation of the double jeopardy provision *per se,* or by reference to the principle of abuse of process, Nteziryayo should not be extradited unless there is some other provision of Rwandan law that clears the path for this to occur. The only path upon which Mr Knowles seeks to rely is Article 8 of the Organic Law to which we refer below at paragraph 457, but which we repeat here for convenience:

> "**Article 8: Trial of an Extradited Person Sentenced by Gacaca Courts**
>
> A person extradited to be tried in Rwanda and who has been sentenced by Gacaca Courts should be tried by a competent courthouse provided by this organic law.
>
> However, the decision of the Gacaca Courts shall first be nullified by that Court."

444. This provision on its face plainly applies only to those who have been sentenced (and thus convicted) and not to those who have been acquitted lawfully. In our view, it has no role to play in Nteziryayo's case.

445. In our judgment, Nteziryayo is entitled to be discharged on this ground.

Article 8 ECHR

446. To the extent that this remained an issue, it falls away in the light of our decision on double jeopardy. However, for completeness and for the avoidance of doubt, we do not consider that Article 8 considerations could possibly operate to prevent extradition in a case involving allegations of genocide.

Celestin Mutabaruka: Double Jeopardy and Abuse of Process

447. As we have indicated above (see paragraph 11), the Senior District Judge summarised the allegations against Mutabaruka in paragraphs 48-51 of her judgment. For convenience, we reiterate that he is alleged to have been involved in killings at or near the Presbyterian Church at Gatare in April 1994 and then in multiple murders on Muyira Hill in Bisesero in May 1994. The allegations are dealt with at some length in the deposition of Martin Ngoga at paragraphs 113-181.

448. At paragraphs 210-213, Martin Ngoga touches on *gacaca* proceedings against Mutabaruka. At paragraph 210 he indicates that Mutabaruka was acquitted before the *gacaca* court in October/November 2007. Mr Ngoga goes on to suggest "these decisions have been vacated by the higher Courts or higher authority" (Ngoga, paragraph 211).

449. The Senior District Judge addressed the question of double jeopardy, arising under Section 80 of the Extradition Act 2003 and as affecting Mutabaruka, between paragraphs 58-70, and then in paragraph 665 of her judgment. In paragraph 61, the Senior District Judge explains:

> "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...."

450. Before the Senior District Judge, the Appellant argued (see Ngoga, paragraph 210, *et seq*) that the relevant *gacaca* court had no jurisdiction to try Mutabaruka in relation to the Gatare matters. The argument before the Senior District Judge was that these decisions do not "attract the principle of *non bis in idem*".

451. The Senior District Judge noted (paragraph 63) that the GoR had given no explanation for the appeal processes and provided no evidence to support the contentions made. The Senior District Judge went on to make the following findings of fact:

> "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." (paragraph 64)

452. In paragraph 65, SDJ Arbuthnot went on to observe that in relation to the Bisesero *gacaca* conviction, the GoR "never responded to a statement served on it by the defence team for CMU". The relevant evidence came from CMU's solicitor, Mr Rackstraw, which appended a translation of the only available record of the relevant *gacaca* proceedings and records that after examining the charges in relation to Bisesero, Mutabaruka was convicted "placed in category 2 and sentenced to 30 years' imprisonment and to pay back 15 cows, the equivalent to 3 million RwFr". In paragraph 68, the Senior District Judge confirms that this conviction was never dealt with in any evidence from Mr Ngoga, or any other witness on behalf of the Respondent. Recording her conclusion in paragraph 70, SDJ Arbuthnot finds that in the absence of 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."

In paragraph 665 of her judgment, SDJ Arbuthnot ordered Mutabaruka's discharge in relation to any extradition request.

453. The GoR seek to appeal this conclusion. Before considering the merits of any such appeal, Ms Malcolm QC for Mutabaruka takes a procedural point. She argues that we have no jurisdiction to entertain the appeal on this ground. Section 106 of the Extradition Act 2003 details the powers of this Court to entertain and address an appeal under Section 105 of the Act. Section 106(5) sets out the conditions under which such an appeal may be entertained and reads:

> "(5) The conditions are that—
>
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the judge deciding the relevant question differently;
>
> (c) if he had decided the question in that way, he would not have been required to order the person's discharge."

454. Ms Malcolm says the approach of the GoR to this aspect of the appeal does not begin to satisfy the conditions laid down. In order to examine that proposition, we must first establish how the matter is put by the Appellant.

455. The Appellant advances three grounds: firstly, that there was insufficient evidence that the *gacaca* convictions arose in relation to the same conduct for which extradition is sought. It is said that the unofficial translation of a record (i.e. the Appendix to the statement of Mr Rackstraw) is an insufficient record of conviction. Further it is said that the record of the *gacaca* conviction (with its paucity of details):

> "resulted in the entire conduct for which CMU is sought being barred by reason of double jeopardy."

Amplifying the latter point, the Appellant seeks to submit that the Gatare allegations were entirely separate from the massacres at Bisesero, and any finding that extradition was barred in respect of those matters was an error.

456. In respect of the Bisesero matters, it is said that the Court below "did not have sufficient information about the alleged conviction of CMU to determine that it was the same conduct alleged in the request". The Appellant submits that there is a "fundamental difference between the two allegations even from the paucity of information offered". The Appellant goes on to argue that the *gacaca* court, for reasons set down in paragraphs 216-227 of Ngoga's deposition, is "not a Court of competent jurisdiction". This was said to have been recognised by the SDJ at paragraph 67. It would therefore follow that the conviction and sentence is defunct, as it cannot be enforced in law.

457. The third argument is that a specific legal provision in Rwanda prohibits extraditees from being dealt with by *gacaca* courts. This is Article 8 of "Organic Law No 04/2012/OL of 15.06.2012: Terminating Gacaca Courts and Determining Mechanisms for Solving Issues which were under their Jurisdiction". Article 8 reads:

> "**Article 8: Trial of an Extradited Person Sentenced by Gacaca Courts**
>
> A person extradited to be tried in Rwanda and who has been sentenced by Gacaca Courts should be tried by a competent court as provided by this organic law.
>
> However, the decision of the Gacaca Courts shall first be nullified by that Court."

458. Based on that provision, the Appellant argues that anyone extradited to Rwanda can only be dealt with by the High Court for the matters outlined in the request and that it will be:

> "A matter for the High Court to quash the Gacaca conviction because the Gacaca jurisdiction no longer operates. The High Court will be in a position to quash the conviction when they are seized of CMU's case, i.e., following his surrender to Rwanda."

459. In a Further Note from the Appellant, the argument is amplified. It is said that it is "uncontroversial that the Extradition Act 2003 requires the judge to focus on the conduct alleged in the extradition request". Where different episodes arise, the Judge must focus on each episode separately and consider if the specific episode of conduct amounts to an extradition offence. The Extradition Act was modified by the Extradition Act 2003 (Multiple Offences) Order 2003 (SI 2003/3150). Specifically, Article 23(4) amends Section 78(4) so as to stipulate that the extradition judge:

> "(4) … must decide whether –
>
> …
>
> (b) each offence specified in the request is an extradition offence:"

460. Article 24 amends Section 79 of the Act, so that when considering any of the relevant bars to extradition, including the rule against double jeopardy:

> "79(3) If the judge decides any of the questions in subsection (1) in the affirmative in relation to any offence, he must order the person's discharge in relation to that offence only."

The Appellant emphasises the "crucial" words in Section 79(3). Hence, it is said that even if the Senior District Judge was right that Mutabaruka's extradition for the *gacaca* conviction in relation to the Bisesero Hills conduct was barred, she was wrong to discharge him in relation to all of the conduct in the request.

461. Having identified the arguments and issues sought to be raised by the Appellant on this aspect of the case, we revert to considering the jurisdictional point advanced by Mutabaruka.

462. Ms Malcolm starts from the observation that the Appellant "failed to argue any of the matters now raised in …. its skeleton argument in the Court below". The Appellant should be debarred from doing so now, because these matters do not constitute "an issue that was not raised at the extradition hearing" nor "evidence available that was not available at the extradition hearing", within Section 106(5). Ms Malcolm argues that the approach adopted in relation to the parallel provisions under Section 104 of the 2003 Act, governing appeals against an order for extradition, should constitute a parallel approach. The principles laid down in the well-known case of *Szombathely City Court v Fenivesy* should be applied *mutatis mutandis*. The policy behind Section 104 and 106 is clear: the parties should not be permitted without good reason to raise issues or introduce evidence on appeal without having first litigated them below.

463. The outstanding Bisesero conviction and 30 years' sentence evidenced by Mr Rackstraw in the Appendix to his statement, should have been the subject of disclosure by the Appellant at the time of the extradition request, or as soon thereafter as it was brought to the attention of the GoR. In fact, this material has never been formally disclosed, despite a statement made in the course of the hearing before the Senior District Judge in June 2014 that the GoR "were going to make some urgent enquiries". The explanation is that the representatives of the Appellant missed the

point at the time of drafting their closing submissions, and so far as it goes that is accepted by Mutabaruka's representatives.

464. However, Ms Malcolm submits this was not a single error. She argues that the Appellant failed on multiple occasions to address the question of double jeopardy in the case of Mutabaruka. The chronology is as follows:

i) The issue was raised in the Statement of Issues on 27 June 2013.

ii) The issue was raised again in Mutabaruka's request for disclosure on 29 July 2013.

iii) The Bisesero conviction was mentioned on various dates in proceedings in the lower court as a matter of administration and "housekeeping".

iv) Evidence was called by Mutabaruka bearing on the issue on 18 June 2014 (papers, volume 12/5971: 6124/36).

v) The matter was argued on Mutabaruka's behalf in closing submissions on 17 August 2015.

vi) The matter was further argued in the reply to the Appellant's submissions on 5 October 2015.

vii) On 25 September 2015 the Senior District Judge made an explicit request of the Appellant as to whether they intended to press this issue.

viii) An additional period of more than a year from that reminder passed with an additional ten months since the Perfected Grounds of Appeal were filed and served on behalf of the Appellant.

ix) Three orders from Ouseley J, directing the service of any fresh material, drew no response from the Appellant by way of fresh material.

x) The first attempt to introduce any document from the Appellant on this issue is said to have been served on the first day of the appeal hearing before us.

xi) In the premises there has been no attempt to comply with Criminal Procedure Rules paragraph 50.20(3) or 50.20(6).

465. In our view, Mr Knowles (who did not appear below), try as he might, cannot contradict the sequence of multiple failures to address this issue on the part of his clients, initially by way of appropriate disclosure, and subsequently by introducing any substantive evidence or argument before SDJ Arbuthnot. We consider Ms Malcolm is correct to submit there "has been no attempt to comply with the [Criminal Procedure] Rules". Whilst we have generally been liberal in our approach to fresh material in this case, since it is so voluminous, and since matters have continued to emerge, we have reached the view here that the egregious failures on this issue are such that by no liberality of approach can the threshold for jurisdiction be passed in respect of material now sought to be introduced. This matter must therefore be decided on the material available below.

466. In relation to matters of law, the correct approach may be different. Here, Mr Knowles relies on authority. In the case of *The Queen (on the application of Soltysiak) v Judicial Authority of Poland* [2011] EWHC 1338 (Admin), the question arose in relation to the parallel provisions under Section 104 of the 2003 Act as to whether a fresh argument of law, overlooked before the District Judge, might be raised in the appeal to the Divisional Court. Bean J (as he then was) considered two earlier authorities, *Hoholm v Norway* [2009] EWHC 1513 (Admin) and *Mehtab Khan v The United States of America* [2010] EWHC 127 (Admin), where apparently contradictory outcomes were reached on such a question. In *Hoholm*, the Court permitted a fresh point of law to be raised on appeal, the matter having been overlooked below. In *Mehtab Khan*, the Divisional Court held:

> "… that the new point was a bad one; so in my view their observations are not part of the ratio of the decision. I therefore consider that I am bound by *Hoholm*. In any event, I consider that *Hoholm* was correctly decided." (*Soltysiak*, paragraph 11)

467. Bean J went on to consider that he was:

> "… in no doubt that it is open to an Appellant to argue on appeal to this Court that the offence for which extradition is sought is not an extradition offence as defined by Section 64, even if that point of law was not spotted before the Magistrates' Court. I say so both as a matter of interpretation of Section 27 and following the decision in *Hoholm*. I am also in no doubt that until and unless this issue is resolved authoritatively, possibly by a three judge Divisional Court or perhaps by a still higher Court, it is the duty of advocates to ensure that this Court, when it is sought to raise a point of law not taken below, is made aware of both *Hoholm* and *Khan*." (*Soltysiak*, paragraph 18)

468. We accept the views expressed in *Hoholm* and *Soltysiak*. We consider there was a serious sequence of failures on the part of the Appellant to address this issue, in disclosure, in the introduction of evidence and in argument below. As we have said, we propose to admit or consider no evidence on this question from the GoR which was not before the Senior District Judge. However, we do propose to consider arguments of law advanced within the confines of the material before the Court below.

469. On the evidence as it was below, the two sets of allegations were those relating to Gatare in April 1994 and Bisesero in May 1994. Without fresh evidence, there is nothing to disturb that factual conclusion of SDJ Arbuthnot.

470. Mr Knowles's argument is that the unofficial transcript of a record of conviction is insufficient evidence of the *gacaca* convictions. However, we do not see why that is so. Such evidence was advanced for that purpose and remained uncontradicted before the Senior District Judge. In our view her factual conclusions were proper.

471. We therefore proceed on the factual basis that Mutabaruka was acquitted before the Nyarwungo *gacaca* court in relation to the Gatare allegations, that that acquittal was

in relation substantially to the same allegations in respect of which extradition is now sought, and that it was substantially the same set of allegations in respect of which the acquittal was overturned before the *gacaca* Court of Appeal in January 2009. On the evidence before SDJ Arbuthnot (and us) we see no basis for the kind of distinction reached in *Kulibaba v USA* [2014] EWHC 178 (Admin).

472. We accept that the amended Sections 78(4) and 79(3) apply to these proceedings. Therefore the double jeopardy/abuse of process bar must be approached with each offence in mind. However, the factual position below also covers the Bisesero conviction and sentence. Therefore, absent a successful argument that *gacaca* proceedings are to be discounted for the purposes of double jeopardy, the proceedings here are concerned with both aspects of the offending in respect of which extradition is sought. In the one instance he has been acquitted and his acquittal overturned, in the other he has been convicted in his absence and faces a 30 year sentence.

473. We have borne in mind the principles laid down in *Fofana and Another v Deputy Prosecutor Thubin Tribunal de Grande Instance de Meaux, France* [2006] EWHC 744 (Admin). In that case, the Divisional Court emphasised:

> "18. In summary the authorities establish two circumstance in English law that offend the principle of double jeopardy:
>
> i) Following an acquittal or conviction for an offence, which is the same in fact and law – *autrefois acquit or convict;* and
>
> ii) following a trial for any offence which was founded on "the same or substantially the same facts", where the court would normally consider it right to stay the prosecution as an abuse of process and/or unless the prosecution can show "special circumstances" why another trial should take place.
>
> 19. In *Connelly,* their Lordships reached this position in practical, though not unanimously in formal, terms by, in the main, confining the notion of double jeopardy to the narrow pleas in bar of *autrefois acquit or convict,* but allowing for a wider discretionary bar through the medium of the protection afforded by the court's jurisdiction to stay a prosecution as an abuse of process. In *Humphreys,* where their Lordships sanctioned a prosecution for perjury based on the same facts plus evidence of perjury by the defendant at an earlier failed prosecution for a driving offence, Lord Hailsham of St Marylebone indicated the second broader discretionary bar in the following passage at 41D-E:
>
>> "(10) Except where the formal pleas of autrefois acquit or convict are admissible, when it is the practice to empanel a jury, it is the duty of the court to examine the facts of the first trial in case of any dispute, and in any case it is the duty of the court to rule as a matter of law on the legal consequences deriving from such facts. In any case it is, therefore, for the court to determine whether on the facts found there is as a matter of law, a double jeopardy involved in the later proceedings and to direct a jury accordingly.""

474. It is to be noted that *Fofana* post-dated the 2003 amendment of the Extradition Act. It is also to be noted that the same approach is adopted to this bar whether it arises in relation to a European Arrest Warrant and Part 1 territory or not: see for example *Bohning v Government of the United States of America* [2005] EWHC 2613 (Admin).

475. Mr Knowles argues these points are immaterial since, as Mr Ngoga asserted in relation to the Gatare matter in his deposition at paragraph 210, "the *gacaca* had no jurisdiction to hear this case". This is hard to follow, given that they did hear both matters. Mr Ngoga went on to argue that "these *gacaca* decisions have been vacated by the higher courts or higher authority" (deposition, paragraph 11). It is not clear what is meant by "higher authority". Nor was there evidence below to substantiate this claim.

476. There is uncontroverted evidence that many prisoners have been tried, convicted and served lengthy sentences from the *gacaca* courts. It is also instructive, as Ms Malcolm points out, that in the case of Uwinkindi, there was explicit evidence before the ICTR that his *gacaca* convictions <u>had been</u> vacated: see the Uwinkindi ICTR judgment and the deposition of Ngoga at paragraph 213. The implication is clear that, absent such vacation the principle of *ne bis in idem* would have been applicable in relation to those *gacaca* convictions.

477. We also bear in mind the cases of Mudahinyuka and Mukeshimana, about whom Ms Nerad gave evidence below. Each was convicted and sentenced by *gacaca* courts in their absence. Each was required to serve those sentences once expelled from the USA and returned to Rwanda.

478. The Appellant argues that the Senior District Judge "recognised … at paragraph 67" that the *gacaca* court is "not a Court of competent jurisdiction". Here too we prefer the view of Ms Malcolm. She submits that SDJ Arbuthnot did no such thing. What the Senior District Judge did say was that the *gacaca* court "does not meet the requirements for Article 6 and as a result … Mutabaruka could never be returned to serve the sentence imposed by *gacaca*". As Ms Malcolm submits, the fact of wholesale breaches of the standards of fair trial does not amount to a lack of jurisdictional competence.

479. We now turn to the third argument advanced by Mr Knowles, namely that the effect of Article 8 of Organic Law No 04/2012/OL is that the *gacaca* verdicts <u>will be</u> nullified by the Rwandan High Court, and Mutabaruka tried exclusively by the High Court.

480. The starting point here is that the *gacaca* verdicts (and sentence) have not been nullified. At present, they stand. For reasons already given, this is not a part of this case where fresh evidence can properly be received. As a matter of record, there is no suggestion that the verdicts have been nullified. As the Appellants concede in their principal written submissions, the decision below was based on the absence of evidence that the *gacaca* conviction <u>had been</u> annulled or quashed. The Appellant's response to this is to point to the Organic Law No 04/2012/OL and the evidence of Dr Clark that the *gacaca* conviction <u>will be</u> quashed or annulled. Part of Ms Malcolm's reply is to cite the criticisms made by the GoR at other points in these proceedings, to the effect that it is unsafe to rely on "expert" opinion on the law from a non-legal expert (such as Dr Clark). Reliance here is also rendered more difficult since, in

effect, the Rwandan Government is relying on a future decision of the judicial branch, a promise Ms Malcolm says they should not be in a position to enforce.

481. Mr Knowles submits that the Organic law was enacted "precisely to avoid" this issue. The law is plain and unambiguous. In saying the Court will grant the application, the Prosecutor General was saying no more than that the Court will apply Rwandan law. The assurance from the GoR is acceptable in principle: see the similar examples to be found in *In Re Peci (Unreported)* [1999] EWHC J1105-6 and *Lodhi v Governor of Brixton Prison* [2001] EWHC 178 (Admin). Mr Knowles submits there is no need to test the assurances in evidence, but the assurance is in any event effective. Mr Knowles advances a number of reasons for this:

> "But if they are examined then they bear out that this assurance is effective. Othman is at A2/Tab 31. As to the criteria: (a) the assurance has been disclosed to the Court; (b) the assurance is specific; (c) the Prosecutor General can bind the receiving state (see above); (d) it has been issued by the central government; (e) the proposed treatment is legal in Rwanda; (f) Rwanda has no track record of not abiding by assurances given. In relation to Mr Mudahinyuka's case, the assurances were given for the purposes of an extradition request which never materialised because he was deported, and so they ceased to have effect; (g) compliance can be objectively verified."

482. We have considered these submissions but they are subject to three objections or problems. Firstly, they really rest upon (or even consist of) fresh evidence. We are not prepared to accept such evidence in this area for the reasons we have given. Secondly, there is a real concern about assurances from the GoR, for reasons sufficiently articulated earlier in this judgment. Thirdly, the bald fact remains that Mutabaruka has been tried, received verdicts (and a sentence) by Courts treated as competent within Rwandan law, and by Courts whose very substantial sentences have been carried into execution.

483. Looking at the matter overall, we find that the basis for this bar is made out. In reaching that conclusion we follow the approach in *Fofana*. This is a case where the broader principle of abuse of process applies.

484. We consider that the Senior District Judge was correct in finding that Mutabaruka should not be extradited because of double jeopardy and/or abuse of process, pursuant to Section 80 of the 2003 Act.

Celestin Mutabaruka: Section 81 Extradition Act – Extraneous Considerations

485. SDJ Arbuthnot dealt with this aspect of Mutabaruka's case in paragraphs 86 to 92, and 95 to 96 of her judgment. The claim advanced on behalf of Mutabaruka is that he will be at increased risk of a political and prejudicial trial because of his political involvement. It is said that in 1993/1994, and now, he is and was a politician. His party is in opposition to the GoR.

486. The Senior District Judge accepted that Mutabaruka helped set up a political party known by the name UNISODEC, which was allied to President Habyarimana. The

judgment deals with that history in paragraph 87. More recently, the case for Mutabaruka is that he set up a new party called "Rwanda Rise and Shine" ["RaS"]. SDJ Arbuthnot accepted his earlier political involvement, but considered that there was "weakness in the evidence that he is currently a political force in Rwandan politics or in the Diaspora". In paragraphs 89 to 91 the Judge gave her conclusions. Broadly she considered that whilst Mutabaruka might be involved in RaS, essentially this "fairly new small organization" was insignificant and there was no evidence "that would lead to me to believe that Kagame would find [Mutabaruka] worthy of eliminating from the political scene".

487. In common with the Divisional Court in 2008/9, and with her approach to the other Respondents where Section 81 issues or political engagement have been raised, SDJ Arbuthnot found there was insufficient evidence to found a serious possibility that the extradition requests were being made for other purposes than the offending named (paragraph 95) and found that there was no reasonable chance or serious possibility that these extraneous factors might lead to any additional prejudice at Mutabaruka's trial (paragraph 96).

488. Ms Malcolm QC submits that the SDJ failed to take sufficient account of the evidence of Mutabaruka's political links and activities and, in short, underestimated the risk relevant to Section 81(b)/Article 6. She submits that it is significant the Rwandan Arrest Warrants were issued by the Prosecutor General and were therefore not subject to any judicial scrutiny or oversight. The extradition request is an executive act. The deposition of Simon Ngoga links UNISODEC directly to the MRND, for which it is said to have acted as "little more than a cat's paw". Ms Malcolm suggests there is little evidence for this, but the expression of the opinion may be sufficient warning of a risk to fair trial. Although, she submits, that in fact UNISODEC was a non-sectarian party, seeking to reduce ethnic tension, the stereotype or misrepresentation of the nature of the party may be the significant factor. Ms Malcolm submits that the evidence of Adelbert Rugeruza and Azariah Shiyranbere demonstrates that, following his move to the United Kingdom, Mutabaruka remained politically active, although the activities were limited. She relies upon the fact, as noted by SDJ Arbuthnot, that the witness Rene Mugenzi was aware of RaS as the metamorphosis or successor to UNISODEC. The submission is in part that the judge was insufficiently sensitive to the practical realities for opposition parties to the Kigali regime. Caution as to the adverse consequences of opposition mean that activities may be muted.

489. Much of the evidence already addressed in the course of our judgment underscores the determination of the Rwandan regime to stamp out opposition.

490. Ms Malcolm submits that Peter Mutabaruka's evidence demonstrates that RaS is of growing influence in Tanzania, a country where opposition to and conflict with the GoR is established. The further submission is that SDJ Arbuthnot "failed to analyse the parallels between this case and those of Patrick Karageya and Faustin Nyamwasa", members of another opposition party based in South Africa, both of whom were tried and convicted of national security offences in their absence. Karageya was subsequently murdered, as we have noted elsewhere.

491. Ms Malcolm also relies upon the evidence of the witness Patrice Niyonteze, who suggests in his witness statement that Mutabaruka "is accused because of his

position", distinguishing his own position as someone not able to influence or mobilise people and therefore not accused.

492. The reply to these specific points on behalf of the Appellant can be summarised as follows. The evidence of Mutabaruka's son, Peter Mutabaruka, and his long-standing friend Rugeruza was "entirely self-serving and deeply unconvincing". The conclusions of the Senior District Judge were correct. Cross-examination of Rugeruza demonstrated that Rwanda Arise and Shine was not a continuation of UNISODEC, and indeed was not formed until, at the earliest, around 2012. Hence the creation of "an alleged party of opposition" post-dates the investigation into Mutabaruka, and calls into question the genuineness of the political activity. Moreover there is no "cogent evidence" that the party operates in any recognisable sense. Rugeruza was said to be part of the party structure, but could not explain the party's aims. Peter Mutabaruka's evidence also exposed the party as a "sham", given his incapacity to answer as to ordinary details of the party's membership, location and activity. His answers were too thin to be credible, even allowing for caution as to individual names. Peter Mutabaruka did confirm that the RaS had only operated publicly over the last two to three years, further undermining the suggestion that this extradition is for political reasons. In short, the reliance on RaS is reliance upon a party "created as a cynical ploy to provide CMU with an additional defence to these proceedings".

493. Taking all of this evidence and these arguments into account, we do not conclude that the Senior District Judge was in error or wrong in her conclusions. On the contrary, her overall conclusion that there was no sufficiently compelling evidence that Mutabaruka was a significant political figure is undisturbed by the submissions made. For those reasons, we conclude that this aspect of the case adds nothing to the concerns about fair trial expressed elsewhere in this judgment.

Celestin Ugirashebuja: Abuse of Process

494. The claim of abuse of process in relation to Ugirashebuja's criminal proceedings before the *gacaca* courts was the subject of no substantial oral submissions before us. The matter was dealt with by the Senior District Judge between paragraphs 658 and 664 of her judgment. She heard a number of live witnesses on this issue, in particular two anonymised witnesses: CU/2 and CU/3. Each was a former *gacaca* judge, CU/2 having been one of the judges acquitting Ugirashebuja.

495. As the Senior District Judge pointed out, Ugirashebuja was tried by the *gacaca* court in Kigoma and acquitted after hearing prosecution and defence witnesses. Quite extensive papers relating to these proceedings have been exhibited and SDJ Arbuthnot heard reasonably full oral evidence via video link from Rwanda. The essence of the submissions and evidence to SDJ Arbuthnot from the Respondent Ugirashebuja was that the *gacaca* acquittal was probably reached and that the quashing of that acquittal by the *gacaca* court of appeal was procured by the GoR, through intermediaries. In this area of the case, SDJ Arbuthnot had a clear advantage over us since there was extensive oral evidence and she was able to make an assessment of the witnesses. As she made clear, she reached the view in this instance that:

> "the brief reasons the court [*gacaca* court of appeal] 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" (judgment, paragraph 662)

496. We have read with care the written material, witness statements and transcripts of evidence of these witnesses. We are not able to conclude that the decision of SDJ Arbuthnot on this point was wrong. However, a further point arises. In paragraph 663 of her judgment, she noted that there was a distinction between the evidence before the Rwoga *gacaca* hearing and the Kigoma allegations, which were quite discrete. None of the 16 witnesses relied on in the request before the Senior District Judge were witnesses against Ugirashebuja in the Rwoga *gacaca* hearing. She noted that the Claimant's witness, Ms Nerad, stated that the Rwoga *gacaca* hearing related to different allegations in a different sector, made by different witnesses. There may have been some "small overlap". In paragraph 663, in addition to the lack of significant overlap, SDJ Arbuthnot simply found that she could not conclude there were reasonable grounds for "believing the conduct alleged by CU may have occurred. I do not find an abuse in these circumstances".

497. Although the events in these *gacaca* proceedings are often hard to follow in detail, from the evidence and transcripts available, we cannot conclude that the decision by SDJ Arbuthnot on this aspect of the case was wrong. In this instance the lack of overlap, combined with the apparently comprehensible reasons for the *gacaca* quashing, means, taken together, that we cannot find the basis for an abuse of process in relation to Ugirashebuja on the request for extradition presented by the Appellant. Hence, on this aspect of the case, the cross-appeal is dismissed.

Summary of Conclusions

498. For the reasons given, we find bars to extradition in the cases of Mutabaruka and Nteziryayo. In each case extradition would represent a breach of Section 80 of the Extradition Act 2003. In the case of Nteziryayo, the cross-appeal succeeds on that point.

499. In respect of all Respondents, we consider the Senior District Judge was correct in her conclusion that, if extradited, they would be at risk of a flagrant denial of fair trial. We conclude as of the date of this judgment that remains the case. As indicated, we leave open a final opportunity, if the Appellant wishes to take it, to seek to persuade the Court that conditions will be put in place sufficient to overcome that bar to extradition.

ANNEX 1
EXTRADITION ACT 2003

79 Bars to extradition

(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—

(a) the rule against double jeopardy;

(b) extraneous considerations;

(c) the passage of time;

(d) hostage-taking considerations.

80 Rule against double jeopardy

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.

81 Extraneous considerations

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

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

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

82 Passage of time

A person's extradition to a category 2 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have—

(a) committed the extradition offence (where he is accused of its commission), or

(b) become unlawfully at large (where he is alleged to have been convicted of it).

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.

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

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

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

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

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

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

(c) to the extent to which the statement appears to supply evidence which would not be readily available if the statement were not treated as being admissible evidence of the fact;

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

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

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

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

87 Human rights

(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 (c. 42).

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

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

95 Speciality

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

(2) But subsection (1) does not apply if the person consented to his extradition under section 127 before his case was sent to the Secretary of State.

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

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

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

(4) The offences are—

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

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

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

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

(5) Arrangements made with a category 2 territory which is a Commonwealth country or a British overseas territory may be made for a particular case or more generally.

(6) A certificate issued by or under the authority of the Secretary of State confirming the existence of arrangements with a category 2 territory which is a Commonwealth country or a British overseas territory and stating the terms of the arrangements is conclusive evidence of those matters.

ANNEX 2
Extract From
Brown v Government of Rwanda [2009] EWHC 770 (Admin)

BACKGROUND

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

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

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

10. At length domestic and international pressure persuaded President Habyarimana to accept a multi-party system in principle, implemented by a new constitution promulgated on 10 June 1991 which established four further political parties. Meanwhile Tutsi exiles launched incursions into Rwanda under the banner of the Rwandan Patriotic Army ("RPA"). Violent incidents ensued. In early 1992 the President began the training of youth members of the MRND to form militias known as the *Interahamwe.* The *Interahamwe* later massacred Tutsi, and committed other crimes which largely went unpunished. The division between Hutu and Tutsi widened. In March 1992, a group of Hutu hard-liners founded a new radical political party, the CDR, which was more extremist than Habyarimana himself.

11. We should make some reference to the office of *bourgmestre*, which was held by three of the appellants. Until the time of the genocide Rwanda was divided into eleven prefectures, each headed by a *prefet.* The prefectures were further divided into communes; and the *bourgmestre* was in effect the mayor of the commune. He had many public functions and considerable legal power and authority. A decree of 20 October 1959, originally passed by the colonial powers but still good law in 1994, gave the *bourgmestre* power to order the evacuation, removal or internment

of persons in a state of emergency. He had judicial functions, and was also a trusted representative of the President; as such he had a series of unofficial powers and duties. He was a figure of great importance in the daily life of ordinary people, who would look to him for protection. The Trial Chamber of the International Criminal Tribunal for Rwanda (the ICTR: it has an important place in the arguments before us, and we will explain its provenance and jurisdiction below) found in its first judgment, in the case of *Akayesu* (delivered on 2 September 1998), that:

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

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

THE GENOCIDE

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

> "106. … On 6 April 1994, President Habyarimana and other heads of State of the region met in Dar-es-Salaam (Tanzania) to discuss the implementation of the peace accords [sc. which had been signed earlier]. The aircraft carrying President Habyarimana and the Burundian President, Ntaryamirai, who were returning from the meeting, crashed around 8:30 pm near Kigali airport. All aboard were killed.
>
> 107. The Rwandan army and the militia immediately erected roadblocks around the city of Kigali. Before dawn on April 7 1994, in various parts of the country, the Presidential Guard and the militia started killing the Tutsi as well as Hutu known to be in favour of the Arusha Accords and power-sharing between the Tutsi and the Hutu. Among the first victims were a number of ministers of the coalition government, including its Prime Minister, Agathe Uwilingiyimana (MDR), the president of the Supreme Court and virtually the entire leadership of the *parti social démocrate* (PSD). The constitutional vacuum thus created cleared the way for the establishment of the self-proclaimed Hutu-power interim government, mainly under the aegis of retired Colonel Théoneste Bagosora.
>
> 108. Soldiers of the Rwandan Armed Forces (FAR) executed ten Belgian blue helmets, thereby provoking the withdrawal of the Belgian contingent which formed the core of UNAMIR. On April 21 1994, the UN Security Council decided to reduce the peace-keeping force to 450 troops.

> 109. In the afternoon of 7 April 1994, RPF troops left their quarters in Kigali and their zone in the north, to resume open war against the Rwandan Armed Forces. Its troops from the north moved south, crossing the demilitarized zone, and entered the city of Kigali on April 12 1994, thus forcing the interim government to flee to Gitarama.
>
> 110. On April 12 1994, after public authorities announced over Radio Rwanda that 'we need to unite against the enemy, the only enemy and this is the enemy that we have always known...it's the enemy who wants to reinstate the former feudal monarchy', it became clear that the Tutsi were the primary targets. During the week of 14 to 21 April 1994, the killing campaign reached its peak. The President of the interim government, the Prime Minister and some key ministers travelled to Butare and Gikongoro, and that marked the beginning of killings in these regions which had hitherto been peaceful. Thousands of people, sometimes encouraged or directed by local administrative officials, on the promise of safety, gathered unsuspectingly in churches, schools, hospitals and local government buildings. In reality, this was a trap intended to lead to the rapid extermination of a large number of people.
>
> 111. The killing of Tutsi which henceforth spared neither women nor children, continued up to 18 July 1994, when the RPF triumphantly entered Kigali. The estimated total number of victims in the conflict varies from 500,000 to 1,000,000 or more."

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

> "114. Even though the number of victims is yet to be known with accuracy, no one can reasonably refute the fact that widespread killings were perpetrated throughout Rwanda in 1994.
>
> 115. Indeed, this is confirmed by the many testimonies heard by this Chamber. The testimony of Dr. Zachariah who appeared before this Chamber on 16 and 17 January 1997 is enlightening in this regard. Dr. Zachariah was a physician who at the time of the events was working for a non-governmental organisation, *'Médecins sans frontières'*. In 1994 he was based in Butare and travelled over a good part of Rwanda upto its border with Burundi. He described in great detail the heaps of bodies which he saw everywhere, on the roads, on the footpaths and in rivers and, particularly, the manner in which all these people had been

killed. At the church in Butare, at the Gahidi mission, he saw many wounded persons in the hospital who, according to him, were all Tutsi and who, apparently, had sustained wounds inflicted with machetes to the face, the neck, and also to the ankle, at the Achilles' tendon, to prevent them from fleeing. The testimony given by Major-General Dallaire, former Commander of the United Nations Assistance Mission for Rwanda (UNAMIR) at the time of the events alleged in the Indictment, who was called by the defence, is of a similar vein. Major-General Dallaire spoke of troops of the Rwandan Armed Forces and of the Presidential Guard going into houses in Kigali that had been previously identified in order to kill. He also talked about the terrible murders in Kabgayi, very near Gitarama, where the interim Government was based and of the reports he received from observers throughout the country which mentioned killings in Gisenyi, Cyangugu and Kibongo.

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

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

118. In the opinion of the Chamber, there is no doubt that considering their undeniable scale, their systematic nature and their atrociousness, the massacres were aimed at exterminating the group that was targeted. Many facts show that the intention of the perpetrators of these killings was to cause the complete disappearance of the Tutsi. In this connection, Alison Desforges, an expert witness, in her testimony before this Chamber on 25 February 1997, stated as follows: 'on the basis of the statements made by certain political leaders, on the basis of songs and slogans popular among the Interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that - as they said on certain occasions - their children, later on, would not know what a Tutsi looked like, unless they referred to history books'. Moreover, this testimony given by Dr. Desforges was confirmed by two prosecution witnesses, witness KK and witness OO, who testified separately before the Tribunal that one Silas Kubwimana had said during a public meeting chaired by the accused himself that all the Tutsi had to be killed so that

someday Hutu children would not know what a Tutsi looked like.

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

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

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

ANNEX 3

Extract from the Judgment of SDJ Arbuthnot

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 interference 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.