IN THE CITY OF WESTMINSTER MAGISTRATES' COURT

BETWEEN:

THE GOVERNMENT OF THE REPUBLIC OF RWANDA

-v-

VINCENT BAJINYA, CHARLES MUNYANEZA, EMMANUEL NTEZIRYAYO, CELESTIN UGIRASHEBUJA

1. This is a request by the Government of the Republic of Rwanda for the extradition of VINCENT BAJINYA, CHARLES MUNYANEZA, EMMANUEL NTEZIRYAYO and CELESTIN UGIRASHEBUJA. The charges alleged in Rwanda against all defendants are the same, viz Genocide; Conspiracy to commit genocide; Complicity in genocide; Crimes against humanity; Premeditated murder and conspiracy to commit murder; Formation, membership, leadership and participation in an association of a criminal gang, whose purpose and existence is to do harm to people or their property; Inciting, aiding or abetting public disorder; Participation in acts of devastation, massacres and looting. Although the defendants face the same charges, they are not connected with each other in any way, the allegations relating to different parts of the country during the alleged genocide in 1994.

2. The United Kingdom does not have an extradition treaty with Rwanda and the position is governed by s.194 of the Extradition Act 2003. In summary, that section provides that if the Secretary of State believes that arrangements have been made between the United Kingdom and, in this case, Rwanda, for the extradition of a person and that territory is not a Category 1 nor Category 2 territory, he may issue a certificate to the effect that he is satisfied on those points and the Act will then apply as if the country in question were a Category 2 territory. Certain provisions of the Act are excluded and other modifications may be made, which must be specified in the certificate.

3. The first Memorandum of Understanding was signed on 4th September 2006 and a s.194 certificate was issued on 11th October 2006. However, a second Memorandum was signed on 22nd December 2006, the purpose of which was to allow a longer period for the production of papers in due course in the extradition proceedings, and, on the same day, a second s.194 certificate which contained the following modification: "in section 74(ii)(a) the required period of '45 days' is replaced by one of '95 days' ". This modification has been considered already by the Administrative Court in habeas corpus proceedings and been upheld. I do not propose to set out the terms of the Memorandum at this point, but will refer to it as and when necessary.

4. Certain preliminary issues were argued at the beginning of the proceedings, the first of which related to disclosure. S.77 of the Act states:

> "S.77(1) In England and Wales, at the extradition hearing the appropriate judge has the same powers (as nearly as may be) as a magistrates' court would have if the proceedings were the summary trial of an information against the person whose extradition is requested".

5. However, a long line of authorities has made it clear that the above general provision does not apply so far as disclosure is concerned.

6. The first of these cases was **R v Pentonville Prison, ex p Lee [1993] WLR 1294**. At p.1298 Ognall J said at Para D:

> "It is important to remember that the conduct of extradition proceedings is entirely the creature of statute. This has a number of consequences.
>
> (1) The requesting state must be the sole arbiter of such material as it chooses to place before the court in support of its application and in purported compliance with the

> relevant domestic extradition legislation. It alone will decide what material in support of its allegations it places before the Secretary of State and the court under sections 7 and 9 of the Act of 1989 ….. "

7. The words "as nearly as may be" also appeared in the 1989 Extradition Act. Ognall J. continued:

> "Those words must be taken to mean as nearly as may be consistent with the terms and purpose of the extradition legislation".

8. The next case in this line of authorities is **Lodhi v Governor of HMP Brixton and the Government of the United Arab Emirates [2001] EWHC Admin 178**.

9. The Government had no bilateral extradition treaty with the United Arab Emirates but jurisdiction in the extradition proceedings was based on the Extradition (Drug Trafficking) Order 1997 which gave effect to this country's obligations under the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This was not what would now be a s.194 request, but was akin to it in so far that there was no extradition treaty with the Emirates. In his judgement Brooke L.J., after quoting from the judgement of Ognall J. in **Lee**, said in Para 115 "It follows that the principles set out by Ognall J. in the passage from his judgement in **ex p. Lee** are still good law".

10. The two latest authorities on this point are both 2007 cases. The first is the Privy Council decision in **Knowles v U.S. Government [2007] IWLR 47**, a case which originated in the Bahamas. In the judgement of their Lordships, which was delivered by Lord Bingham, it was said at Para 34:

> "Some doubt has arisen concerning a requesting state's duty of disclosure in extradition cases. Giving the judgement of the Divisional Court in **ex p. Lee** Ognall J. ……………. observing that

'fairness is not a criteria relevant to the function of the committing court'. It was suggested in **ex p. Kashamu** that this observation could not stand in the light of Articles 5 and 6 of the European Convention but in **Lodhi** Ognall J's judgement was held by another Divisional Court to remain good law. This was because it was held in **Application No. 10479/83 v United Kingdom [1984] 6EHRR 373** that Article 6 has no application to extradition proceedings".

11. He continued at Para 35:

> "The Board would hesitate to adopt the full breadth of Ognall J's observation. There are many respects in which extradition proceedings must, to be lawful, be fairly conducted. But a requesting state is not under any general duty of disclosure similar to that imposed on a prosecution in English criminal proceedings. It does, however, owe the court of the requesting state a duty of candour and good faith. Whilst it is for the requesting state to decide what evidence it will rely on to seek a committal, it must in pursuance of that duty disclose evidence which destroys or severely undermines the evidence on which it relies. It is for the party seeking to resist an order to establish a breach of duty by the requesting state".

12. Although this was a judgement of the Privy Council it is now taken as representing a statement of the law on disclosure in extradition proceedings.

13. Finally, in **R (Government of the United States of America) v Bow Street Magistrates' Court [2007] IWLR 1157**. At Para 85 the Lord Chief Justice said

> "Neither the rules concerning disclosure in a civil action, nor those concerning disclosure in a criminal trial can be applied to an extradition hearing. Furthermore, these rules form part of an

adversarial process which differs from extradition proceedings. Where an order for disclosure is made, it requires one party to disclose documents to the other, not to the court. But where extradition is sought, the court is under a duty to satisfy itself that all the requirements for making the order are satisfied and that more of the bars to making the order exists.

86. There is a further objection to ordering disclosure. The order will be made either against a judicial authority within the European Union or against a foreign state that is requesting the Secretary of State to comply with foreign obligations. In neither case would it be appropriate to order discovery. Were it appropriate to make such an order, the only sanction for failure to comply with it would be to reject the request for extradition".

14. Although the above is set out as a statement of law regarding disclosure, it is upon this that the government relies in opposing the application for disclosure by the requesting persons, upon whom the burden lies in satisfying the court that there has been a breach of duty by the requesting state.

15. On behalf of the defendants it was argued that the ordinary rules of disclosure in extradition proceedings do not apply in this case. The main submissions were made by Mr Watson on behalf of Mr Ugirashebuja, but adopted by the other defendants. It was submitted that the position has changed since the decision in **Lodhi** as a result of Article 5(4) of the ECHR. However, it is quite clear from the subsequent authorities that Article 6 of the Convention does not apply in extradition proceedings, and to seek to rely on Article 5(4) is merely an attempt to circumvent the Strasbourg decision and has no merit. The basis of submission was that there should be equality of arms, which, for this purpose, meant full disclosure. The cases which have been heard subsequent to 2000 make it clear that this does not apply to disclosure in extradition cases.

16. The second limb of the argument was based on the fact that there is no extradition treaty with Rwanda. It was submitted that there are five categories of territory for extradition purposes viz Part 1 Territories; Part 2 Territories where no prima facie evidence is required; Part 2 Territories where prima facie evidence is required; Territories where extradition proceedings are governed by Conventions, such as **Lodhi**; and finally, Territories where ad hoc arrangements are in place, such as the present case. The position has changed since cases such as **Lee** where the court had, in effect, to treat extradition proceedings as committal proceedings, but now must be treated as a summary trial. **Lodhi** should be distinguished as that was based on a Convention.

17. It was further submitted that full disclosure should be given because of the lack of a bilateral treaty with Rwanda. The Memorandum of Understanding is a temporary arrangement covering only the current proceedings. This is indicative of a lack of trust of the Rwanda government on the part of the British authorities.

18. In support of this argument, Mr Watson relied on the comments of various bodies, such as Amnesty International, which, it was argued, opposed the transfer of cases from the ICTR to the domestic Rwandan courts. Further, the present position was contrasted with, for example, requests from the USA where the papers will usually set out the arrangements for disclosure, whereas nothing of a similar nature has been put forward here.

19. Finally, the court's attention was directed to statements made during the passage of the Extradition Bill in the House of Lords on what is now s.194. Lord Filkin in moving (in the Grand Committee) the insertion of the clause referred to countries with which the UK does not have extradition arrangements as "the kinds of country which we believe are unlikely to meet our standards and tests in regard to human rights".

20. At the Report stage, Baroness Scotland said "The countries with which we do not have general extradition arrangements are often the kind of

countries where we might be unable to extradite for human rights reasons". It was submitted that taking all these matters together, the normal rules of disclosure should apply, just as if there were ordinary domestic criminal proceedings.

21. S.194 of the Act makes it clear that once the Secretary of State has issued the certificate, the matter is then to be treated as a Category 2 case, but one in which prima facie evidence will be required. There is no justification for treating this as other than a Request governed by Part 2 of the Act. Although under the 2003 Act such proceedings are to be treated as a summary trial as opposed to committal proceedings under the 1989 Act, the phrase "as nearly as may be" appears in both Acts and cases such as the ones cited earlier which have been decided subsequently to the 2003 Act make it clear that the position on disclosure has remained unchanged.

22. Similarly, there is no reason to distinguish the case of **Lodhi** because it was a request initiated under the Vienna Convention. Finally, whatever the misgivings expressed by the Government in the House of Lords, the reality is that they passed the provision which is now s.194 and were content on the face of the statute to allow such countries to be treated as Category 2 territories. The wording of the statute is quite clear and the ordinary rules of disclosure must apply in this case.

23. I am satisfied, therefore, that there is no general duty of disclosure on Rwanda, but, there, nevertheless, remains their duty of good faith and candour, which requires them to disclose matters which destroy or severely undermine their case.

24. Questions were raised about the role of the CPS in the questions of disclosure. The CPS represents the Government of Rwanda in these proceedings. I am satisfied that the relationship is not a solicitor/client relationship. The duty of disclosure lies on the requesting state in Part 2 cases – per Lord Phillips C.J. in **R (USA) v Bow Street Magistrates'**

Court, not on the CPS although I am satisfied that proper advice has been tendered to the Rwandan authorities in this context.

25. On behalf of the individual defendants, various arguments were put forward as evidence of lack of candour and good faith on the part of the Rwandan authorities. In the case of Munyaneza, one element of this related to enquiries which had been made in respect of the position when he was in South Africa in 1999. This would be relevant to the question of whether his extradition would be barred because of passage of time, and in any event would only come into play when the defence was advanced. Although Mr Munyaneza had submissions made on his behalf his case was used by others as the basis for saying that the Rwandan authorities were not acting in good faith. Further reference is made in the witness statements to a man named Simba. He has appeared before the ICTR as a defendant and mention was made of Mr Munyaneza in that case. It would appear that some of the witnesses in that case did not have their evidence accepted by the court. Some of the incidents in that trial are the same as those alleged against one of the current defendants. The witnesses in that case gave evidence anonymously. It was submitted that the Rwandan authorities must have been aware of their identities and so were not acting in good faith as they did not disclose their names. To do so would destroy or at least severely undermine their case.

26. However, it became clear that this was based on a misconception. The trials were conducted in the ICTR in a neighbouring state. The Rwandan State had no connection whatsoever with those trials. They were investigated independently and prosecuted by counsel who, again, had no connection whatsoever with Rwanda. The Rwandan authorities had no knowledge, therefore, who those anonymous witnesses were.

27. Special emphasis was placed on one witness, Valerie Bereniki. She had appeared as a Defence witness in an ICTR case but was now to be a prosecution witness in this case if extradition is ordered. Her statements in the two cases appear to be at odds with each other and, it was submitted, it was evidence of lack of good faith on the part of the

Rwandan authorities that they had not disclosed her previous statement. This submission is not accepted, as it was a defence statement and was a case in which the Rwandan authorities had no part – the only difference here being that the witness had waived her right to anonymity and so her identity was known.

28. A further submission which was made related to the timing of the taking of the statements from potential witnesses in this case. All the statements are dated on or after 17/1/07. The original Memorandum of Agreement was entered into on 14th September 2006. Therefore, it is said, there must have pre-existing material before 17th January 2007, if not before 14th September 2006 or the Secretary of State would not have entered into that agreement.

29. Of those witnesses who have given statements against her client, Miss Ellis pointed to the fact that six are in prison; two are awaiting trial and three of the others are Tutsi. What, it was submitted, was not known were the circumstances under which those statements were made and whether any inducements were made.

30. This limb was developed by Mr Jones on the basis of the evidence to be presented in due course as to the Human Rights position. According to the reports from various international bodies there is evidence of torture in prison. Some of the witnesses against these four defendants have been in prison for nine years or more and, so it is argued, the statements may have obtained from these witnesses by the use of torture.

31. Miss Ellis supported her argument by reference to Articles 7 9 and 11 of the Organic Law. It is the current plan that the ICTR will be wound down and cases relating to the genocide will be heard in Rwanda by the domestic courts. This part of the Organic Law deals with the transfer of statements which have been taken by the investigations of the International Tribunal to, and how they may be used, in the Rwandan courts.

32. This, it is argued, is within the knowledge of the Rwandan authorities and any such statements should be disclosed. Not to do so amounts to a lack of good faith and candour.

33. The burden lies on the defendants to satisfy the court that the requesting state is behaving with a lack of candour and good faith in this case. This I do not accept. As pointed out early in these Reasons, there is no wide ranging duty of disclosure. The requesting state is under a duty to disclose anything which might destroy or severely undermine their case. There has been no evidence of this. There has been speculation as to whether anonymous witnesses in other cases whose evidence was not accepted by the Tribunal, albeit on occasion for lack of corroboration, are witnesses in this case. With the exception of one passing reference to Rwandan investigators working with the ICTR personnel in 1999, there is no evidence whatsoever that these witnesses are the same. Indeed, as pointed out earlier, the Rwandan authorities had no part to play in those cases.

34. There is speculation as to what materials if any were in existence before the signed and dated statements of the witnesses in this case. There is further speculation as to whether inducements were made to the witnesses or what were the circumstances under which those statements were made. As far as the Organic Law is concerned, there is no evidence as to which, if indeed, any statements have transferred.

35. A request was submitted in August 2007 by those acting on behalf of Bajinya of items required to be disclosed. This ran to twenty seven numbered paragraphs. There is no need to reproduce them seriatim, suffice it to say that it is akin to a list of items required to be disclosed in English criminal proceedings. There is a similar document, albeit not as long and detailed, on behalf of Nteziryayo. The same comment applies. These applications are outside the rules of disclosure in extradition proceedings. There is an even shorter list in the submission on behalf of Ugirashebuja but again it fails for the same reasons.

36. There is no evidence that the Rwandan authorities have in their possession material which will destroy or severely undermine their case. Even if the attempts to identify the anonymous witnesses were correct, this does not go far enough. It is a question of how the trial court views these witnesses. In any event, there are other witnesses in these cases. "Destroy or severely undermine " is a high hurdle to surmount. There has been no evidence nor submission that comes anywhere near it. In brief it has been a fishing expedition and in those circumstances I am satisfied that the position of Rwanda in this case is the same as any Category 2 territory and that there has been no lack of candour and good faith on their part and that, in the circumstances, no order should be made as to disclosure.

37. As this request was initiated by a Memorandum of Understanding under s.194 and the appropriate certificates were issued by the Secretary of State under that section, the application must be treated as if it were a request for extradition to a designated Part 2 territory. The first requirement under s.70 of the Act is that a valid request must be received from the requesting state. S.70(3) states:

> "A request for a person's extradition is valid if –
>
> (a) it contains the statement referred to in sub-section (4), and
>
> (b) it is made in the approved way".

Sub-section (4) reads:

> "The statement is one that the person
>
> (a) is accused in the Category 2 territory of the commission of an offence specified in the request …………".

and sub-section (7):

"A request for extradition to any other Category 2 territory is made in the approved way if it is made –

(a) by an authority of the territory which the Secretary of State believes has the function of making requests for extradition in that territory, or

(b) by a person recognised by the Secretary of State as a diplomatic or consular representative of the territory".

38. Provided that the above conditions are satisfied, then the Secretary of State must issue a certificate under s.70. This was done in respect of the defendants on 12th March 2007 and certifies that the request was valid and made in the approved way.

39. The initial stages of the extradition hearing are governed by s.78 of the Act. S.78(2) requires that the judge decides whether the documents sent by the Secretary of State consist of (or include) –

(a) the documents referred to in section 70(9);

(b) particulars of the person whose extradition is requested;

(c) in the case of a person accused of an offence, a warrant for his arrest issued in the Category 2 territory.

40. Dealing with these individually, the documents referred to in s.70(9) are the request and the certificate. S.70(9)(c) refers to any relevant Order in Council – but this is not relevant in this case. The other two documents were sent in respect of each defendant.

41. (b) Dealing with each of the defendants:

Bajinya

The deposition of Jean Bosco Mutangana, the Prosecutor with National Jurisdiction responsible for these cases sworn on 6th March 2007 contains details of the requested person and annexes his photograph. A second deposition sworn on 28th March 2007 has attached a copy of a passport application and of the resulting passport. His identity has also been confirmed by a number of people who have given witness statements who were shown his photograph.

Munyaneza

A similar deposition sworn on 6th March by Mr Mutangana contained a photograph, which was shown to a witness who confirmed the identity of the person in the photograph.

Nteziryayo

A third deposition of 6th March contains a photograph of this defendant and also shown to someone who has made a statement and who confirmed the identity.

Ugirashebuja

Again there is a deposition with photograph attached. The photograph in this case was taken at a wedding. A witness gave this photograph to the Prosecutor General's Office and the defendant was identified by persons who attended the wedding.

42. I am satisfied, therefore, that S.78(2)(b) is satisfied.

43. (c) In each case the first deposition of Mr Mutangana includes the following:

(1) the offences for which each person's extradition is sought.

In all four cases the offences are the same: genocide; conspiracy to commit genocide; complicity in genocide; crimes against humanity; premeditated murder and

conspiracy to commit murder; formation, membership, leadership and participation in an association of a criminal gang, whose purpose and existence is to do harm to people or their property; inciting, aiding or abetting public disorder; participation in acts of devastation, massacres and looting.

(2) the relevant law in respect of each offence. The first four are said to be contrary to the Organic Law and the remainder contrary to the Rwandan Penal Code.

(3) A brief summary of the allegations against the defendants is contained in each individual deposition.

(4) Witness statements in support of the prima facie case are annexed in respect of each person.

44. Again I am satisfied that this requirement is met.

45. (d) Arrest warrants in respect of all four defendants dated 24th August 2006 have been sent to the court.

46. At this stage the court has to be satisfied that documents as set out in paragraphs (a) – (c) have been sent to the court. This has been done.

47. What, however, is in dispute is whether the request is a valid one, as, it is submitted, there is a conflict between s.78(2) and the contents of the Memorandum of Understanding. In particular, Paragraph 6 of the Memorandum states:

(1) The request will be in writing and communicated through diplomatic channels.

(2) The request will be supported by:

(a) The means for identifying (the defendant)

(b) The indictment, or judgement, or ruling on detention or another equivalent document, is the original or a certified copy.

These papers will contain: the name and surname of (the defendant) and other data necessary to establish his identity, the description of the act, the legal qualification of the offence and the evidence on which the suspicion rests,

(c) If (the defendant) is accused but not convicted of the extradition offence, such evidence as would justify committal for trial under the laws of the requested Participant and

(d) An extract from the criminal law of the Requesting Participant to be applied ….. against (the defendant) in regard to the offence which prompted the petition for extradition and the sentencing provisions applicable to that offence ……..

48. No points are taken on paragraphs (a) and (c). On behalf of the defendants it was submitted that the request which has been submitted does not comply with paragraphs (b) and (d) and the request is, therefore, invalid.

49. It was submitted by Ms Ellis and adopted by the others that none of the documents listed in paragraph 6(2)(b) has been supplied and that the papers which have been supplied do not disclose

(a) the description of the act
(b) the legal qualification of the offence
(c) the evidence on which the suspicion rests.

50. Whilst the request makes reference to certain charges, no particulars are provided and there is no link between the alleged offences with any described act or the evidence relied on in support thereof. In respect of the charge alleging crimes against humanity, it is said the underlying act is not even specified.

51. Finally, there is no extract of the criminal law as required by paragraph 6(2)(d).

52. Taking these submissions in reverse order, the reference to the extract of the criminal law would seem to correspond with the provisions in s.2(4)(c) of the Act which specifies what is to be contained in a European Arrest Warrant, and, in particular "any provision of the law of the Category 1 territory under which the conduct is alleged to constitute an offence". It is the inevitable practice to set out the relevant law in full in EAWs. In this case, it is arguable that what has been provided is a summary and not an extract.

53. It was further argued that as the list of charges prepared by the Government differ from those supplied by Rwanda, this is an implicit acknowledgement that there is no evidence in respect of some of the Rwandan charges. There is no merit in that submission in so far that the draft charges prepared by the CPS are in respect of the question of whether the offences in respect of which extradition is sought are extradition offences under the Act and reflect the dual criminality test. In any event, what must be considered there is the conduct of the defendant, not whether the English charges exactly mirror the Rwandan ones.

54. As far as paragraph (b) is concerned, the wording is slightly ambiguous in so far as the use of "These papers" is infelicitous. Does it mean "Such a document"? In any event, identification is dealt with under paragraph (a) and (c) deals with the evidence. What was suggested on behalf of the defendants was that "indictment" in this context should be interpreted

in the same way as the word is used in English domestic criminal proceedings, and there is an absence of such a document.

55. It was submitted that this absence of such a document was fatal as far as the Rwandan government was concerned. The Memorandum of Understanding had to be complied with. If it was not, then the Request as provided was not valid and, therefore s.78(2) was not satisfied and the court should exercise its powers under s.78(3) and discharge the defendant.

56. On behalf of the requesting state Mr Lewis submitted that any interpretation of the Memorandum of Understanding is a matter for the High Court, not this court. This court has no powers outside the 2003 Act powers. In support of this he relied on the case of **R v Governor of Pentonville Prison ex p. Sinclair [1991] 2AC 64** where at P.89 Para E, Lord Ackner said "Mr Jones is thus supported in his contention that monitoring the provisions of the Treaty is an executive, not a magisterial, function". Again at P.91 Paras F-G: "I cannot accept that the legislature intended that it was to be part of the function of a police magistrate to preside over lengthy proceedings ….. hearing heavily contested evidence ….. directed to whether there had been due compliance with the many and varied obligations of the relevant Treaty".

57. Similarly in **R v Lyons [2003] IAC 976** at 992 Para 27 Lord Hoffman said: "It is firmly established that international treaties do not form part of English Law and the English courts have no jurisdiction to interpret them or apply them".

58. By analogy, it was submitted that the Memorandum of Understanding was a treaty between the two countries. The duty of the court is to apply the statutory scheme contained in the 2003 Act.

59. I am satisfied that there is no power for this court to, as it were incorporate the terms of the Memorandum with the scheme of the 2003 Act.

60. That document was an agreement between two governments. Indeed the Memorandum is shown as made between the two governments who are described as the Participants. Paragraph 6 sets out what is required from the Rwandan government as far as the request and supporting documents are concerned.

61. Paragraph 6(1) makes it clear that the request will be communicated through diplomatic channels. The request in any Part 2 request, which this is by virtue of s.194, is made government to government. Having received the request, the Secretary of State, if satisfied that the request is in order, issues a certificate under s.70 which is then sent to the court along with the request.

62. S.78(2) is prescriptive in its terms as to the duty of the appropriate judge. It is to satisfy himself that the documents and items listed in that sub-section have been sent to him by the Secretary of State. Other documents may be sent, but this is the minimum requirement. There is no power to examine the documents. There is an assumption that the Secretary of State was satisfied before he issued his certificate that the request was in order and that cannot be questioned under s.78(2).

63. This should be contrasted with the position regarding EAWs under Part 1 of the Act. These are requests made judicial authority to judicial authority with no governmental intervention. The only intermediary is the Serious Organised Crime Agency which is the designated authority for the purposes of s.2(7) of the Act and its sole function is to certify that the issuer of the warrant had the authority to do so. S.2 lays out what must be contained in the warrant. It is the duty of the appropriate judge to consider the contents of the warrant to ensure that they comply with the contents of this section. If it does not comply then the defendant must be discharged. Under Part 2 cases, that function is carried out by the Secretary of State. Once his certificate has been issued the extradition court has no power to go behind it.

64. S.194(4) does give the Secretary of State the power to include in the s.194 certificate any modifications to the Act which he considers appropriate. In this case the only modification is the replacement of “45 days” in s.74(11)(a) by “95 days”. Therefore, the Act must apply as passed by Parliament.

65. It must be borne in mind that the Memorandum of Understanding was entered into because there is no extradition treaty with Rwanda. This specifies for the Rwandan benefit exactly what is required for the United Kingdom Secretary of State to be satisfied that he should issue a s.70 certificate. The requirements of other territories might be different.

66. As the Secretary of State has been given an express power to introduce modifications and has not done so in respect of s.78(2) then it cannot be done by inference.

67. I am aware of the argument that Article 5(4) of the ECHR must be taken into account, but I do not consider that this alters my conclusion in any way.

68. At an earlier stage in these proceedings the modification introduced by the s.194 certificate was challenged. This was reported under the name of **Vincent Brown (formerly Bajinya) v Government of HMP Belmarsh [2007] EWHC 498 (Admin)**. That was in the form of habeas corpus proceedings. By analogy, any challenge to the s.70 certificate must be way of similar application to the Administrative Court.

69. In all these circumstances, I am satisfied that the procedural requirements of s.78(2) are met.

70. Next I turn to s.78(4). This reads:

> “If the judge decides that question [i.e. s.78(2)] in the affirmative he must decide whether –

(a) the person appearing or brought before him is the person whose extradition is requested;

(b) the offence specified in the request is an extradition crime;

(c) copies of the documents sent to the judge by the Secretary of State have been served on the person".

71. Sub-section (5) states that the standard of proof as to sub-section (4) is on the balance of probabilities.

72. No issue has been raised on (a) but in any event I am satisfied that the four defendants are the persons whose extradition is sought as they confirmed their names and dates of birth when arrested and also in court.

73. Similarly, no point is taken on (c).

74. The issue here centres on (b). For the purpose of this hearing the definition is contained in s.137(2) of the Act. This provides:

> "The conduct constitutes an extradition offence in relation to the Category 2 territory if these conditions are satisfied –
>
> (a) the conduct occurs in the Category 2 territory;
>
> (b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in that part of the United Kingdom;
>
> (c) the conduct is so punishable under the law of the Category 2 territory (however it is described in that law)".

75. Dealing with the individual paragraphs, it is clear and uncontested that the conduct occurred in Rwanda.

76. Turning to paragraph (b), it is clear from the judgement of Lord Browne-Wilkinson in the case of **R v Bow Street Metropolitan Stipendiary ex p. Pinochet [2000] IAC 147** that the alleged conduct must have been an offence in the United Kingdom at the time that the alleged offence occurred, not at the time of the request. A set of draft English charges has been provided by the prosecution, as is the standard practice in these cases, to satisfy the provision of para (b).

77. Objection was taken that there are no charges relating to crimes against humanity nor formation etc. of a criminal gang. However, the paragraph does not require these to be exactly corresponding charges, but only that the conduct in its totality is covered by English charges. If conduct which is a criminal offence in the requesting state but not in England, however it might be described, then it is not an extradition offence. By way of example only, in some European countries failure to pay child maintenance is a criminal offence. In England it is not criminal conduct, and, therefore, not extraditable.

78. In this case I am satisfied that the conduct alleged against all the defendants would have been punishable by more than twelve months imprisonment in 1994.

79. Turning to paragraph (c) it is clear from the depositions of Mr Mutangana that the penalties for the alleged offences are in excess of the twelve month limit. The maximum penalty for the genocide crimes and crimes against humanity and murder are unlimited, which, in practice, means life imprisonment. The formation of a criminal gang carries a maximum of twenty years in these cases, as does participation in acts of devastation etc. The public disorder offences carry a maximum of ten years imprisonment. It was submitted on behalf of one defendant that there was no evidence before the court that the non-genocide offences were extradition offences because no extract from the criminal law had been

provided to show the punishments. I am satisfied, however, from the deposition of Mr Mutengena that the punishments do satisfy the test laid down in the Act and that these are extradition offences.

80. The real issue here is whether genocide and crimes against humanity are extradition offences. The question raised is whether they were offences in Rwanda in 1994. Reliance is placed on the judgement of Sedley L.J. in the case of **Bentley v Government of the United States of America [2005] EWHC 1078 (Admin)** where it was held that the offence in respect of which extradition was sought had to be a crime in the requesting state at the time when it was alleged that the offence took place, not at the time of the request.

81. In order to decide this question it is necessary to look at the deposition of Mr Mutangana as he sets out the position in some detail. Although submissions have been made on behalf of all the defendants, no evidence has been produced on their behalf.

82. The starting point is the Convention on the Prevention and Punishment of the Crime of Genocide. Article 1 confirms that genocide is a crime under international law which the Contracting Parties undertake to prevent and punish. Article 5 is an undertaking to enact the necessary legislation to, inter alia, provide effective penalties. On behalf of the defendants it is said that this had not been done in 1994.

83. The Convention was ratified by Rwanda in 1975 and implemented in Rwandan law by Decree Law number 08/75 of February 12th 1975.

84. Organic Law 08/96 of 30th August 1996 on the Organisation of Prosecutions for offences constituting the crime of genocide or crimes against humanity committed since 1st October 1996 (sic) made provision for legal procedure and penalties of the crime of genocide committed since October 1990.

85. I am of the view that the first stated date of 1st October 1996 must be an error and should read “1990” in order to correspond with the later date. It is clear that the purpose is to deal with the 1994 killings.

86. The preamble states:

> “Given the need to adopt provision to prosecute and adjudicate the perpetrators of and accomplices in these crimes;
>
> Given the acts committed constitute offences provided for and punished under the penal code as well as the crime of genocide and crimes against humanity;
>
> ………………………………………………………………………………
>
> Given that Rwanda has ratified these three (Geneva) Conventions and has published them in the official Gazette but without having provided for penalties for these crimes;
>
> Given that as a consequence the prosecution must be based on the penal code;
>
> Given that, in order to achieve reconciliation and justice in Rwanda, it is essential that the culture of impunity be eradicated forever;
>
> Given that the exceptional situation in the country requires the adoption of specially adapted measures to satisfy the needs for justice of the people of Rwanda ………..”

87. There have been a number of Organic Laws since that date, the current one being 16/2004.

88. It was submitted that mere ratification of the Convention was not sufficient to make the offence of genocide part of the law of Rwanda,

something further was needed such as parliamentary legislation. On behalf of another defendant, it was submitted that the preamble indicates that as people were being prosecuted under the ordinary penal code and no punishment had been laid down for genocide that these were not offences "under the general criminal law" as required by s.137.

89. As far as the first submission is concerned different states have different methods of passing legislation. Merely because the procedures are different in Rwanda does not mean that they are wrong. Mr Mutengena says quite specifically in his deposition: "and implemented in Rwandan law by Decree Law number 08/75". The use of the word "implemented" can only mean that it became part of the law of Rwanda, after its ratification that year.

90. What is clear and set out in the deposition is that no punishment had been laid down, and for this reason, it appears, that people had been prosecuted under the ordinary criminal code of the country. Nowhere in s.137(2) of the 2003 Act do the words "general criminal law" appear. As long as they were part of the law, which I am satisfied that they were, then they are possible extradition offences.

91. It is noteworthy that the preamble itself to the Organic Law does state that the necessity is to "adopt provision to prosecute and adjudicate the perpetrators". In other words, systems must be put in place to use the existing law on genocide. The law itself is described as "on the Organisation of Prosecution for offences ……….". This imposed a system of prosecution and punishment for offences of genocide committed since 1990.

92. This clearly had a retrospective effect, but only in so far as procedures and punishments were concerned. The basic law was in place.

93. I am satisfied, therefore, that the provisions of s.137(2) are satisfied and that these are all extradition offences. I note in support of this that the ICTR was, of course, entirely retrospective in its work as it was set up

after the 1994 massacres, and although it had not been argued in this case, s.196(3) of the Extradition Act states: "It is not an objection to extradition under this Act that the person could not have been punished for the offence under the law in force at the time when and in the place where he is alleged to have committed the act of which he is accused or of which he has been convicted". The section is headed "Genocide, crimes against humanity and war crimes". Retrospectivity is clearly contemplated where the allegation is one as extreme as genocide and must be employed in the interests of justice in such exceptional circumstances.

94. The final issue to be decided at this stage is the admissibility of the statement of Adama Dieng, the Registrar of the International Criminal Tribunal for Rwanda. The government sought to have this statement accepted as proof of the fact of the genocide in Rwanda, and the background. It did not concern any of these present defendants.

95. The statement was a summary of the background and history leading to the genocide and précised judgements from the Tribunal. No point was taken on receivability under s.202 of the Act, but the defendants objected to its admissibility on the grounds of hearsay.

96. The government sought to rely on s.84(2) and (3) in support of its argument. S.84(2) states:

> " ……. 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 a 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".

97. In this case the statement was not made to a police officer etc. It was prepared by Mr Dieng himself. Furthermore, he would not be able to give direct oral evidence of the facts himself, as he was merely summarising a number of judgements. I am satisfied that this statement cannot be admitted under s.84(2).

98. The next submission was that it should be admitted under the provisions of the Criminal Justice Act 2003 dealing with hearsay. On behalf of the defence it was argued that there was no provision for the evidence to be introduced in this way. The Extradition Act contained its own code for the receiving of evidence. The main section is s.84(2) in Part 2 cases. In addition, there are the receivability provisions of s.202 and s.205 allows for statements and admissions under ss.9 and 10 of the Criminal Justice Act 1967. There are no other provisions in the Act or the Criminal Justice Act to allow the introduction of such evidence. S.84(3) and s.114(2) of the Criminal Justice Act are very similar in setting out what the court has to consider in deciding whether to admit the statement. If the government arguments were correct then s.84(3) would not be necessary.

99. Reliance was also placed on the decision in the case of **the Government of India v Rajarathinam and Bow Street Magistrates' Court [2006] EWHC 2919 (Admin)** where a guide was given as to the use of hearsay, and, in particular, s.84(4), although no reliance has been placed on that sub-section in this case. The provisions of the Criminal Justice Act were not considered in that case.

100. In response Mr Lewis on behalf of the government sought to rely on the case of **R v Governor of Brixton Prison ex p Levin [1997] AC 741** at 747B where Lord Hoffman said:

> "Committal proceedings are of course criminal proceedings and these provisions would make little sense if the metropolitan magistrate could not apply the normal rules of evidence and procedure"

101. That was a case decided under the Extradition Act 1989. It is not clear whether there was a similar section to s.84 in the earlier Act as the case turned on the provisions of s.69 of the Police and Criminal Evidence Act 1984.

102. It lies upon the government to satisfy me that the hearsay provisions of the Criminal Justice Act apply. It is difficult to see why such detailed provisions were inserted in the Extradition Act unless they were meant to be self contained. In these circumstances I do not accept that the provisions of the Criminal Justice Act apply.

103. Finally, the government relied on the principle of judicial notice. The principle of judicial notice is that when matters are so notorious or clearly established or susceptible of demonstration by reference to a readily obtainable source, the evidence of their existence is unnecessary. Some facts are so notorious or so well established to the knowledge of the court that they may be accepted without further enquiry. Others may be noticed after enquiry, such as after referring to works of reference or other reliable and acceptable sources – Phipson on Evidence.

104. There has been widespread reporting of a genocide in Rwanda in the various media. In addition, there have been many governmental and international reports dealing with the situation in Rwanda in 1994. In the case of Karemera in the Appeals Chamber of the ICTR reported on 16th June 2006 at Paragraph 35 it was said:

> "The fact that genocide occurred in Rwanda in 1994 should have been recognised by the Trial Chamber as a fact of common knowledge. Genocide consists of anti acts, including killing, undertaken with the intent to destroy, in whole or in part, a national, ethical, racial or religious group, as such. There is no reasonable basis for anyone to dispute that, during 1994, there was a campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda's Tutsi population ……….."

105. Similarly, in the Canadian case of **<u>Minister of Citizenship and Immigration v Mugesera et Ors</u>**, it was said at paragraph 8 of the judgement:

> "There is no doubt that genocide and crimes against humanity were committed in Rwanda between 7 April and mid-July 1994".

106. It would be flying in the face of all the international and humanitarian agency reports on the situation which pertained in Rwanda in 1994 not to take judicial notice of the fact that genocide took place there at that time, a fact fully recognised by the pronouncements of the Appeals Chamber of the ICTR and the Supreme Court of Canada.

107. This, of course, covers only the general question of whether there was genocide. As far as the individual defendants are concerned the evidence against each of them must be looked at and considered in turn.

108. Having been satisfied as to the provisions of s.78 of the 2003 Act, the court must proceed in accordance with S.78(7) under s.79. This section reads in part:

> 79(1) If the judge is required to proceed under this section he must decide whether the person's extradition is barred by reason of –
>
> (a)
>
> (b) extraneous considerations;
>
> (c) the passage of time
>
> (d)

109. S.81 is the interpretation section dealing with s.79(1)(b) – extraneous considerations. This reads:

> "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".

110. Although the burden of proof lies on the defendant in each case, the test differs between the two paragraphs.

111. In the case of s.81(a) the test is one of proving on a balance of probabilities. This is because an allegation of bad faith is being made against the Requesting State and there must be strong evidence to support this. In relation to s.81(b), it was said by Lord Diplock in **Fenandez v Government of Singapore [1971] 2All ER 691** in respect of the equivalent section under earlier legislation:

> "There is no general rule of English Law that when a court is required, either by statute or at common law, to take account of what may happen in the future and to base legal consequence on the likelihood of it happening, it must ignore the possibility of something happening merely because the odds of it happening are fractionally less than evens. The matter was to be judged, as a matter of common sense and common humanity, by reference to the gravity of the consequences of the decision to surrender, or

not to surrender. A lesser degree of likelihood than balance of probabilities would justify discharge, whether expressed as a 'reasonable chance', 'substantial grounds for thinking', or 'a serious possibility' ".

The threshold is, therefore, lower in the case of s.81(b).

112. The submissions on behalf of the Defence may be summarized as follows, as set out by Mr Fitzgerald in his submissions:-

(a) Government approach that all Hutu officials were complicit in the genocide;

(b) Vast predominance of Tutsis in the government, judiciary and prosecution department;

(c) No Tutsis nor RPF members have been prosecuted

(d) evidence of bribery and intimidation of witnesses;

(e) conclusions of Professor Reyntjens and Professor Sands.

113. On behalf of Dr Bajinya, the submissions went further and were to the effect that aspects of the case against him had been fabricated.

114. Some of these submissions are also relevant with regard to whether the defendants will receive a fair trial and will be dealt with in greater detail at that stage. However, for present purposes, the following comments can be made.

115. By its very nature and definition, genocide involves the mass killing of one particular group by another, whether that grouping is based on racial, ethnic or other factors. Therefore, if prosecution and punishment of the perpetrators is to follow, then those so accused must, inevitably, be members of the slaughtering group. They are, therefore, prosecuted

not because they are members of a particular racial or ethnic group, but because they were members of the killing group, and their racial or ethnic background is incidental.

116. There was also evidence before the court that in present day Rwanda, members of the population are classified as Rwandans, not as Hutu or Tutsi, although it is accepted that in practice it may be possible to distinguish them physically.

117. The suggestion that the vast majority of those in positions of power in the Executive and Legal worlds are Tutsi is based on a figure of 90% put forward by Professor Reyntjens, although it is not clear on what this is based.

118. It is also noteworthy that the accepted figure for acquittals in the gacaca courts was about 20% in 2007 and Professor Schabas, the government expert witness, is of the view that this has now risen to 30%. This does not indicate that a defendant will suffer bias against him if he is a Hutu defendant.

119. The question of prosecution of one side only will be looked at in greater depth when considering whether there is a prima facie case. However, although it is clear that there have been no high profile cases, Professor Schabas was of the opinion that some Tutsi had been prosecuted, albeit in some form of Court Martial and one witness in this case who was a member of the RPF says in his witness statement that he had been prosecuted for his activities in 1994. It is also the case that there have been no prosecutions of Tutsi in the ICTR.

120. A similar situation arose in the case of **Travica v Government of Croatia [2004] EWHC Admin 2747**, where at Paragraph 38 of his judgement Lewis L.J. said

> "But I cannot think that the section should be read as conferring on this Court so wide a power of judgement over the practices of a

> foreign State as to require a refusal of extradition where the applicant will face a perfectly fair trial but complains only that members of other groups would not have to face trial at all …… If Croats are, or have been unduly favoured as regards decisions to prosecute (or, for that matter, in relation to the conduct of trials) that is not of itself any basis for according protection to Serbs under the 1989 Act".

121. It was suggested by the defence that that case may be distinguished because some Croats were being prosecuted and it was merely a question of unbalanced numbers as opposed to the instant case where no Tutsis are said to have been prosecuted. I do not accept that. This is merely a difference of degree not of kind.

122. As far as the question of a fabricated case, or at least one put together through bribes and intimidation is concerned, this is more appropriately dealt with on the question of a prima facie case, but suffice it to say at this point that I do not accept that submission. It is also clear from correspondence that has been exhibited that the original impetus to investigate these four defendants came, not from the Rwanda government, but from the ICTR. This was contained in a letter dated 21st April 2008 from the Chief Prosecutor of the ICTR to Mr Martin Ngoga, the Prosecutor General of Rwanda. This makes it clear that although Dr Bajinya was on their list of suspects, he was never actively investigated by the ICTR because priority was given to other suspects. In 2005 files relating to the other defendants were transferred with a view to further investigation taking place to build on the work already done by the ICTR with a view to indictment in Rwanda in due course.

123. In its Country Report on Human Rights Practices – 2007 – issued by the United States State Department on 11th March 2008, it said at Page 21:

> "Since 1994 the government has called for national reconciliation and abolished policies of the former government that were perceived to have created and deepened ethnic cleavages. The

government eliminated all references to ethnicity in written and nonwritten official discourse, and there was no government policy of ethnic quotas for education (etc). The constitution provides for the eradication of ethnic, regional, and other divisions and the promotion of national unity ……….. however, there was no evidence suggesting that the government practised ethnic favouritism".

124. This is the latest report from what is generally regarded as the most authoritative and respected Report on Human Rights, and, clearly, emphasizes the actions of the government in eradicating racial and ethnic divides.

125. For the reasons advanced by Mr Fitzgerald Professors Reyntjens and Sands came to the conclusion that because the defendants were, in three cases bourgmestres and in the fourth an official of the MRND and all Hutus, they would not receive a fair trial, but I am satisfied for the reasons above that the extraneous considerations set out in S.81(a) & (b) are not met in this case. The different tests which the defendants have to pass in order to satisfy the burden of proof are not passed. I am not satisfied as far as grounds (a), (c) and (e) are concerned that on the balance of probabilities the real motive for prosecuting them is racial or ethnic, rather than because of their alleged participation in the genocide and I am not satisfied to the lower standards in the cases of (b) and (d) that they will be prejudiced at this trial because they are Hutus.

126. In her submissions on behalf of the Government of Rwanda, Miss Montgomery relied in part on Article VII of the Genocide Convention of 1948. This states:

> "Genocide and other acts enumerated in Article III shall not be considered as political crimes for the purposes of extradition.
>
> The contacting parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force".

127. This was at a time when if a court was satisfied that a crime had been committed for political reasons, this was a bar to extradition. The exception contained in the Convention makes it clear that genocide is a crime of such horrific proportions that a defendant should not be allowed to shelter behind such a bar. Although the concepts involved have changed, as has the way in which succeeding legislation has altered the position with regard to political crimes, nevertheless, the Convention remains in force and is persuasive on this point.

128. The second bar to extradition advanced on behalf of the defendants was that contained in s.79(1)(c) – the passage of time. S.82 is the defining section for this bar and reads as follows:

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

129. In this case the test relates to the length of time since the alleged offences were committed.

130. The leading case on this bar is **Kakis v Government of Cyprus [1978] IWLR 779** where at p.782H Lord Diplock said:

> " 'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair. Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself fleeing

the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him".

131. As with other bars to extradition, the burden of proof lies on the defence on the balance of probabilities.

132. There are general principles which must be looked at first, and then each defendant's circumstances examined individually.

133. In **Kocuikow v District Court of Bialystok III Penal Division [2006] EWHC 56 (Admin**), a case where the alleged offences had taken place in 1999 but the warrant was not issued until 2005, Jack J said at Paragraph II:

"The explanation may be simple. It may be that it is alleged that after he had committed the offence the appellant fled from Poland and that enquiries had not been able to locate him until last year. Equally, it is possible that no attempt was made to trace him. We do not know. In this situation it cannot be for the appellant to show that there are no good reasons for the delay. It is his case that his leaving Poland was unconnected with the offences. In the absence of any explanation from the extraditing authority he is entitled to assert that there is a prima facie case calling for an answer, which is unanswered".

134. This may be summarized by saying that there must be evidence before the Court from the requesting State explaining the delay in the issue of the Requests or Warrants.

135. However, the approach of Jack J appears to have been modified by Laws L.J. in his judgement in **La Torre v The Republic of Italy [2007] EWHC 1370 (Admin)** where he said at Paragraph 37:

"As the district judge was to observe in the present case at the time the court was considering the matter there was simply no information as to the nature of the prosecution evidence, quite apart from the causes of delay. In my view the proper approach in this area of the law is, with respect, relatively straightforward. I think that perhaps there is a danger that in the search for a just result the court may be inclined to stray too far from the simple words of the statute: the question is whether 'it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have committed the extradition offence'. That is, of course, the starting point. There are then Lord Diplock's observations in **Kakis** which describe the overlapping scope of 'unjust' or 'oppressive'. Next, the words of the Act do not justify a conclusion that any delay not explained by the requesting State must necessarily be taken to show fault on the State's part such as to entitle the particular extraditee to be discharged. Jack J, I am sure, did not intend to suggest as much. All the circumstances must be considered in order to judge whether the unjust/oppressive test is met. Culpable delay on the part of the State may certainly colour that judgement and may sometimes be decisive, not least in what is otherwise a marginal case. And such delay will often be associated with other factors, such as the possibility of a false name of security on the extraditee's part. The extraditee cannot take advantage of delay for which he is himself responsible. An overall judgement on the merits is required, unshrouded by rules with too sharp edges".

136. The decision in **Lisouski v Regional Court of Bialystok (Poland) [2006] EWHC 3227 (Admin)** makes it clear that the test is risk of prejudice, not actual evidential difficulty. Further the court may have regard to any evidence of judicial safeguards in the requesting State – **Woodcock v Government of New Zealand [2002] EWHC 2668 (Admin, [2004] 1ALLER 678**. No evidence has been produced in respect of the relevant Rwandan High Court procedures.

137. What is common to all defendants in this case is that the alleged offences took place in 1994, but they were not arrested until the end of December 2006. However, this must be viewed against the background that for the greater part of this period, the judicial system and the investigation process in Rwanda was in a state of total disarray, even if it was functioning at all. The court is not here involved with an established Criminal Justice System working in what may be regarded as a normal way where a particular crime has been reported whose perpetrator is sought, and this must have a bearing on the topic.

138. As a result of the genocide the number of people arrested has run into hundreds of thousands. Because of the ensuing chaos and lack of a sound base for continuing or establishing a proper Justice system after the genocide, it was not until 2004 that an Organic Law was passed dealing with the difficulties.

139. Further, the task of pursuing and bringing to justice alleged genocidaires had been assigned to the ICTR and was not the responsibility of the Rwandan Government. Finally, there was no extradition treaty between Rwanda and the United Kingdom.

140. It is clear from the letter of 21st April 2008 from the Chief Prosecutor of the ICTR that Dr Bajinya was put on their list of suspects in June 1999, but his case was never further investigated by that body. What is not clear is when his name was made known to the Rwandan authorities, although it is reasonable to assume that it was in 2005. In that year, the files of the three other defendants were transferred to the Rwandan Government for further investigation with a view to prosecution.

141. In October 2006 a Memorandum of Understanding was entered into between the two governments, subsequently amended in December 2006, in respect of each of the defendants which led to their arrests later that month. In these circumstances, I am satisfied that, adopting the rounded approach of Laws L.J., there cannot be any blame attached to the Rwandan Government for the delay, as having become aware of the

allegations against the defendants, they progressed the investigation to the point where negotiations with the British Government were such that the Memoranda were signed.

142. It also cannot be said that a false sense of security was produced in the defendants by the actions of the Rwandan Government. In the case of **Doyle** the defendant had been given his passport back and told that he could leave Germany. Subsequently, his extradition was sought, but refused, because he had been led to believe that no further action would be taken. That is not the case here.

143. Turning to the individual defendants, the first one to examine is Dr Bajinya. He has produced a document headed "Defence Case Statement" but has not given evidence. It was accepted on behalf of the Government of Rwanda that following the decision in **The Government of the United States of America v Tollman and Tollman [2008] EWHC (Admin 184** that a limited defence summary may go before the Court, but it was argued that no weight should be attached to it at this stage.

144. On behalf of Dr Bajinya it was submitted that he would be prejudiced at any future trial in finding witnesses to whom he refers in his statement, and four particular items of evidence are mentioned. Since arriving in London, he has settled here with his wife and children and has obtained British nationality. He has worked with a charity as a doctor. It would be, therefore, also oppressive to return him after such a period of time.

145. The statement of Dr Bajinya is in fact rather vague as to his actions from July 1994 onwards. He left with his family on 14th July 1994. They crossed the border with Zaire, to a place called Goma. His evidence, and indeed that of his witnesses, is that he played no part in the genocide and was simply living at his parents' home in the country. He felt that he would have been killed if he had remained.

146. From Zaire the family moved to Kenya but no date is given for this. His wife and children came here in April 1998. The explanation is that there was only enough money for them. Dr Bajinya eventually followed in January 2000. What is not stated is what explanations were given to the Immigration Authorities.

147. Although he joined his family in January 2000, according to the witness statement of Yvette Umowe he was still known as Bajinya in July 2004. The explanation given for the change in surname to Brown was that it was to make matters easier for the children, particularly at school. If this were the case, no explanation has been given for a delay of over four and a half years at least after his arrival in the country.

148. As far as the question of “unjust” is concerned, it is claimed on behalf of the defendant, that he will not be able to find witnesses after this length of time. However, in the comparatively short period of time which the defence have had at their disposal and working within the financial constraints imposed by the Legal Service Commission a large number have been found. The defence, in summary, is in two parts: the defendant did not have any role in the MRND; and he was back at his home commune immediately after the genocide began and remained there until he left for Zaire. There are a number of witnesses who have provided statements covering both these aspects of the defence, none of whom, in contrast to those giving statements for other defendants has sought anonymity.

149. As far as oppression is concerned, it would appear to be the case that the defendant is settled in London and obtained British nationality for himself and his family and has been working for a charity. However, it was made clear in **Berningham** that it would only be in exceptional circumstances that extradition would be barred on the ground of oppression. Extradition is always distressing for families in these circumstances, but there is nothing exceptional about this case.

150. In summary, therefore, blame cannot attach to the Rwandan Government for the lapse of time since 1994. I am satisfied that the defendant did take steps to avoid any possible detection and that it would not be unjust or oppressive under s.82.

151. The second defendant is Mr Munyaneza, who did give evidence. He left Rwanda in July 1994 and went to the Democratic Republic of Congo. He accepted in cross-examination that on his own account he had fled with people who were of the type who, according to his evidence, had been attacking him for saving Tutsi. The only explanation he could give was that he was in fear of his life because the government which he had served had lost power. After two years in DRC he went to Tanzania, then Malawi and Mozambique before ending up in South Africa in December 1997. On his own admission he used the name Musa Seliman in all countries except Zaire and Tanzania. He said that he was from Burundi.

152. Whilst in Durban, where he worked as a security guard, he was asked to go and see the Immigration Authorities, but believing it to be a trap, he left and went to Johannesburg. Whilst there he was told by a friend that his name had been mentioned in a newspaper. I have been shown a copy of that paper. The reference to Mr Munyaneza is a short one in a much longer article referring to another genocidaire. It says:

> Another prominent killer, former mayor Charles Munyaneza, was living in Durban claiming to be a Burundi citizen called Musa Seliman. Last week he was pulled in for questioning by the Department of Home Affairs after his cover was blown. Munyaneza has since disappeared. Rwandan officials believe he is trying to seek a visa for Britain or Holland".

153. That article is dated 23rd April 1999. The defendant left on 14th May 1999 for England, travelling, it would appear, via Italy. The evidence of the defendant was that he had used a false name, Charles Muneza, on entry and had not disclosed that he had been a bourgmestre. In 2002 he had

been granted a work permit and had been given indefinite leave to remain.

154. What emerged in cross-examination, however, and had not been mentioned in evidence in chief was that that status had been removed in August 2006 when it was drawn to the attention of the Home Office that the name given was false and that he had given his occupation as teacher and had not mentioned being a bourgmestre. As refugee status had been obtained by deception, it was removed in 2006.

155. Further, in his evidence in chief he stated that his family joined him in 2003 when he was allocated a Housing Association property. According to Home Office records on 12th November 2001 he requested that two children should be permitted to remain with him in the U.K., their having arrived without passports on 9th November. His wife and two children were granted family reunion visas by the British visa-issuing port in Pretoria and were admitted to the U.K. on 21st November 2002.

156. It is quite clear that he has done his very best to cover his tracks by moving from country to country; using a false name in Africa; gaining refugee status by the use of another false name and the deliberate failure to mention the position he held in Rwanda. The only reason for doing so was to conceal his whereabouts from the authorities.

157. In any event, investigators working on his behalf have found a number of witnesses on his behalf, and so he would not be prejudiced at any future trial. There is nothing in his circumstances which would make it oppressive for him to be extradited. In closing submissions on his behalf Lord Gifford said, on instructions that his client was experiencing blood pressure problems but no further details nor a medical report was forthcoming, and I attach no weight to that.

158. Turning to the third defendant, Mr Nteziryayo, he neither gave evidence nor submitted a Defence Case Statement. The only information about him is contained in a short potted history in the final written submissions

made on his behalf. He and his wife were married in 1992 and have five children aged between five and fourteen years. He and his family left Rwanda in 1994 and have been resident in the United Kingdom since 2003. There is, of course, strictly speaking no evidence even of these facts, but the court has no information whatsoever of what was the position between 1994 and 2003, and what information was given to the Immigration authorities in support of their application to be admitted to this country, nor, even, what their immigration status is.

159. No weight nor credence can be attached to this submission on his behalf. The presumption must be that he fled Rwanda in order to avoid prosecution. When arrested in December 2006 he originally gave false details to the arresting officer.

160. Like the others a number of potential witnesses have been located and statements taken so that it would not be unjust to extradite him.

161. Sadly the defendant's youngest child was born prematurely in 2002 and suffers from quadriplegic cerebral palsy with the result that he has severe learning difficulties and significant physical problems, requiring professional assistance. I have seen medical reports confirming all these facts and that he is not independently mobile and requires constant medical attention.

162. It is argued, therefore, that it would be oppressive to extradite him. The leading authority on this point is **Cookeson v Government of Australia [2001] EWHC (Admin) 149**. In that case the defendant's son was a thirty-two year old schizophrenic. Although the court expressed doubts as to the evidence as to the defendant's being his sole or main carer, extradition was barred in that case as the medical evidence was that the stark choice for the future was the son's being looked after by the defendant or the welfare authorities. The situation had been made worse by the son's attempting to commit suicide by setting himself alight.

163. That case can, however, be distinguished from the present. Mr Nteziryayo has been in custody since December 2006. It is quite clear from the medical reports that the child has been taken for all necessary medical appointments and professional visits during this period, presumably by his mother. There is no evidence before the court as to the rôle played by the defendant prior to that time, so that it cannot be said that he is in any way a sole or even main carer. Therefore, I am not satisfied that the circumstances are exceptional so that the bar would operate.

164. Finally, I turn to Mr Ugirashebiya. He also left Rwanda in 1994 with his family for the Congo and then travelled to Kenya. From September 1994 to July 1997 he studied for a theology degree, which he was awarded in July 1997. His family had joined him in Kenya in January 1995.

165. He entered the U.K. in September 1997. His immigration proceedings are stayed pending the outcome of this extradition request. He enrolled at the Colchester Institute in 1997 to study information technology. At the time of his arrest in 2006 he was living with his wife at Frinton-on-Sea. The written submission continues:

> "Details of his children's whereabouts will be made available to the judge in closed session".

166. It is also said that he suffers from high blood pressure and stomach complaints.

167. Again there has been no evidence before the court, only these assertions in the written submissions. There is no evidence of how he and his family travelled. I would have expected at the very least to have seen some form of documentary evidence of his degree, but not even this has been forthcoming, nor have details of his children's whereabouts.

168. Again no credence nor weight can be placed on these assertions. The inference must be that he left Rwanda to escape prosecution. A number

of potential witnesses have been found in his case also. There is nothing in his personal circumstances that would make it oppressive for him to be extradited.

169. Having found that neither of the bars applies in these cases, the court is required by s.79(4) to proceed under section 84 of the Act.

170. Having ruled earlier in these proceedings that the Government could not rely on the provisions of the Criminal Justice Act 2003 for the purposes of introducing hearsay evidence, the court was asked to rule on the question of admissibility of evidence for the purposes of deciding under S.84 of the Extradition Act whether there is evidence which would be sufficient to make a case requiring an answer by the person whose extradition is sought if the proceedings were the summary trial of a charge against him.

171. Evidence must be both receivable and admissible.

172. On behalf of the Government it was argued that the 2003 Act did not introduce a new or different test as to admissibility than that which had applied previously. Historically, there was a distinction between the Fugitive Offenders Acts, which dealt with Commonwealth countries, and Extradition Acts which covered other countries and territories. However, a common scheme was established under the Extradition Act 1989, but even there a distinction was drawn in connection with evidence. S.26 dealt with the authentication of documents, but S.27(1)(a) made documents in extradition proceedings arising out of a request by a Commonwealth country or a colony both receivable and admissible as evidence of the matters stated in it. However, it was made clear in a series of cases starting with **R v Governor of Pentonville ex parte Kirby [1979] 1WLR 541** and culminating in **Fernandes v Governor of HMP Brixton [2004] EWHC 2207 Admin** that S.27 did not make them admissible if they otherwise were not acceptable under English law because, for example, they contained hearsay.

173. It was argued on behalf of the requesting state that provided a statement is duly authenticated it is always admissible, unless it still contains hearsay and it is only then that the question of admissibility will arise. To rule otherwise would be to overturn a long period of the law of evidence in extradition proceedings.

174. This argument was opposed on behalf of the defendants who argued, in short that a new scheme was introduced by the 2003 Act. In order to resolve this question, the Act must be examined.

175. The starting point is S.202 which is headed “Receivable Documents”. In particular, S.203 states:

> “A document issued in a Category 2 territory may be received in evidence in proceedings under this Act if it is duly authenticated”.

176. Sub-section 4 deals with the definition of authentication and sub-section 5 is a saving clause allowing admission of non-authenticated documents. There is no argument but that the documents on which the Government seek to rely have been duly authenticated. This section deals with both Category 1 and 2 territories and is the equivalent of S.26 of the Extradition Act 1989. There is no equivalent of S.27, and the heading to S.202 refers to receivability. No mention is made of admissibility, as was the case in S.27, which, in any event, applied only to Commonwealth countries.

177. I am satisfied, therefore, that S.202 relates only to receivability of documents in evidence.

178. It is necessary then to turn to S.84 which deals with the question of admissibility of evidence contained in statements. The section is as follows for this purpose:

S.84(2): In deciding the question in sub-section (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.

179. Sub-section 3 then goes on to deal with the matters to be taken into account by the judge in deciding whether to treat such a statement as admissible evidence of a fact.

180. No issue was taken on S.84(2)(b). The difficulty which the Government appeared to feel that it faced was the interpretation of the phrase "another person charged with the duty of investigating offences". Some of the statements on which the requesting state sought to rely had been taken by police investigators, and so did not cause any difficulty. Others, however, had been taken by prosecutors and it was felt that they did not satisfy the test. The defence, however, went further and were of the view that it related to any statements obtained by their solicitors and investigators.

181. S.84 is concerned with evidence to establish a prima facie case. It was common ground that in English law that people other than police officers have a duty to investigate offences. This was recognised in S.67(9) of the Police and Criminal Evidence Act 1984 which is in almost identical terms:

> "Persons other than police officers who are charged with the duty of investigating offences or charging offenders shall ……….. ".

182. This section clearly contemplates investigators such as those employed by Her Majesty's Revenue and Customs or Serious Fraud Office. At a more local level, trading standards officers fall within this definition.

183. What was not entirely clear was whether "charged with the duty" meant charged by a statutory duty. However, it is clear from **R v Bayliss [1994] 98 Cr.App.R 235** that, according to the particular circumstances of a case, it could include FACT investigators, investigators employed by banks and other commercial organisations or even store detectives.

184. However, in English law prosecutors do not have a duty to investigate offences. The question, therefore, is how rigidly the English concept of an investigation should be applied in S.84(2). It was clearly envisaged in S.67(a) of the 1984 Act that it was meant to apply to a wider class than police officers. Mutatis mutandis this must apply in the 2003 Act.

185. It is clear from the decisions of the Administrative Court in connection with Category 1 territories that English concepts should not be applied too rigidly when dealing with the procedures of foreign jurisdictions. For example, a European Arrest Warrant must be issued by a judicial authority. In certain cases, Sweden for example, the warrant is not issued by a judge but by a prosecutor as part of his duties. This was deemed acceptable by the Administrative Court.

186. In the instant case there is an affidavit from Jean Bosco Mutangana who is a prosecutor. Among his duties are the supervision of police investigations. The taking of witness statements is an essential part of any investigation. Some of the statements in this case have been taken by prosecutors as part of the investigation. It is clear that it is part of their role within the Criminal Justice System of Rwanda to perform this duty. It should also be borne in mind that the Rwandan system is based on the Civil Law not the Common Law, and I am satisfied that any such statements do fall within S.84.

187. A purposive construction must be given to the provisions of the Act and, as such, due regard must be paid to the procedure and system of the foreign jurisdiction.

188. I have also considered the provisions of S.84(3), although no argument has been taken on it, and I am satisfied that the statements should be taken as admissible evidence of the facts. It is quite clear that S.84 is a new procedure which was designed to save time and money and prevent inconvenience in witnesses having to travel to give evidence.

189. The next question is whether S.84 applies to the defence as well as the Government. The section is concerned with the presentation of evidence to establish a case to answer. In general terms those who are mentioned are people who are as part of their occupation charged with producing the evidence for a case to be brought to court. Any investigator acting on behalf of a defendant is not in the same position. He is there to help the defendant to find evidence to, as it were, knock down that case – the very opposite of those listed in S.84. The persons in S.84 must be sui generis.

190. This would, therefore, at first blush appear to put the defence at a disadvantage. At an earlier stage I ruled on the question of the use of the hearsay provision of the Criminal Justice Act 2003. This was in relation to a Government application to admit a statement which was not possible under S.84 as it had not been taken under S.84(2). My decision was that the Government could not rely on the CJA provision because S.84 was a self-contained code for the admission of prima facie evidence.

191. However, this was a ruling against the Government. As it has the benefit of S.84, which the defence does not this would appear to be contrary to the Equality of Arms principle.

192. The defence can always, of course, call live evidence. What is at present in issue is whether the evidence of Mr Frank Brazell, the solicitor for Dr Bajynia, can be given as it contains hearsay.

193. S.202(5) allows a statement which has not been duly authenticated to be received in evidence. S.77(1) of the Act states:

> "At the extradition hearing the appropriate judge has the same powers (as nearly as may be) as a magistrates' court would have if the proceedings were the trial of a summary information against the person whose extradition is requested".

194. This would appear to allow the court to consider the question of hearsay evidence being put forward by the defence, provided that the application is properly made on application in accordance with the provisions of the Criminal Justice Act.

195. The final point in issue with regard to admissibility of evidence was the scope of the decision in **Schtracks v Government of Israel [1964] AC 556**. This was a case heard under the Extradition Act 1870. S.3(1) of that Act stated that a fugitive criminal should not be extradited if the offence was of a political character or if his extradition was sought with a view to trying or punishing him for an offence of a political character.

196. Under the 1870 Act the defendant could make representations to the Court and to the Secretary of State that the offence was of a political character and that he should not be extradited.

197. At p.582 Lord Reid said: "I cannot suppose that the Secretary of State was intended to be bound by the strict rules of evidence nor can I hold that the word 'prove', which is used only once in the sub-section, means something different in relation to the Secretary of State from what it means in relation to the court or magistrate. In fact some of the material which your Lordships have admitted could not normally have been received in evidence".

198. It is clear from this that material may be admitted more informally than would be usual, but only if it comes within this exception. The rationale for this exception is the fact that representations could be made to the Secretary of State under S.3(1) of the 1870 Act, and those representations would not be bound by the normal rules of evidence. It would have been illogical to insist on the strict rules if the same submissions were made to the Court.

199. The House of Lords judgements in that case refer specifically to the question of political offences. The modern day equivalent is now contained in S.81 of the Act which deals with one of the bars to extradition, viz. extraneous considerations. This reads:

> "A person's extradition is barred ……. 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 for his race, religion, nationality, gender, sexual orientation or political opinions, or
>
> (b) if extradited he might be prejudiced at his trial or punishment……..".

200. S.81 has, therefore, widened the exception to include matters other than political opinions. However, under S.93 of the Act the Secretary of State must decide whether he is prohibited from ordering the person's extradition under S.94, 95 or 96. These deal with the death penalty, speciality and earlier extradition respectively. Political opinions are no longer a ground for the Secretary of State to prohibit extradition, and, therefore, it is arguable that the decision in **Schtraks** should be revisited by the House of Lords. For present purposes, however, I am bound by it and must apply if the bar in S.81 is argued.

201. The question is whether it should be extended. Although it was not stated as such in the 1870 Act the political exception was what nowadays is called a bar to extradition. It has never been a way in which evidence can be admitted to decide whether a prima facie case exists.

202. As a bar, the provisions of S.81 can be distinguished from the other bars in so far that it strikes at the bona fides of the request, whereas the other bars are external matters which may prevent what is otherwise a genuine request in itself. The matters set out in S.81 are personal characteristics of the defendant which, it is said, are the real reason for the extradition not the alleged offence. It can be, therefore, distinguished from the other bars. It was suggested in the course of argument that the exception could be extended to include the passage of time – S.82 – and the right to a fair trial under the Human Rights considerations in S.87. Whilst it is true that the characteristics set out in S.81 could be considered in S.82 or S.87 as a reason for not having a fair trial, there are many other factors which may militate against a fair trial and there is no justification in the judgements in **Schtraks** to justify widening this exception.

203. Although the preceding paragraphs of this judgement relating to the decision in **Schtraks** are of some relevance to s.81, they have been inserted at this juncture as it was argued that the decision should be extended to cover the admission of evidence under s.84 dealing with the prima facie case, but, as indicated, I am satisfied that it was never intended for that purpose.

204. Before looking at the provisions of s.84 in detail and how they relate to the individual defendants, mention should be made of how evidence has been introduced in this case. The Government has relied on s.84 and read all the witness statements relating to prima facie case. As far as the defence were concerned in the light of the ruling that the defence could rely on the provisions of the Criminal Justice Act the Government did not object to the witness statements being read out, whilst not accepting the

truth of them but submitted that what the court had to decide was what weight should be attached to them.

205. S.84(1) provides:

> "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".

206. The approach which the court must adopt was laid down by Lloyd L.J. in **R v Governor of Pentonville Prison ex p. Osman [1990] IWLR 277 at 299-300:**

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

207. This approach was approved by the House of Lords in **R v Governor of Pentonville Prison, ex p. Alves [1993] AC 284**. At p.292 Lord Goff of Chieveley said:

> "Indeed, if Mr Newman were right, retraction in this country of evidence previously given in the requesting State would ipso facto discredit the evidence so given and so deprive the magistrate of any power to commit on that basis. I do not think that that can be

right. If the magistrate concludes, on the evidence before him, that the previous evidence is such that a jury properly directed could not properly convict upon it, then, on the principle stated in **R v Galbraith [1981] IWLR 1039** he should not commit .

This was the approach adopted by the Divisional Court in **Osman** where it stated that the magistrate should reject any evidence which he considers to be worthless. But, otherwise, on the principle stated by Lord Lane C.J. in **Galbraith**, if the prosecution evidence is such that its strength or weakness depends on the view to be taken of its reliability, the magistrate is entitled to act upon that evidence in deciding whether there is sufficient evidence to justify an order for committal".

208. No point was taken at the earlier stage in the proceedings when arguments were raised in respect of s.84(3) as to provision of s.84(3)(e) but were reserved for closing submissions. S.84(3) reads as follows:

"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)

(b)

(c)

(d)

(e) to any risk that the admission or exclusion of the statement will result in unfairness to the person where 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".

209. On behalf of Mr Munyaneza Lord Gifford submitted that the court should exclude the statements of witnesses for the Government which had been read under the provisions of s.84(3)(e). This submission was supported by the representatives of the other defendants.

210. The basis of the submission was that it would be unfair to the defendants if the statements were admitted as it would not be possible to cross-examine the makers of the statements. This had to be viewed against the general background of the taking of the statements. In summary, it was said on behalf of the defendants by investigators and defence witnesses that witness statements had been obtained by the government through bribery, intimidation and inducements. If the witnesses had attended in person then they could have been questioned on these matters. To deprive the defendants of the opportunity to do so was unfair and the evidence should be excluded.

211. In response Miss Montgomery on behalf of the Government made three points. The first was that in extradition proceedings the requesting State is under no duty to call all its evidence. Any unfairness which is based on the admission of written evidence is inherent in all extradition proceedings. The level of unfairness which is necessary to satisfy this test must be a high one. The cases of **Osman** and **Alves** cited earlier make it clear that the court in extradition proceedings may only reject evidence if it is found to be worthless. Unfairness, therefore, can only be established if it can be shown that the absence of cross-examination has deprived the defence of the opportunity to show that the evidence of a witness is so manifestly unreliable as to be worthless. Secondly, the defence have had the opportunity to call rebuttal evidence. Thirdly, with the exception of one witness, Gregaire Rwakayonza, no particularised reason has been shown for supposing that the admission of evidence from particular witnesses will be unfair.

212. It is necessary to look at the exact wording of s.84(3)(e). If the only method of controvertion was by cross-examination then the wording would not be as it is in its present form. What the paragraph pre-supposes is that cross-examination is one way of controverting the evidence of the witness. As he is not present, clearly that is not possible. Therefore, is there any other way in which the defence can controvert the Government's evidence.

213. The test, therefore, is not whether there will be any unfairness because of lack of cross-examination; as this lack is inherent in the non-attendance of the witness, but whether there is any other way of controverting the evidence. It is this that the court must look at in deciding whether there is any unfairness. In general terms in this case there have been a large number of witnesses where evidence has been read and who have also given evidence orally on behalf of the defence that no unfairness has resulted to the defendants in admitting the statements.

214. A final argument on the point concerned s.78 of the Police and Criminal Evidence Act 1984. It was accepted by the Government that it does apply in extradition proceedings. This was accepted in the case of **R (Saifi) v Governor of HMP Brixton [2001] IWLR 1134**. However, in **R v Governor of Brixton Prison ex p. Levin [1997] AC741** Lord Hoffman giving the judgement of the House of Lords made it clear that what must be considered is whether the admission of the evidence would have an adverse effect on the extradition proceedings, not on the fairness of the eventual trial. He stated that it would be a very rare case in which the court would come to that conclusion. I am satisfied that this is not such a case. In this case there are only allegations about the way in which the evidence was obtained as opposed to the proved complaint in **Saifi** and the defendants have been able to obtain what they say is controverting evidence. In these circumstances, s.78 does not apply in this case.

215. I am satisfied, therefore, that the statements upon which the Government rely should be admitted under s.84.

216. As far as defence statements are concerned, I ruled earlier that the defence could take advantage of the Hearsay provision contained in the Criminal Justice Act, provided that the appropriate Hearsay notices were served and there was compliance with the provisions of the Act.

217. Hearsay notices were served under the Act. In summary, the applications were made on the grounds that it was in the interests of justice for the evidence of the witness to be before the court and the witness was unable to attend. The evidence which it was said that the witnesses could give on behalf of the various defendants was probative of the matters in issue but were unable to attend for a variety of reasons, in all cases because they were living abroad and either were detained in prison; did not have the means to do so or could not leave Rwanda.

218. In the cases where such Hearsay Notices were served I am satisfied that this evidence should be admitted.

219. At an earlier stage of the proceedings an application was made by Miss Ellis on behalf of Mr Nteziryayo for evidence to be given anonymously. Although the reasons for granting that application in part were delivered at that time, it now follows for the sake of completeness.

220. An application was made by Ms Ellis on behalf of Mr Ntezilyayo for anonymity to be granted to his witnesses. A number of redacted statements were served on the Government and the Court in September 2007 in which the witnesses were identified by the letters ABDEFGH. The witnesses indicated that they were prepared to allow their identities to be disclosed to the court and those representing the Government. Further statements were obtained from them by the investigator instructed by Mr Ntezilyayo's solicitors as to the reasons why they sought to have their names and identifying details withheld.

221. The general principle governing the conduct of trials is that they take place in public and that the identity of all witnesses is known to the other

party in the case. Evidence is given orally, unless agreed, and the witness is in full view in court unless an order has been made for special measures, eg screens.

222. However, this principle may be departed from in exceptional circumstances. The factors which are relevant to the making of such a decision were set out in **R v Taylor (G) The Times 17 August 1994 CA**, which emphasised that such a decision is a matter of discretion for the judge. In that case the judge allowed a prosecution witness to conceal his identity from the judge.

223. In this case the application is to protect witnesses called for the defence, but there seems to be no reason why, in principle, the court should not have the same discretion. This was confirmed by the decision of the Court of Appeal in **R v Davis (Ian) et Ors The Times 1 June 2006**.

224. The factors to be taken into account as set out in **Taylor** are as follows:

(a) There must be real grounds for fear of the consequences if the identity of the witnesses were revealed.

Statements were obtained from each of the witnesses, apart from E, as to their concerns and fears if their identity were to become known to the Rwandan Government.

Witness A described his fear of imprisonment or even death; B merely said that he did not want his identity disclosed but could not say why; D repeated the comments of A in a slightly different form and also a fear of fake accusations being made against him in the gacaca courts; F has the same concerns as D, although he does not mention the gacaca courts, but rather harassment by other members of the population; G has fears of being prosecuted himself for an offence known as “genocide ideology”, which is, in essence, a denial or belittlement of the genocide, if he were to give evidence.

Reliance was also placed by Ms Ellis on various Non-Governmental Organisation (NGO) Reports such as those by Amnesty International.

(b) The evidence must be sufficiently important to make it unfair to make the [Defendant] proceed without it. In this case all the witnesses are witnesses of fact on behalf of the defendant and directly contradict the evidence of the witnesses against Mr Ntezilyayo.

(c) The court must be satisfied that the creditworthiness of the witnesses has been fully investigated and disclosed. The statements were taken by Mr Ralph Lake an extremely experienced investigator who has acted in that capacity in a number of areas of Africa, but, in particular, for the International Criminal Tribunal for Rwanda. I am satisfied, therefore, that they were properly taken.

(d) The court must be satisfied that there would be no undue prejudice to the [Government]. Other measures should be considered, eg the use of video screens or other similar protective measures. In this case, the problem is not one of putting in place measures to improve the quality of the evidence giving. Some, at least, of the witnesses would be prepared to give evidence by video link from Kigali. However, that would be subject to the proviso that their identity was not disclosed. It is, therefore, rather more fundamental than allowing the witnesses to give their evidence in a way that shields them from the defendant. If anonymity is not guaranteed, then the witnesses will not give evidence.

(e) The court can balance the need for the protection of the witness against unfairness or the appearance of unfairness.

On behalf of the government, it was conceded that the court did have the discretion to allow witnesses to give evidence anonymously. The burden of proof lay on the defence on the balance of probabilities, and if the court was satisfied that the fear was genuine then anonymity should be granted.

It was submitted that this was a balancing exercise. On the one hand there is the unfairness to the defendant if anonymity is refused and the witnesses refuse to give evidence. On the other, there will be difficulties for the Government if the evidence cannot be properly challenged and nothing is known about the witnesses. It was also suggested that there was no real proof that these witnesses actually existed.

225. The case of **Davis** expanded the principles involved in the consideration of whether to grant anonymity, but again stressing that it was only in exceptional circumstances that it would apply.

226. The Strasbourg jurisprudence has established that to allow a witness to give evidence anonymously is not inconsistent with Article 6 of the European Convention provided that:

(a) the need for anonymity is established;
(b) cross-examination is permitted;
(c) that the trial overall is fair.

227. The Court of Appeal went on to deal with further safeguards:

(a) the decision must be case-specific;
(b) [Not applicable]
(c) the jury should be directed as to the particular disadvantages to the [Government].

228. There are further comments regarding the role of the Court of Appeal and of counsel's position particularly vis a vis his client.

229. In this case, I am satisfied from the statements of the witnesses themselves, with one exception, that they do have a genuine personal fear for their safety. This is a subjective test not an objective one. Although reliance was sought to be placed on the evidence of the experts, I do not place any weight on those as they had not given evidence or been cross-examined at the time this application was made. The same position applies in respect of the NGO Reports as they are untested.

230. As to the importance of the evidence, as authorised above, it is central to the defence case and it would be unfair to proceed without it.

231. Further, as stated above, Mr Lake, who took the statements is a very experienced investigator and his statement shows that he satisfied himself as to the identity of the witnesses.

232. I accept that the Government is hampered to a certain extent in cross examination; but the test is "undue prejudice" and in all the circumstances I am satisfied that the prejudice is not so great as to amount to "undue".

233. Turning to the Strasbourg jurisprudence, the need for anonymity is established in this case; cross examination is permitted; and there has been no suggestion other than that overall the hearing will be fair.

234. I have considered the disadvantages to the Government but I am aware that any such defence will involve looking at whether there is any other supporting or corroborative evidence and what weight is to be placed on the anonymous evidence.

235. In those circumstances, I am satisfied that witnesses ADEFG should be permitted to give their evidence anonymously. Witness B said in his statement: "I cannot say why I do not want my identity disclosed to the

Rwandan authorities or the public because I do not fear them. This is just how I feel on the issue".

236. As he does not disclose any fear, in fact, the exact opposite, I do not grant anonymity to Witness B.

237. A further application was made recently by Miss Ellis in respect of another witness but refused. My reasons as given at that time were:

238. This is an application for anonymity in respect of Witness X, and, if granted, for special measures, as it was the intention of the Defence that this witness would give his evidence live. The general principle is that all hearings are held in public and that the identity of witnesses is known to the parties and the public. However, the court does have a discretion to depart from this general principle in exceptional circumstances and grant anonymity to witnesses.

239. The factors to be taken into account are set out in **R (Al-Fawwaz) v Governor of Brixton Prison [2002], IAC556H.L**. These can be summarized as follows:

1. Real grounds for fear of the consequences if the identity were to be revealed, either for the witness or others.

2. The evidence must be sufficiently important to make it unfair for the Crown (in this case defence) to proceed without it.

3. The creditworthiness of the witness has been fully investigated and disclosed.

4. There must be no undue prejudice to the other side e.g use of special measures.

5. The need for the protection of the witness must be balanced against any appearance of unfairness.

240. In **R v Davies, The Times 1st June 2006**, the Court of Appeal stated that the court possesses an inherent jurisdiction to control its proceedings. The disadvantages of anonymity can be ameliorated provided that the other side retain, through counsel, the ability to pursue a substantial degree of cross-examination.

241. This is deemed not to be inconsistent with Article 6 of the ECHR provided that the need for anonymity is established; cross-examination is permitted and that the trial overall is fair.

242. On behalf of the defendant, it was submitted that the grounds for granting anonymity are set out in the statement, namely that if the witness should return to Rwanda in the future he would fear for his safety and he also has concerns for his eighty seven year old mother who still lives there. The Government objected to the application on the basis that they would not have the ability to test the substantive evidence by cross-examination, as the defence are seeking to withhold all details of the witness from them. Certain details are set out in the redacted statement but almost any question would disclose his identity. On this basis it would not be possible to challenge the substantive evidence, as there is nothing in the statement as to creditworthiness. It was further submitted that the evidence is not vital to the case, i.e. that the Defendant's name was not mentioned to the witness when he was gathering lists of genocides.

243. Anonymity has been granted in this case to witnesses where evidence has been read in connection with the question as to whether there is a prima facie case. These witnesses have all been living in Rwanda. For the most part they were farmers and the like and living on a daily basis in circumstances where cases relating to the genocide were taking place in Gacaca courts and what was taking place had produced in them a subjective fear for their safety.

244. However, this witness has lived in Europe for the last eight and a half years. He does not express any fears for his own safety at the present, but only if he were to return to Rwanda in the future. There have been a large number of defence witnesses in this case whose evidence has been given live or been read who are in exactly the same position and who have not sought anonymity. Even on the witness' own statement I am not satisfied that he has any fears for his own safety if he were to give evidence. As far as his mother is concerned, it is quite clear that this witness is, on his account, someone who has fallen foul of the Rwandan Government. Having been mistreated there, he fled to Europe where he writes and gives talks on Human Rights with reference to Rwanda. Again he is no different from other witnesses in this case and he is a person who must be known to the Rwandan Government. There is no suggestion that his mother has had her life interfered with in any way during the time that he has lived in Europe and there is nothing in the statement to indicate otherwise. The other witnesses who have given their evidence openly have had relatives still in Rwanda.

245. In the circumstances, I do not consider that there are real grounds for fear in this case, and that it does not amount to an exceptional case justifying anonymity.

246. In any event, the Government would be severely hampered in its ability to cross-examine as any question as to the witness' history or creditworthiness would disclose his identity.

247. His evidence is not vital to the defence case and I do not consider that the defendant is prejudiced in his defence overall by the lack of this witness' evidence.

248. At the time that Miss Ellis' original application was made, those who instruct her had obtained funding from the Legal Services Commission for funding for investigators to visit Rwanda to gather evidence. Those representing Mr Munyaneza and Mr Ugirashebuja had more difficulty with the Commission and similar applications have been made

subsequently for anonymity in the case of their witnesses. These applications reveal similar fears on the part of the witnesses for themselves and their families should it become known that they have given evidence. There appears to be no valid distinction between the fears experienced by these witnesses and those in respect of whom the earlier application was made by Ms Ellis. I am satisfied, therefore, that the anonymity sought should be granted. There was no such application for anonymity for witnesses whose statements were read on behalf of Dr Bajinya.

249. By way of final general comment, I am conscious that such anonymous evidence merits extra scrutiny as the Government has been handicapped in its ability to scrutinise the evidence fully and to rebut any allegations made.

250. Turning now to the individual defendants, the first to be considered is Dr Bajinya. The allegations against him have been summarized by the Government as follows:

1. A close associate of President Habyarimana; a member of the Akazu.

2. Participated in MRND party meetings prior to April 1994.

3. Was a member of MRND until 1993 when the CDR was founded.

4. In 1993 he attended a meeting in Nyamirambo Stadium in Kigali the purpose of which was to call upon Hutu to disassociate themselves from the Tutsi who were perceived as the enemy. Bajinya was in charge of protocol.

5. Participated in the killing of Dominique on 7th April 1994.

6. Established roadblocks.

7. Participated in the death of Leandre.

8. Participated in the killing of Charlotte Kamugaja.

9. Gave instructions on roadblocks.

10. Manned a roadblock in Gisenyi.

11. Attended a swearing in ceremony for the interim government on 4th July 1994 at Kibehekank and was tasked with collecting financial contributions.

251. I am satisfied that the correct approach when considering the allegations in the case of this defendant (and, indeed all the other defendants) is to consider whether the depositions taken at their highest disclose a prima facie case which in the case of a summary trial would require an answer by the defendant. Next should be considered whether there is any evidence by the defence which seriously undermines the prosecution evidence so that it is rendered worthless, bearing in mind the test in **Galbraith**.

252. The evidence in respect of the first three allegations comes from Valerie Bemeriki who was a journalist who describes meeting him on occasions at MRND meetings. Her evidence as to membership of Akazu is supported by Janvier Mabuye and Jacques Sagahutu, both of whom knew him, apparently, as neighbours.

253. Both of them also refer to his political affiliations.

254. The evidence as to allegation 4 is from Celestin Hakizimana. He was a former neighbour of the defendant, socialized with him and was a fellow member of MRND, in which capacity he attended the meeting at the Stadium.

255. The allegation of participation in the killing of Dominique, Allegation no. 5 is from four witnesses, Dieudourne Murasandoni, Damin Ntambara and Jacques Sagahutu, and Janvier Mabuye.

256. Two at least of the same witnesses give evidence with regard to the setting up of roadblocks, and the same four give evidence as to the involvement of Dr Bajinya in the death of Leandre.

257. Ntambara and Sagahutu give evidence as to death of Charlotte. These two witnesses give evidence as to the deaths of three victims. Their accounts are as near as makes no difference corroborative and this is also the case with the other two witnesses who give evidence as to the first two deaths. It is also noticeable that with one exception the statements were taken by different investigators.

258. In addition to other witnesses, Valerie Bemeriki and a witness named Hussein Rongorongo give evidence as to Dr Bajinya giving instructions on roadblocks and the witness Hakizimana finally gives evidence as to his manning a roadblock at Gisenyi and attending the swearing-in ceremony in July 1994.

259. On the basis of having considered the statements of the prosecution witnesses, I am satisfied that the provisions of s.84(1) are met.

260. Turning to the evidence produced by the defence, the witnesses can be classified under three broad heads: viz, those who were leading members of MRND; alibi; and character witnesses. It is the first two categories which must be considered in this context.

261. There is evidence by way of statements from Edouard Karemera who knew the defendant and states that he was not a member of MRND; Joseph Nzirorera who was a high ranking official MRND and did not know Dr Bajinya; Matthieu Ngirumpatse, again a high ranking official, who “does not remember Dr Bajinya”; and finally Georges Rutaganda,

who states that he is not in a position to say because he never met Dr Bajinya.

262. In addition to these party luminaries, there are a number of people who say that he did not participate in politics.

263. The alibi witnesses include his houseboy whose evidence is to the effect that Dr Bajinya left his property with his family and returned to his home commune from where there is other evidence about his activities helping people in the commune at the time.

264. There is also evidence that there is no reference to him in lists of members of MRND and Akazu. Professor Reyntjens said in evidence that it was not a name familiar to him and that he had not come across the name as a member of Akazu, although he did go on to state that it was a multi layered organisation and membership could be at different levels and with different involvement.

265. Further there was a statement from Peter Robinson, an American attorney involved in trials at the ICTR, who in spite of database searches and reading of many thousands of documents and interviewing hundreds of witnesses, had never come across the name of Bajinya.

266. It has now been shown that Dr Bajinya was known to the ICTR, although considered low down on the list of suspects and for priority of investigation.

267. Further investigations made by the Government, although not produced in witness statement form have shown that Dr Bajinya was present at a meeting on 15th October 1991 which recounts a meeting on 9th October 1991 when Dr Bajinya was elected as a committee member of a youth group who were to go and popularize the MRND party.

268. Doubt has also been cast on the evidence of two witnesses who stated that Dr Bajinya did not involve himself in politics. Guadence Nyirasafari

is, in fact, a distant relative of the defendant and allegations have been made at the ICTR that she was a member of Akazu, with supporting evidence of her being present at various meetings.

269. Finally, there is evidence against at the ICTR that Dr Ndalihoranye who gave similar evidence in his statement to this court was an MRND activist.

270. In addition, a search has been carried out of the gacaca courts' records and Dr Bajinya's name was not discovered. Explanations have been given by various witnesses as to why they did not mention Dr Bajinya at their hearings before these courts.

271. In summary, Mr Jones on behalf of the defendant characterized the witnesses against his clients as a number of people who were either serving prison sentences or had completed them at about the time that they made their statements to the investigators; and, in respect of the three killings alleged, a bunch of cronies led by the witness Mabuye who, it is alleged, is a member of the Directorate of Military Intelligence.

272. There are also assertions that statements may have been obtained by torture or inducements to those held in prison. They are assertions and nothing more.

273. In his closing written submission, Mr Jones has analyzed the evidence against his client setting out all the inconsistencies etc.

274. It must be remembered that all the defence witnesses on the question of prima facie case, with the exception of Professor Reyntjens have not been cross-examined, and it is clear that there are grounds for doing so in the light of the information that has been forthcoming even so far from the ICTR.

275. There are obvious points in the alibi evidence that also needs examination, such as the evidence of Habimana, the houseboy, that Dr

Bajinya returned twice to Kigali during the period of the allegations against him.

276. There are many other inconsistencies pointed out by the government in their closing submission which again need further examination.

277. When all these matters are weighed together, I am not satisfied that there is any evidence presented by the defence which seriously undermines the prosecution evidence so as to render it worthless. The court that must consider the evidence fully is any future trial court. I am satisfied that there is a case to answer and that the requirements of s.84 are met in the case of Dr Bajinya.

278. In the case of Mr Munyaneza the allegations may be summarized as follows:

1. On 7th April 1994 the defendant, as bourgmestre, chaired a meeting at the commune office and encouraged Hutus to kill Tutsi as the enemy.

2. At the same time he instructed the conseillers and responsables that the homes of the Tutsi should be destroyed and their property looted.

3. Some days later he led an attack on the home of a Tutsi called Ntivuguruzwa and ordered the looting of his shop, with all looted property to be placed in his vehicle.

4. He ordered the setting up of roadblocks and night patrols.

5. Following the instructions of the defendant, Tutsi were killed in the area.

6. On or around 12th April the defendant instructed members of the Interahamure to go and kill members of Bwiruka family.

7. He attended a meeting on 13th April of all the bourgmestres in Gikongoro province to examine the issue of the killing of Tutsi.

8. The defendant had punished members of the Interahamwe who had taken the cows of Bwiruka but not carried out killings. Tutsi believed that they had been punished for looting and sought refuge at the commune office where they were killed by the Interahamwe. Mr Munyaneza was present at the killings and stopped others from fleeing.

9. On around 13th April he shot dead Joel, son of Semuroba. Later he told the assembled Hutus that they should not loot property without killing the owners first, and encouraged the killing of Tutsi.

10. A few days later he instructed the responsables that they must track down and kill Tutsi.

11. He attended a meeting at the prefecture office on or around 26th April when he reported that 1000 Tutsi had been killed in Kinyamakara.

12. He led a number of attacks over some days on Ruhashya over the Mwogo river.

279. The evidence in respect of the first allegation is contained in the statement of Uziya Ntakavuro, and that for the second in that of David Rugumirizia, who also gives evidence of the attack on the home of Ntivuguruzwa. Sylvestre Rwagacuzi describes the ordering of the establishment of the roadblocks and night patrols.

280. Daniel Ntegeyinka gives accounts of the killing of Tutsi in the commune and includes details of his own involvement in these killings (Allegation 5).

281. The evidence for the incident involving Bwiruka and its aftermath when the Interahamwe were punished by Munyaneza for looting the cows, but not killing the owners, comes from Eriyeri Nyamucahakomye, Claver Munyakayanza and Evanisti Sibomana, who was one of the Interhamwe involved in the looting and subsequently punished by Munyaneza.

282. The killings at the commune office (Allegation 8) are attested to by Eriyeri Nyamucahakomye and Frida Munganyinka – both Tutsi.

283. The killing of Joel is reported by Vienny Ntambara and Evaniste Sibomana, both Hutu, and Claver Munyakayanza, a Tutsi. Désiré Ngezahayo, who was a member of the MRND and bourgmestre of Karama commune at the time of the genocide testifies as to the meeting of 26th April at which he was present.

284. The most serious allegations against Mr Munyaneza relate to the attacks across the Mwgo river in which many thousands of Tutsi who had sought refuge were slaughtered. There are statements from twelve witnesses, nine Hutus and three Tutsis describing the attacks which took place over a number of days. Although there are variations in detail because the events are described by people who were not together in the attacks, the main body of the evidence when read as a whole is cohesive and corroborative, and firmly implicates the defendant as a leader in the attacks.

285. The defence in their closing submissions appear to concede that if the statements are admitted by the court, then there is a case to answer. As set out in my general comments above I am satisfied that the statements put forward on behalf of the prosecution satisfy the requirements of s.84 of the Act and should be admitted.

286. Turning to the defence case, it is said that four of the prosecution witnesses have been convicted of genocide offences, five are still awaiting trial and three are Tutsi survivors. Some of the Government witnesses have now been identified as witnesses in the ICTR in the trial

involving Colonel Simba. One of these was referred to as ANX in that trial. At Paragraph 194 of the judgement the Court stated that it considered his evidence with appropriate caution, as he was an alleged accomplice of the Colonel. The Court also had misgivings as to whether the witness had played down his own involvement in the killings. It also did not find convincing his explanation for the discrepancies between earlier statements and his testimony. It continued at Paragraph 196 "In view of these concerns, the Chamber hesitates to rely on Witness ANX's testimony without further corroboration".

287. A second witness KSM was found not to be "clear and coherent" and "had problems in answering even simple questions in a precise and convincing way".

288. A third witness, KDD, is called "coherent and articulate" in respect of his evidence in court, at Paragraph 269, but after considering other statements made by him, by Paragraph 277 the Chamber had "reservations about the reliability of witness KDD's evidence". However, this witness did not give evidence in respect of Munyaneza at the trial.

289. Finally, a fourth witness, KSS, is described in Paragraph 243 as providing a first hand and consistent account and alleged discrepancies pointed out by defence are minor and do not affect his general credibility. "The Chambers considers him a witness who endeavoured to provide a truthful account of the event".

290. In Paragraph 245, the Chamber dealt with the question of identification evidence and the caution that must be exercised when considering such evidence obtained in difficult circumstances. In this case, the witness' prior knowledge of Simba was weak. For that reason the Chamber found it difficult to accept his evidence placing Simba at a particular place at a particular time without corroboration.

291. It was, therefore, in two cases lack of corroboration that caused the Chamber not to be satisfied by the witness' evidence. In this case there is a great deal of corroboration.

292. Further, it is said, there are other causes for concern. The first of these is that Mr Munyaneza's name did not appear on any public list of people wanted for genocide offences before May 2006. However, on his own evidence, he was aware in 1999 that he was considered a suspect.

293. The book by Alison des Forges "Leave None to Tell the Story" deals with the activities of the defendant during the relevant period. Her picture of him during the early days is favourable: imprisoning looters; good relations with the Tutsi; tried to stop the killings; hid Tutsi; house was attacked and some attackers killed; at a meeting on 29th April protected Tutsi.

294. Subsequently the picture changed and he is implicated in the genocide, although the accounts are qualified by the use of words such as "apparently" and "supposedly", although no real explanation is given for this.

295. Mr Munyaneza gave evidence on his own behalf. He denied all the allegations against him and said that he was considered an accomplice of the Tutsi because he had aided them. He gave his own account of the attack on his home. In cross-examination he said that the description of this in the des Forges book was true. However, although it is not necessary for me to decide the point, there are significant differences between his evidence and the account in the book, eg he said that he was not at home, the book says he was; he did not mention any attackers being killed, the book says five.

296. In his evidence he dealt with various matters described in the Government evidence, but gave a different perspective to them. Two examples will suffice. First he arrested the intrahamwe to protect Bwiruka and his family, not because they had looted but not killed;

secondly, the meetings at the préfecture were to discuss protection of the Tutsi, not discuss their being killed.

297. A number of witness statements have been read on his behalf. Most were from genocide survivors testifying as to how they had been saved by him, or been given Hutu identity cards.

298. The only witness to deal with the attack across the Mwogo river is JEF. He was involved in the attack. The description in his statement is somewhat vague and appears to describe a small scale attack, which is totally at odds with the evidence of the Government in this case and of that which has been heard at the ICTR. He states that he did not see the defendant, but this must be treated with caution when viewed against the size of the attacking force.

299. In the statements of these witnesses there are various allegations of bribes, attempted bribes, threats and other matters which have been used by the Government agencies to get people to testify against the defendant.

300. It is not clear how much these allegations were tested, but certainly Miss Scarlet Nerad, the investigator instructed both by this defendant and Mr Ugirashebuja, did state in cross-examination that when she had pressed one witness on the matter of payment, it had turned out to be no more than a <u>per diem</u> allowance.

301. The statements from the defence witnesses are anonymous and so, could not be investigated by the Government.

302. However, as with Dr Bajinya, the question to be answered is: as there is a case to answer on the Government papers, does the evidence produced by the defendant render that evidence worthless so that the defendant should be discharged. I am satisfied that the defence evidence in this case does not achieve that. The proper court to deal

with the evidence and make the appropriate factual determination is any future trial court.

303. The third defendant, Mr Nteziryayo, was bourgmestre of Mudasomwa commune. The allegations against him are:

1. On or around 7th April 1994 he held a meeting of the conseillers of the thirteen secteurs in his commune and distributed guns to them. They were also told to establish roadblocks, check identity cards and kill all Tutsi.

2. He supervised the burial of the bodies of the Emujeco workers who had been murdered and organized a party for the killers.

3. He arranged for Tutsi refugees to be taken to Murambi which was a school under construction, where the water was cut off and food denied to the refugees.

4. Homes belonging to Tutsi were burned down.

5. On or about 9th April he addressed a crowd at the Rya Rubundo section in Buhoro. He told them that they should turn on the Tutsi.

6. On or about 9th April the defendant distributed handguns and then made a tour of the roadblocks.

7. On the following day when on another such tour, he promised to take steps to see whether a person manning that roadblock could be moved as he was complaining about the lack of Tutsi to kill.

8. On 10th April or thereabouts he gave guns to the Hutus of Bohoro secteur knowing that they were to be used to kill Tutsis.

9. On 13th April there was a meeting at the Gikongoro Prefecture Office when he informed the other participants that the killings had started in his commune.

10. After that a roadblock was established at Kumurangura where many people were killed.

11. About 13th or 14th April a message was sent from the Mudasomwa commune office that all young able bodied men had to report to Ruramba. They were then sent to Rwamiko to kill the Tutsis.

12. The defendant informed people at Gasendra market that because white men were taking photos of the dead, any Tutsi bodies should be taken to a pit near where his home was being built and put in it. He also suggested using the Emujeco digger for a similar purpose.

13. On or about 17th April Mr Nteziryayo arrived at the roadblock near the Mata Tea Factory, just after three religious brothers had been killed. He told the conseiller of the secteur to find a place to bury the bodies.

14. On or about 21st April attacks were launched on Murambi by interahamwe armed with guns, grenades and traditional weapons. The defendant had transported interahamwe and bags of grenades there.

15. On 26th April at a meeting at the prefecture he reported that all the Tutsi in his commune had been killed, and assistance had been given in other areas.

16. On a date in May a Hutu woman, married to a Tutsi, went to seek the protection of the defendant for her baby. Later he called a meeting in her secteur, which she attended, and at which the defendant urged the audience to seek out Tutsi. That same day

interahamwe went to the house where the woman was living and asked for her husband. He was dead but the interahamwe dug up his body.

17. Also in May, Mr Nteziryayo attended at a roadblock where people were being beaten. He did nothing to prevent it.

18. In the following month he called for the military training of Hutu youths.

19. Having fled to the Congo, he was a leader in a refugee camp.

304. Turning to the evidence in support of these allegations, that for the first allegation comes from Gregorie Rwakaoniza, a commune policeman.

305. That in respect of the second allegation is from four witnesses, the said Rwakayoniza, Valence Singironkalo, Nyabyenda Uzabakiriko and Phoebe Mukamudenge.

306. Desire Ngezulayo who was the bourgmestre of Korona commune and Valience Singwanhabo describe the evidence in respect of Allegation 4 – the burning down of Tutsi properties.

307. Nyabyeda Uzabakarido also gives evidence on the emergence of the killing of Tutsis (Allegation 5).

308. The distribution of guns on 9th April was witnessed by Jean Baptiste Kaguye who was given one.

309. The evidence on the tour of roadblocks is from Gregoire Rwakayonza who accompanied him as a commune policeman.

310. That in respect of the second allegation is from four witnesses, the said Rwakayonza, Valence Singirankabo, Nyabyenda Uzabakiriho and Phoebe Mukamudenge.

311. Désiré Ngezahayo who was the bourgmestre of Karana commune and Valence Singirankabo describe the evidence in respect of Allegation 4 – the burning down of Tutsi properties.

312. Nyabyenda Uzabakiriho also gives evidence on the encouragement of the killing of Tutsis (Allegation 5).

313. The distribution of guns on 9th April was witnessed by Jean Baptiste Kaguge who was given one.

314. The evidence on the tour of the roadblocks is from Gregoire Rwakayonza who accompanied him as a commune policeman.

315. The further distribution of guns was seen by Uzabakiriho, Shirubwiko and Kaguge who were all given weapons.

316. Bourgmestre Ngezahayo describes in his evidence the meeting of 13th April.

317. Uzabakiriho gives descriptions of the killings on the roadblocks, as he does in respect of Allegations 11 and 12.

318. The attacks on Murambi and the involvement of the defendant are described by Annonciata Muhayimana a Tutsi woman who lived in the Mudasomwa commune and was present during the attacks.

319. The further meeting on 26th April is again described by Ngezahayo. The incident described in Allegation 16 is by Gerolina Nyirandutiye, the woman concerned.

320. The evidence as to the beatings at the roadblocks is from Phoebe Mukamudenge who has also described other incidents.

321. Kaguge describes the youths being called upon for military training.

322. Uzabakiriho went into exile with the defendant and deals with his role in the refugee camps.

323. Mr Nteziryayo did not give evidence himself. On his behalf it was submitted that the evidence of the prosecution witness could not be relied on. Five of them are incarcerated, either serving sentences or on remand. The three female witnesses were either Tutsi or married to Tutsis.

324. The statements were taken in 2007 and within a period of a month. It has been established that it was not until 2005 that the defendant's name was passed to the Rwandan authorities and so the taking of these statements must follow that time. I cannot see that it is a criticism that all the statements were taken in a short space of time.

325. It is suggested that because the witnesses are imprisoned in extremely poor conditions that they have made these statements to relieve their own position. There is no evidence for this submission whilst statements from prisoners must be viewed with caution, this does not, of itself, mean that they are not true.

326. There were general submissions along the same lines as those from other defendants, eg no previous mention of the defendant. However, this is not relevant at this stage of the proceedings.

327. The one problematic witness is Gregoire Rwakayonza. He produced a statement to the Government dealing with various incidents which he witnessed as a commune policeman. He was subsequently interviewed by Mr Ralph Lake an investigator instructed on behalf of the defendant who approached the witness. Anonymity was sought originally, but later he said that he was prepared for his identity to be known. The witness appears to retract some of the allegations in his second statement.

328. There was some cross-examination of Mr Lake as to his method of interviewing. It was by means of question and answer format. The interview was recorded, although the witness was unaware of “free recall” as a method of interviewing. A careful reading of the two statements shows differences of detail, but not sufficient to entirely reject the statement of the witness. By way of example only, in his original statement he said that the defendant had given guns to the thirteen conseillers at the same time. Subsequently, he told Mr Lake that they had been given guns, but not all at the same time.

329. What is also noticeable is that the statement signed by the witness is in English, a language which the witness neither reads nor understands. There is attached a statement from the interpreter that he translated it orally into Kinyarwanda before it was signed, but I do not consider that this is a satisfactory procedure for taking a statement for use in court. The transcript of the recording makes it clear also that there were deficiences in the practices of the interpreter which must weigh against the statement, eg some matters not being translated, and the interpreter adding something to the answers.

330. The witness has been subsequently interviewed on two occasions by representatives of the Prosecutor-General as to the interview with Mr Lake. In these he does make allegations that what he told Mr Lake had been changed. He also said that he told Mr Lake what he thought he wanted to hear. (Interestingly, in his evidence Professor Reyntjens said that it is a national characteristic of Rwandans, I paraphrase, that they will not lie but rather tell the other person what they feel will be to their own best advantage [Mon 12th November 2007 p.44 Line 9 onwards]).

331. Some of the evidence given by this witness is corroborated by others. Therefore, I do not think that the value of his testimony has become worthless, and so need not be discarded at this point. Clearly, it will be subject to close cross-examination at any subsequent trial.

332. A number of anonymous witnesses have given evidence in written form on behalf of the defendant. Their evidence can be summarized by saying that far from arming and encouraging the interahamwe he was regarded as their enemy for the help he gave the Tutsi, and examples of the help are given.

333. As with other defendants it must be borne in mind that these statements have been given anonymously and that the truth of them cannot just be assumed.

334. Similarly, they paint an opposite picture to that put forward by the Government, as has been the case with the other defendants. It is not the function of the court to decide where the truth lies at this stage. The evidence provided by the government has established that there is a case to answer. What has been put forward is a defence, but at this stage the point has not been reached where the defence case has rendered the Government's evidence worthless. Therefore, I am satisfied under s.84(1).

335. Finally we come to Mr Ugirashebuja. The allegations against him may be summarized as follows:-

1. He was a long standing member of the MRND, having been the bourgmestre of the Kigoma commune since the 1970s.

2. Roadblocks had been established in his commune prior to April 1994, but after the death of the President, people had to show their identity cards, and subsequently Tutsis were murdered on these roadblocks and this continued for some time. The defendant passed by while this was happening, and would enquire as to the number of deaths.

3. He convened a meeting of the conseiillers and responsables at the commune office and instructed them to set up roadblocks and bring any inyenzi to him.

4. At a meeting in the Gahambo secteur he encouraged the setting up of roadblocks and arresting of Tutsis. Following this, Tutsi were killed, their property looted and their houses burned. A group of Tutsi refugees from Ntongure were also killed.

5. Ugirashebuja instructed his driver to "take a man named Munyensanga and his family to Nyanza", which meant to kill them. His driver refused, and so another man was instructed to do and he took them away in the commune vehicle.

6. Dionise Karima and his family were killed at the commune office and buried near the defendant's home on his instructions.

7. The commune policemen, who were under his direct control, played an important part in the killings, especially his brother-in-law.

8. At a meeting in Kigama the defendant urged those attending to kill the Tutsi. After this there was more burning of houses.

9. On or about 13th April boxes of guns were unloaded from the commune vehicle.

10. Some Tutsi men were taken to the commune office in the pick up truck. The defendant issued instructions that they were to be taken to a certain place and then they were killed.

11. He refused to help an old Tutsi man and he was subsequently killed.

12. He gave instructions that Tutsis were to be tricked to come out of hiding so that they could be killed; looting of Tutsi property was to take place and their homes burned to destroy the evidence; dead bodies were to be moved so that they would not be seen by

foreigners. All of these instructions were followed and the bodies were buried in a pit.

13. The interahamwe brought a Tutsi to the commune office. The bourgmestre ordered them to take him and kill him.

14. During the period of the genocide Tutsis were kidnapped and taken to Nyanza to be killed.

15. Guns to kill Tutsi were distributed by the defendant.

16. A man named Rurangirwa hid Tutsis in his home. The defendant instructed the interahamwe to take them away. Rurangirwa persuaded them not to do so on the basis that he would kill them. Later Ugirashebuja came to see him threatening to send men to search for them and boasted of having had the Tutsis in Mugandamure killed. Subsequently the interahamwe came and took two old Tutsi women and three children.

17. At a meeting in May, he urged a crowd of about three hundred people to destroy the property belonging to Tutsis.

336. The evidence in respect of the first allegation comes from a number of witnesses. They give various dates for his appointment and in an analysis of the Government evidence by Miss Scarlet Nerad, the investigator instructed by the defendant, she puts this forward as evidence of the unreliability of the case, even going so far as to suggest, without any apparent basis for doing so, that some of the witnesses may have been led by .the prosecutor taking their statements. It is not surprising that after thirty years it would be difficult to recall the exact date of such appointment and I do not accept what is put forward on behalf of the defence.

337. The evidence for the second allegation was from one of these same witnesses, Gabriel Bagilishya, together with the other witnesses Sostene

Munyemana and Charles Twagirimana. That same last witness gives evidence of the meeting at the commune office (Allegation 3).

338. Yahaga Munyaneza and Matthias Simbizi give evidence about the meeting in the Galembo secteur and the aftermath. The death of Munyensanga and his family is contained in the statements of Munyemana, Twagirimana and Enos Tabaro. Tabaro deals also with the meeting at the commune office. (Allegation 8).

339. The witness Bagilishya deals with the unloading of the guns. Dominique Havugimana witnessed the killing of the young men. (Allegation 10).

340. Jeannette Nyiramana witnessed the allegation contained in numbers 12, 14 and 15 and she, and others, subsequently dug up the bodies in the pit and gave them a more dignified burial.

341. The incident alleged in 13 was witnessed by Havugimana who was in the commune office at the time.

342. Leonard Rurangirwa gives the evidence with regard to the killing of the two old women and three children.

343. Havugimana and Twagirimana deal with the meeting in May.

344. There were a number of extra statements which were served on 8th April which did not allow the defence sufficient time to investigate them further and I have disregarded them for this reason.

345. In forceful submissions made on behalf of the defence, Mr Fitzgerald urged that I should not accept the prosecution evidence because of the methodology employed by the Government investigators in seeking only inculpatory evidence. This was contrary to the evidence of Professor Schabas who stated that in a civil law system, the investigation carried out by the judge would seek exculpatory evidence as well. At the moment the statements are being sought for the purpose of these

extradition proceedings, not any eventual trial under the Rwanda civil law system.

346. There is also, according to defence witnesses, evidence that some of the Government witnesses were bribed to give their evidence. However, at the moment these remain pure statements and allegations by defence witnesses which have not been tested in any way.

347. Thirdly, there was criticism of survivor agencies, and, in particular, of one Ms Nyirazaninka. She has informed the Government that, in spite of what has been said by defence witnesses, she has no interest in Mr Ugirashebuja, but is seeking evidence against another man resident in Belgium who was responsible, so she believes, for the slaughter of her family. Whether this is so or not, there seems to be no reason why such agencies should not be involved in seeking witnesses to the atrocities.

348. As far as defence witnesses are concerned, a similar application for anonymity to those made on behalf of two other defendants has been made and I am prepared to grant it for the same reasons.

349. Twenty two witness' names were given to the defence team but only two were prepared to co-operate. The defence investigators then sought out witnesses who had been named in Government evidence but from whom no witness statements had been taken. Those who have made statements have given ones which are contrary to those provided by prosecution witnesses. In addition, there was a number of witnesses whose evidence is to the effect of the work done by Mr Ugirashebuja in saving and helping Tutsis.

350. Miss Nerad has set out an analysis of the Government evidence in which she deals with inconsistencies in the evidence of the Government witnesses. This does, as shown in the example quoted earlier of the dates of the defendant's appointment as Bourgmestre, reveal such inconsistencies but does go no further than that. She also refers to some witnesses as "lying". This is on the basis that defence witnesses state

the contrary, or that the witnesses have allegedly been bribed. Although her investigation methods appear to be rather more rigorous than those of Mr Lake, she could only come to her conclusions by accepting that what had been said by the defence witnesses was entirely truthful. They have not been subjected to any proper cross-examination in a court, so that what has been said by the defence witnesses must at this stage be regarded with caution. A fact finding exercise as to where the truth lies is for any court of trial in the future.

351. No evidence was given by Mr Ugirashebuja.

352. Further, as pointed out by Miss Montgomery on behalf of the government, the evidence of the defence witnesses needs careful examination. In spite of the evidence of defence witnesses that the defendant had opposed the genocide and the orders of the provisional government, he remained in post as bourgmestre.

353. One of the witnesses, AAA, gave a statement that the roadblocks were for peaceful purposes. It emerged in cross-examination that that witness had pleaded guilty to acts of genocide whilst stationed on these roadblocks.

354. There is also an acceptance on the part of Miss Nerad that Munyesonga was taken to the commune office where he was murdered. This, says Miss Montgomery, would suggest that the commune office was not a safe haven.

355. There are other examples given by her in her closing submissions. This is indicative that there are matters in the defence evidence which also need to be examined.

356. What has been put forward on behalf of the defence are matters which will need to be looked at by a trial court, but at this point I am satisfied that the appropriate test has been met by the government and that the provisions of s.84 are satisfied in the case of Mr Ugirashebuja also.

357. Having been satisfied as to the provisions of s.84, the court is required by s.84(6) to proceed under s.87 of the Act. This reads as follows:

> "S.87(1) If the judge is required to proceed under this section (by virtue of section 84, 85 or 86) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998".

In particular the court has been requested to examine Articles 2, 3, 6 and 8 of the European Convention on Human Rights.

358. The main issue before the court was whether there had been breaches of Article 6. As far as Articles 2 and 3 were concerned, they were mentioned but did not appear to be strongly argued.

359. Article 2 provides:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. (Not relevant to this consideration).

360. Article 3 states:

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

361. These two Articles can be conveniently considered together.

362. The Court of Appeal in the case of **AS & DD (Libya) v Secretary of State for the Home Department [2008] EWCA Cw 289** considered the

correct test to apply. In his judgement Sir Anthony Clarke MR said at Paragraph 22:

> "It is common ground that the correct test is whether substantial grounds were shown for believing that the respondents would face a real risk of suffering treatment contrary to Article 3 of the Convention on return to Libya".

363. The same text would apply in relation to Article 2 – **Lord Steyn in R (Ullah) v Special Adjudication [2004] AC 323** at Paragraph 40C. He continued at Paragraph 24:

> "We should first note that, in our judgement the requirement that there must be substantial grounds for believing that there would be a real risk of ill treatment contrary to Article 3 on return, means no more than that there must be a proper evidential basis for concluding that there was such a real risk".

364. He then made reference to the recent decision of the Grand Chamber of the ECtHR, application 37201/06, in the case of **Saadi v Italy** where it was said:

> "It is in principle for the appellant to adduce evidence capable of proving that there are substantial grounds for believing that if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 ……….Where such evidence is adduced, it is for the Government to dispel any doubts about it".

365. It is therefore up to the defendant to produce evidence to the court that he is at risk of suffering such treatment if he were to be extradited to the Requesting State. The hurdle is a high one, and further, the defendant must show that he is at that risk personally, and not because he is a member of an ethnic or national group. This has been well-established in extradition cases involving defendants of Romany origin. In this case,

therefore, it would be necessary for a defendant to show the risk to himself, and being a Hutu would not be sufficient.

366. In any event, in this case no such evidence has been produced to the court, and I am satisfied that no contravention of Articles 2 and 3 has been established.

367. Turning now to Article 6 which reads:

1. In the determination of his civil rights and obligations, or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

368. The starting point in looking at the legal test to be applied in deciding whether there could be a breach of Article 6 is the case of **Soering v United Kingdom [1989] 11EHRR 439** where at Paragraph 113 the court said:

> "The right to a fair trial in criminal proceedings holds a prominent place in a democratic society. The court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country".

369. The leading English authority is the House of Lords decision in **R (Ullah) v Special Adjudicator [2004] AC 323**. In his judgement Lord Bingham, after reviewing the Strasbourg jurisprudence, said at Paragraph 21D:

> "The court has not excluded the possibility of relying on Article 6, and even Article 5, while fully recognizing the great difficulty of doing so and the exceptional nature of such cases".

370. At Paragraph 24 he said:

> "While the Strasbourg jurisprudence does not preclude reliance on Articles other than Article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case ………….. where reliance is placed on Article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving State".

371. Lord Steyn said in his judgement at Paragraph 44:

> "This is a qualified right and it is subject to derogation in time of war or public emergency. Moreover, in deciding what amounts to a fair trial the triangulation of interests of the accused, the victim and the public interest may require compromises ………. On the other hand, there are universal minimum standards. It is important to bear in mind the status of the right to a fair trial. It is a universal norm. It requires that we do not allow any individual to be condemned unless he has been fairly tried in accordance with law and the rule of law. The guarantee of a fair trial is a core value under the ECHR ………. It can be regarded as settled law that where there is a real risk of a flagrant denial of justice in the country to which an individual is to be deported, Article 6 may be engaged".

372. Finally, in his judgement at Paragraph 69 Lord Carswell said:

> "The concept of a flagrant breach or violation may not always be easy for domestic courts to apply ……….. but it seems to me that it was well expressed by the Immigration Appeal Tribunal in **Devaseelon v Secretary of State for the Home Department [2003] Imm. AR1, 34, para 111** when it applied the criteria that the right in question would be completely denied or nullified in the destination country. This would harmonise with the concept of a fundamental breach, with which courts in this jurisdiction are familiar".

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

374. The evidence put before the court on behalf of the defendants came from a variety of sources; expert witnesses, investigators, two Rwandan nationals living in exile and NGO documents and reports.

375. I propose to look at the evidence of the two expatriate witnesses first, but to consider the evidence of the other witnesses within the context of the arguments put forward on behalf of the parties.

376. The first of these witnesses was Jean Damascine Ntaganzna. He stated that he obtained a Baccalaureate Diploma in Law at the Free University of Kigali. He had been employed in the Human Rights field in Rwanda from 1994 – 2004. From 1998 to 2004 he had been employed by the League for the Promotion and Defence of Human Rights in Rwanda (LIPRODHOR). He had fled the country in 2004 when he was told that his name was on a list of wanted people who were considered to have genocidal ideology and an intention to divide Rwanda. He fled to Holland and stated that he now has an extensive network in Rwanda and is in contact by telephone several times a week.

377. He was presented to the court as an expert witness, but it soon became clear that he was nothing of the sort. He had only appeared once as an expert witness in a trial. This was in Belgium on behalf of a defendant who had been convicted. He had no publications to his name. Most devastating however was the evidence that emerged in cross-examination that far from obtaining a Baccalaureate Diploma, he had been expelled from the university for cheating. He had, therefore, lied to the court. He tried to bluff his way out of it by saying that he had carried out his studies by working by day and studying at the university by evening, although it transpired that the distances involved were considerable.

378. Finally, he had to concede that his brother had been the Prosecutor-General in the pre 1994 regime.

379. He cannot, therefore, be regarded in any way as an expert witness. His evidence with regard to the judicial system in Rwanda was totally unconvincing and carries no weight. He clearly saw this as an opportunity to criticize the current regime.

380. The main thread of his evidence was his concern about the independence of the judiciary. He gave examples from his own experience and others of which he was aware. Of necessity, the examples that he purported to give from his own experience were pre 2004 and the greater majority of the others were from the late 1990s.

381. These were of historical interest only as far as this case is concerned. It was a matter of agreement between Professors Schabas and Sands that at that time the Criminal Justice System was in total disarray and the question to be decided here is whether sufficient progress has been made. He also dealt at some length with prison conditions but was unaware of the provisions being made for these defendants.

382. The tenor of his evidence was that the trial process will be masterminded by the government and that as three of them were bourgmestres they will be considered as guilty before the trial starts.

383. He was cross-examined on various alleged failings by the judiciary and other matters designed to show the authoritative nature of the government. On cross-examination it became clear that these examples were either exaggerated, wrongly emphasized or wrong. I accept that he may have had to rely on his contacts for at least some of the information, but they are, no doubt, of a similar disposition to himself and it did not add to his creditworthiness.

384. When asked for trials which had been reported to him, he could not say how many there were. He was asked about the independence of the

judiciary. He avoided the question by talking about the gacaca courts. Further reference will be made to these, but suffice it to say that there are local courts with untrained "judges" and no lawyers are allowed. They are irrelevant as far as this case is concerned as the defendants will, if extradited, be tried in the High Court.

385. He clearly had little if any knowledge of the current situation in Rwanda. He was unable to answer any questions about the High Court. When asked if there were any problems with the High Court, his response was that it was not the only Court. He did go on to say that pressure had been applied to the High Court judges in the last two years but was not able to give any examples nor elucidate any further.

386. He admitted that he had not read the 2007 Organic Law which would cover cases such as the present one if they are to be tried in Rwanda. When it was put to him that Africa Watch had agreed to monitor any trials, his somewhat surprising answer was that he had not read the law.

387. I have dealt with this witness at some length as I disregard his evidence and attach no weight to it. He was not an expert; he had no knowledge of the current situation in terms of any future trials; he was either evasive or totally unwilling to answer questions put to him in cross-examination. In short, a wholly unconvincing witness.

388. The second witness to be considered at this point is Paul Rusesabagina who was called on behalf of Dr Bajiniya, the previous one having been called by Mr Munyaneza. His father was a Hutu and his mother a Tutsi. His wife is a Tutsi. After attending a Seventh Day Adventist School he studied Theology and then moved into the hotel trade.

389. He had been working in a hotel in Kigali but in April 1994 moved to the Hotel Mille Collines. Whilst there he saved 1268 refugees. None was killed, taken out or beaten. When asked in examination in chief how he had managed this, he replied that it was "with the help of God" but he also used his acquaintances and friends.

390. He left Rwanda in September 1996 after being almost killed by the Directorate of Military Intelligence. However, he gave no explanation for this, nor how it was attempted. This is somewhat perplexing as on his own account he was regarded as a hero for his actions, particularly as some members of the present government are among those allegedly saved.

391. From 1994 onwards he was approached by film makers, on his evidence, to make a film about his experiences, but it was not until 2003 that work started on the film "Hotel Rwanda".

392. In 2002 he was to be invested by President Kigama with an award for bravery, but did not travel for "personal reasons" – although these were not explained.

393. In spite of his reason for leaving 1996, he returned in 2003 with the film makers and survivors were interviewed resulting in fifteen hours of tapes. According to a statement filed by Mr Terry George, the director of the film, among those interviewed were members of the Kagame government, although the witness has declined in his statement to name those people. Mr George does not mention his being accompanied by Mr Rusesabagina.

394. In 2004 he went back to Rwanda with his wife, younger child and two young cousins to show them the country. Whilst there, he left as he did not consider it safe, but his wife and the children stayed on.

395. Upon the film's release it was screened specially in Kigali for the government by Mr George. According to the latter's statement, Mr Rusesabagina pulled out of the trip at the last moment on the grounds of personal safety, but was again content for his wife to go.

396. About this time, it would appear that the Rwandan authorities began criticizing the witness, because he had been speaking out against the government. Subsequently, he has published his autobiography.

397. As far as his personal circumstances are concerned, he now lives in Belgium. He has a transport company in Zambia and has set up a Foundation, the Hotel Rwanda Rusesabagina Foundation, which is funded through money from his speeches and the seeking of donations. He has been given medals and awards mainly in America, which like the setting up of the Foundation appear to coincide with or post date the release of the film. He describes himself as a humanitarian.

398. I do not accept that this witness may be regarded as an expert witness. He possesses no qualifications to this end and his only publication appears to be his autobiography. His evidence is that of an implacable opponent of the regime and cannot in any way be regarded as that of an expert. It would also appear that he has never given evidence before as an expert.

399. He gives examples in his statement of reasons for saying that the defendants would not receive a fair trial, but many go back to the 1990s, which as stated above when dealing with the earlier witness, are of historical interest only. Any trials conducted in gacaca courts are also not relevant.

400. According to this witness, any successful Hutu will be killed, imprisoned or be forced into exile but one historical example only is given. There are allegations of lack of judicial independence but the examples given are again of historic interest only. There are a number of wild and general allegations about Human Rights in Rwanda which are made without any supporting proof and he dismissed the judicial reforms as a “smokescreen”.

401. He also deals with prison conditions. It is agreed by the expert witnesses that the prison conditions are deplorable, but none of them goes as far as

this witness as saying that there are ten times as many prisoners accommodated as the numbers the prisons were built for; that prisoners are used as, effectively, slave labour in the Congo; and, strangest of all, that there are secret jails located in unidentified areas unknown to humanitarians, human rights activists and journalists. He produces no supporting evidence for any of these allegations.

402. In his conclusion, he stated that he had never known Dr Bajinya. Because of the conditions in Rwanda as he had described them in his statement, Dr Bajinya would face the possibility of death.

403. The cross-examination of the witness began in an unusual way. He agreed that he had been sitting near the dock when the defendants entered but denied speaking to Dr Bajinya. He admitted knowing one of the other defendants – Mr Ugirashebuja – although he could only remember his Christian name.

404. He eventually admitted that he had spoken to Dr Bajinya, saying in Kynirwandan – "How are you? How are you doing?" His explanation was that he had spoken to Dr Bajinya as he was the nearest defendant.

405. He had been manager of the Mille Collines Hotel until November 1992. He had then transferred to the Diplomat, but after the killing started the manager of the Mille Collines telephoned him to say that he was leaving and so he moved there as the government was leaving Kigali for Gitarama. He admitted that he knew most of the Habyeramana government who had been in power prior to 1994. He knew them through his job, not as personal friends in the sense that they would visit each others' homes.

406. He was then asked about his knowledge of various witnesses called on behalf of Dr Bajinya. He admitted that he and George Rutaganda had grown up together. The latter became Vice President of the Interahamwe. He had seen him many times in the period April – June 1994. He was aware of his conviction by the ICTR and had refused to

testify for him. He was not aware of the massacre of 11th April nor of the importation of half a million machetes in 1993/4. As far as he was concerned Rutagendu was a good man who gave children safe conduct through roadblocks. He accepted that bourgmestres had effective control of the communes.

407. Another name put to him was that of Bagosora. He stated that this man was not a friend but was staying at the Diplomat Hotel when it was under his management. People came to close the Mille Collines Hotel and the witness called contacts by telephone to seek help including from Bagosora. By this time he had his telephone number in his personal "black book".

408. He was then referred to the Amended indictment in the ICTR case number 00-56-01 dated 23rd August 2004. The first named defendant on the indictment was Augustine Bizimungu who was Chief of Staff of the Rwandan army. On 17th June, the witness went to see Bizimungu to give him supplies to, in his own words, "buy favours". At that time the militia were getting into the hotel. Bizimungu returned there with the witness and told them to get out. As with Bagosora, who is mentioned in the indictment but is not joined in it, Bizimungu was a "good man".

409. He was directed to various parts of the indictment, but his overall comment was that he learned not to trust allegations when they came from the Rwandan government. This ignored the fact that this was an ICTR investigation and prosecution.

410. The second named defendant was Augustin Ndindiliyimana who was Chief of Staff of the Gendarmerie Nationale. The witness did not regard him as a personal friend but would have a drink with him and had his telephone number in his "little black book". Again various matters were put to him from the indictment but again he denied hearing of them. His only function at the hotel was to welcome and entertain the people in the government.

411. He was then asked about his book. He stated that he had saved the lives of 1268 people – “peasant and elite”. Some were saved by God, but God is helped by people. He persuaded the militia not to kill people in the hotel, by giving them drinks. He also learned of pending attacks on the hotel from these sources.

412. He had not at the time mentioned the name of “generals” because they were involved in “butchering” elsewhere. He did not want their role in helping at the hotel to be known as it could have worked against them.

413. He denied that there was UN observers in the hotel, only four soldiers. He also denied that the UN soldiers had fought off three attacks and bombardments. He also alleged that one of the UN personnel had made a profit out of the refugees by buying their cars and exporting them. He said that it was wrong to make a profit out of the refugees.

414. He denied that he had charged the refugees and had threatened to evict those who did not pay.

415. He was then shown three faxes on this very point – two from the refugees and the third from Sabena, the owners of the hotel which instructed him not to put pressure on those who could not pay.

416. He claimed that all these documents were faked.

417. He had never received instructions not to charge and he had never taken any money. I note that attached to the statement of Mr George is an article he wrote for the Washington Post in which he said “……….. that he had charged people to stay in the rooms (a fact we had highlighted and explained in the film)”.

418. As far as the fax from Sabena is concerned, I am satisfied that it is genuine. At the top there is the date and time of transmission. There are in fact two such entries, one dated 18th May 1994, the date of the Memo, which appears to be an internal transmission within the company from

the sender of the Memo, and a second dated 19th May from the Sabena chairman.

419. The other two documents are the messages which were allegedly sent by the refugees. There is no such information about date and time of transmission on these, but as these are the documents copies of which were faxed, then there would not be such information on them. This appears only on the copy which reaches the recipient. I am satisfied also about their genuineness.

420. He was then asked about his knowledge of the various witnesses who would give evidence if necessary on behalf of Dr Bajinya, but first admitted to knowing Jean Damascne-Ntangwanza.

421. He admitted knowing Edward Karemera, Secretary General of the MRND; Joseph Njirorera, who he described as a minister in the Government; Matthieu Ngirumpatse who was President of MRND; George Rutaganda, a life long friend, who was Vice President; Gaudnce Nyirasafore who is a relative of Dr Bajinya and has been identified earlier as actively involved in MRND politics. He stated that he knew her as his wife was a nurse at the Central Hospital in Kigali, where Dr Bajinya worked. He also incidentally mentioned studying abroad and said that in order to do so it was necessary to obtain patronage from someone in the President's circle. Dr Bajinya studied in Canada from 1989 to 1991.

422. He also knew Jean Baptiste Ndalihoranye as a minister and is still acquainted with him in Belgium. The same thing obtained with Jean Marie Nkezabera who was a high ranking MRND official and Member of Parliament.

423. He has become acquainted with Michel Niyibizi since moving to Belgium. The same obtains with Joseph Matata. The witness stated this man had not been in Rwanda at the time of the genocide, but this is clearly contradicted by Mr Matata himself.

424. On further cross-examination he stated that the Human Rights agencies are biased in favour of the RPF and that UN troops helped the RPF. The RPF killed the President and the President of Burundi and so are responsible for the genocide. The people manning the roadblocks were supporters of Kigame. What occurred was not a systematic government driven genocide.

425. In summary, therefore, this is a witness who was presented as an independent witness who could give evidence on the question of Human Rights. Unlike Ntangwanza he did not ever mention having any contacts in the country who kept him informed and up to date. He had not lived in Rwanda since 1996, so it is difficult to see how he can speak with any authority on the current situation, indeed on his own admission in cross-examination he knows nothing of the legal aid position nor the current position with regard to the judiciary nor other relevant matters such as the detention facilities for any defendants transferred back to Rwanda.

426. He was well acquainted with leading members of the MRND and government ministers and also with a number of Dr Bajinya's witnesses. On his own evidence he was able to call on senior genocidaries for favours.

427. Some of his subsequent statements eg that the Human Rights agencies support the RPF; that the roadblocks were manned by RPF and that there was no systematic government led genocide are so contrary to all evidence and facts placed before this court as to be worthless.

428. He was not independent. He is clearly a very strong opponent of the present regime, even going so far as to suggest that it was responsible for the genocide, and making other wild and exaggerated claims.

429. I have spent a great deal of time looking at this evidence. The government had indicated that they were prepared to have this evidence read but the defence called him. It has been suggested that the cross-examination was aimed at a character assassination. In reality what it

did was expose the background to this evidence and show that the evidence was not that of an independent expert, but rather that of a man with a background strongly allied to the extremist Hutu faction, and as such cannot be considered as independent and reasoned. In the light of the bias displayed, I am satisfied that no weight can be attached to this evidence.

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

431. Their personal experiences of present day Rwanda are limited in the extreme. Professor Reyntjiens was associated with the pre 1994 government and assisted in the drafting of its constitution. He has not been back to Rwanda since the time of the genocide and is dependent for his knowledge on contacts both inside and outside the country.

432. Professor Sands had had no contact with the country prior to his being instructed in this matter. He knew of no-one within the country whom he could contact and so had to get in touch with former students in order to be able to try to interview people and form a picture of the situation on the ground, as well, of course, as reading literature in the public domain such as NGO Reports. In this way, he was able to talk to and interview people sufficiently for the purposes of his Report.

433. Professor Schabas has assisted the present regime and did help in the drafting of an Organic Law. He had last visited the country in 2001, before his field trip of one week in 2007 for the purposes of preparing his Report. During the currency of this case he has visited for a few days to assist in judicial training.

434. Neither Professor Sands nor Schabas claimed to be experts in Rwandan law. Professor Reyntjen's evidence must, for reasons set out later, be

viewed with some caution. It was suggested that Professor Schabas should not be regarded as a disinterested expert witness because of the assistance given to the present government. I accept that this must be something to be taken into consideration and while certain valid points of criticism were made by the defence I am of the opinion that his involvement is nowhere as near as great as that of Professor Reyntens with the previous regime, and that he has in the long run been able to display more objectivity.

435. One preliminary matter which may be disposed of at this point is the question of disclosure. Earlier I dealt with this matter in relation to disclosure in this case. I was satisfied that there was no duty on the Government and that the condition necessary for it to operate, as laid down in **Tollman**, did not apply. There has been no evidence before the court as to whether there is a duty of disclosure or one to, for example, produce previous inconsistent statements, in Rwandan law. As Professor Schabas pointed out such procedures are a feature of Common Law, and, indeed, a comparatively recent one at that. Such duties do not exist in Civil Law, but there are usually corresponding safeguards. The right to a fair trial is one to a fair trial according to the laws of the requesting State, not according to the laws of England and Wales. I do not, therefore, consider that this is a relevant point.

436. All experts were agreed that at the time of the genocide and thereafter for some years, the Criminal Justice System in Rwanda was in a state of collapse and, indeed, for some time did not operate at all. Since 1994 efforts have been made to rebuild the country in all ways. Professor Reyntjens acknowledged that there had been progress in the economic and legislative fields but not in the field of criminal justice. Professor Sands acknowledged that progress had been made in that field also, but not sufficient, while Professor Schabas was of the view that the defendants would receive a fair trial.

437. The view of Professor Reyntjens was that, in summary, it would be impossible for the defendants to receive a fair trial as they were Hutus

and had been bourgmestres and, as such, would be regarded as guilty from the start. There was no independent judiciary as it was subject to government pressure and no witnesses would come forward.

438. On his own admission, however, he had not read the Organic Law which was passed to deal with such trials. His explanation for this was that he had been instructed to reply to Professor Schabas' request and as he had not mentioned the Organic Law he had not read it. In fact, Professor Schabas' report contains a whole section on the Law, at pages 19-24, as well as having other references to it. This explanation holds no water whatsoever, and, in any event, as an expert on Rwandan Law, I would have expected Professor Reyntjens to be familiar with it. Having read it overnight, he was extremely dismissive of it when his evidence resumed.

439. The test propounded by Professor Schabas when giving evidence in November 2007 that the court should adopt was: Was there a likelihood of a miscarriage of justice? which was interpreted by Mr Fitzgerald as: "all that matters is whether the innocent will be convicted". It is clear from the judgement of Lord Steyn in **Ullah** that the test goes much deeper than this and is concerned with the trial procedure itself, not merely the outcome.

440. By the time that he responded to the evidence of Professor Sands in April, he appeared to have revised his view and accepted that the correct test was the **Ullah** test, as propounded By Professor Sands.

441. As helpfully suggested by Lord Gifford in his closing submission it will be useful to look at the points on which the experts agree:-

(a) Rwanda is not a democracy but an authoritarian state:-
There was fundamental agreement on this, but the degrees were in dispute – Professor Reyntjens saying that there was increased repression whilst Professor Schabas conceded that it was not a democracy, was authoritarian and a one party state.

(b) Freedom of the Press is not respected:-

Again the degree varied between the experts, but it was generally accepted to be the case. As mentioned earlier caution must be exercised in the case of Professor Reyntjens even allowing for his expertise on Rwanda because of his close connection with previous regime. He drafted the constitution, but was at pains to point out that the politicians had the final say; he had the ear of the President; he is non persona grata as far as the present regime is concerned and his opposition to it was clear when he gave evidence.

(c) There was interference with the judiciary by the executive in the Pasteur Bizimingu trial.

(d) A culture of attempted interference by the executive with the judiciary.

(e) Government of Rwanda has displayed hostility at the acquittal of alleged genocidaires.

(f) Experts could not help with the record of the High Court in providing fair trials.

(g) New Law is untried.

(h) No evidence on safeguards for defendants – the penal system.

(i) Concern about safety of defence witnesses.

(j) No proper funding for legal defence of the accused.

442. The concern of the defence with regard to fair trial can be summarized as follows:-

(a) Independence of court.

(b) Ability to call witnesses.

(c) Proper representation.

443. Before examining them in detail, a preliminary point is what is the basis of the right to a fair trial and what are the elements of it. Professor Sands based his report on Article 14 of the International Covenant on Civil and Political Rights. However, s.87 of the Extradition Act 2003 refers specifically to the "Convention rights within the meaning of the Human Rights Act 1998". This must, therefore, be the test, but, in reality, the difference is one of source rather than substance.

444. Turning, therefore, to the first of these concerns, the question of the independence of the judiciary and whether it is subject to executive pressure.

445. On behalf of the defence it was submitted that it is arguable whether it is ever possible to have a fair trial in an authoritarian state, particularly if there is not freedom of the press. This can be only a starting point and each individual system must be looked at appropriately.

446. There is no doubt that there have been criticisms of acquittals in the ICTR by members of the government, but, as it can be safely said that it is not unknown for politicians universally to criticize court decisions they do not approve of, this in itself is not sufficient. There is no doubt that the President and others of his government have recently been guilty of using extremely intemperate language when commenting on the decisions of a Spanish judge to issue arrest warrants against members of the RPF. Again this in itself is not sufficient, the question to be answered is what evidence is there that the executive have tried to interfere and have they been successful.

447. The starting point in looking at the question of interference is the case of Pasteur Bizimingu in the High Court in 2004. Although examples have

been given of various cases where it is alleged that there was interference they have been much earlier than 2004 and in the light of the fact that it is the present and recent past that must be examined to determine this question, I do not have any regard to that earlier period.

448. The decision in this case surprised many independent observers in view of the lack of corroborating evidence. His appeal was dismissed by the Court of Appeal. Professor Reyntjens described the sentence as "fundamentally unfair". At first Professor Schabas took a rather more relaxed view of the decision, but what he had not included in his report, but was noted in his notebook was a comment from a member of Avocats Sans Frontieres that a judge in the case had said that his decision had been dictated to him. Finally Professor Schabas said: "I think there probably was executive interference in the Bizimungu case. I don't know the full nature of it, but it certainly smells like a case of executive interference". Later he said "It is not a glorious moment in Rwandan justice".

449. A point was also made of the fact that the present Deputy Chief Justice was a member of the Court of Appeal and that this is in itself a cause for concern. What is not known, however, what are the legal grounds for appeal in Rwanda and whether, or how they are limited.

450. If what was reported to Professor Schabas was correct, then this is, of course, very disturbing. Paradoxically, however, the defendant was granted a Presidential pardon.

451. However, this is the only case that the defence can point to as an example of executive interference. It was mentioned countless times in the course of this case, and the very number is illustrative that there appears to be no other case which may be highlighted.

452. There are allegations that there are still attempts being made, and it is said that certain members of the Executive can see nothing wrong in attempting to influence the judiciary in their decisions. In their Amicus

brief to the ICTR in connection with the transfer of the case of **Kayishemo** to the Rwandan national jurisdiction Human Rights Watch refers to the views of twenty five high ranking lawyers of all descriptions that the Rwandan courts were not independent in spite of the reforms of 2004 which were supposed to guarantee their autonomy. In the same brief the evidence of Professor Schabas in this case is quoted when he referred to a case mentioned to him by the President of the High Court when a member of the executive had telephoned a judge. The response of the President was robust and indicated that it was not acceptable. Similarly in the HRW brief, the comment of one judge to a colleague was to switch off his telephone when facing a difficult decision.

453. In contrast to the views of HRW is the United States of America State Department Report on Rwanda for 2007. Under the heading "Denial of Fair Public Trial" it says:

> "The constitution and law provide for an independent judiciary and the judiciary operated in most cases without government interference; however there were constraints on judicial independence. Government officials sometimes attempted to influence individual cases, primarily in gacaca cases. Members of the National Bar Association noted increased judicial independence during the year, citing the increased willingness of judges to rule against the government and a higher standard of judicial training and education. There were reports that some members of the executive branch considered it appropriate to call judges to discuss ongoing cases privately and to express executive preferences."

454. It is noticeable that the reports are of the views held by some of the executive. It does not say that they have influenced the Bench, and, indeed, the view of the Bar seems to indicate the opposite.

455. Professor Schabas agreed that political interferences could not be ruled out, but did not think that it was a serious possibility in this case.

456. The next point which is allied to any alleged interference by the Executive is the display of hostility at acquittals. These can also be considered at this point as it is tangentially connected is the question of presumed innocence. In this case it has been said that the defendants will be presumed guilty as they were Hutu bourgmestres. The witnesses who said this were all opponents of the regime and so weight cannot be attached to that view.

457. This matter is also considered by HRW but it is supported there by extrajudicial matters, eg killing by police; defendants on remand not allowed to vote; convicted and remand prisoners housed together and wearing same uniforms; collective punishments. None of these matters appertain to the presumption of innocence in court.

458. The case which is cited in this context is Bagambiki. He had been acquitted by the ICTR of genocide offences, but then tried in absentia by the gacaca courts. This is taken as evidence that the executive is not willing to accept the decisions of the court and will ensure that it will do all it can to secure a conviction.

459. In fact, what had happened was that the ICTR prosecutor had attempted at a late stage to amend the indictment by adding a count of rape. The application was refused by the court. After the acquittal, he was indicted before a gacaca court on the count of rape, not genocide offences.

460. As with Bizimingu, this case was cited on numerous occasions as evidence of the approach of the Executive, but it was the only one that the defendants could cite.

461. What has not been made available to the Court has been any positive information as to how the High Court, which will be the trial court in the event of extradition, has functioned. It is known that there are twenty six trained judges, but little beyond that. Professor Schabas was unable to

provide any information and no-one from Rwanda was called to give any details.

462. The only indication of number of cases in courts other than gacaca courts, where representation is not available, is contained in Paragraph 78 of the HRW brief where it refers to Avocats san Frontiere providing legal aid for the indigent in 477 cases, 312 of them being in respect of genocide. Unfortunately, no further details are given, so that for the purposes of this judgement there is no information as to the performance of the High Court.

463. Similarly there is no information on the operations of the Organic Law of 2007 as there have been no transfers or extradition.

464. In coming to his conclusion that the right to a fair trial would not be violated, Professor Schabas placed great weight on the fact that the Chief Prosecutor to the ICTR, Mr Jallow, had decided to apply to the Security Council of the United Nations for the transfer of cases from the ICTR to Rwanda. He referred to the meetings of the Security Council of the United Nations held on 15th December 2006 and 18th June 2007. The background to this application is that the ICTR is supposed to finish its work by December 2008 and such applications are in respect of unheard cases.

465. Professor Reyntens was vehement in his assertion that the application was being made purely because of the closure strategy and because the Prosecutor had come under pressure to make these applications. He had himself refused to co-operate with the ICTR and give evidence because no RPF members were being prosecuted by it. His view must, therefore, be regarded as biased. Professor Sands submitted that Professor Schabas had been selective in his use of material.

466. The discussions and Reports to the Security Council in 2006 were mainly concerned with progress to date in the ICTR and how the completion strategy was progressing. The delegates of United States and the

United Kingdom, in particular, spoke of the necessity of ensuring that any defects in the Rwandan justice system were rectified in advance of the closure of the ICTR.

467. In his briefing in June 2007, Mr Jallow said:

> "Rwanda has recently enacted legislation, which has now come into force, providing for the trial of cases referred from the ICTR and from States for offences related to the 1994 genocide. That law excludes the application of the death penalty in such cases and provides extensive guarantees for fair trial similar to the provisions of the ICTR Statute. The Office of the Prosecutor has secured the agreement of the African Commission on Human and Peoples' Rights to monitor the trial of any case referred by the Tribunal to Rwanda. Donor assistance, notably from the European Union, Canada and the United States of America, and technical assistance from the ICTR continue to provide for capacity building for the Rwanda legal system".

468. It was on these bases that he had decided that applications could now be made, although he acknowledged that the final decision was for the ICTR.

469. The delegate for the United States supported the bid to transfer, provided "the ICTR finds that the Rwandan's judiciary meets the fair trial requirements of rule IIbis".

470. The Russian delegate said:

> "We welcome the adoption by the Rwandan Government of the law excluding the application of the death penalty to cases referred from the Tribunal. We believe that this will allow the Tribunal in future to transfer a greater number of cases to courts of national jurisdiction".

471. On behalf of the United Kingdom, Ms Pierce said:

> "We note that the Prosecutor has filed an application for the first transfer of a case to Rwanda's domestic jurisdiction. We note the welcome development that Rwanda has passed legislation to exclude the application of the death penalty to cases referred to it from the ICTR and other States. If Prosecutor Jallow were able to provide more information about the new legislation, we would certainly welcome hearing more about it".

472. These were the only comments made on the topic in the discussion by the Member States of the Security Council. The comments can at best be described as neutral. Professor Schabas appeared to adopt the stance that as the other members had said nothing, this was to be taken as support. Whilst no opposition was expressed, it cannot be taken as support.

473. Strong support cannot, therefore, be found to bolster Professor Schabas' view that a fair trial is possible in this meeting of the Security Council. The best that can be said is that Mr Jallow was sufficiently encouraged by the passing of the Organic Law to consider that he could now make an application.

474. Turning to the law on the question of an independent judiciary, it is a fundamental principle that the tribunal must be seen to be independent and free of bias, eg in **De Cubber v Belgium [1984] 7EHRR236** the investigating judge was a member of the trial court and in **Findlay v United Kingdom [1997] 24EHRR221**, the composition of a Court Martial was found not to be independent.

475. A more recent case concerned with executive interference is **AS & DD (Libya) v SSHD & Anor [2008] EWCA Civ289** where there was evidence that Colonel Gaddafi had interfered in an earlier trial.

476. That is incontrovertable. However, the evidence must be looked at in each individual case. Here the only evidence advanced in support of the contention that it would not be an independent judge is the case of Bizimungu. Only one case is cited in support of the proposition that the executive are critical of acquittals and will do all they can to have a person convicted. If there had been more I do not doubt that they would have been cited.

477. The brief from HRW, which I am sure, reflects the views of other NGOs working in Rwanda does not quote any other examples, only anecdotal evidence.

478. Although there is concern quite properly that the attitude of the Executive is such in its approach to the question of the independence of the judiciary, there appears to be no real objective evidence that this is affecting the judiciary. The indications from the Bar are that there is a growing sense of independence which the judges are prepared to exercise.

479. As emphasized by the House of Lords in **Ullah** the test to be pursued is a very high one. Even in **Ottman (Jordan) v Secretary of State for the Home Department [2008] EWCA Civ290** where the court refused to order deportation because evidence might have been obtained by torture, the Court had refused to make an order on the ground of Article 6 in respect of State Security Council which would have been the court of trial in Jordan. In this, I am not satisfied that the defence have established a breach of Article 6 in respect of the independence of the court.

480. The next argument raised is in respect of witnesses where a contrast is painted between prosecution and defence witnesses. It is said on behalf of the defence that prosecution witnesses are being bribed, induced or threatened to give evidence. The allegations are based on the testimony of defence witnesses who have been granted anonymity in most cases

for the purposes of this hearing. At this stage this remains merely an allegation.

481. In contrast, it is said that the defendants will have difficulty in presenting their case, if there is to be a trial, because people will be unwilling to come forward as witnesses. In the applications for anonymity it was said by the witnesses that they feared for their safety and that of their families if they were to be identified.

482. In the course of her investigations Ms Nerad encountered a number of potential witnesses who were either unwilling to assist or would only do so anonymously as they feared that the government would be informed of their actions and this could lead either to physical violence or being arrested, even if not charged, with genocide minimalisation. They also did not believe that there was any witness protection scheme in place. However, the evidence from Human Rights Watch which is dealt with later would appear to indicate that this is not the case.

483. Professor Sands in his report echoes the concerns expressed by Ms Nerad with regard to the safety of witnesses. He then quotes from the Organic Law, Article 14:

> "In the trial of cases transferred from the ICTR, the High Court of the Republic shall provide appropriate protection for witnesses and shall have the power to order protective measures similar to those set forth in Rules 53, 69 and 75 of the ICTR Rules of Procedure. The Prosecutor General of the Republic shall facilitate the witnesses in giving testimony, including those living abroad, by the provision of appropriate immigration documents, personal security as well as providing them medical and psychological assistance. All witnesses who travel from abroad to Rwanda to testify in the trial of cases transferred from the ICTR shall have immunity from search, seizure arrest or detention during their testimony and during their travel to and from trials. The High Court of the Republic may establish reasonable conditions on a

witness's right to safety in the country. As such, there shall be determination of limitations of movements in the country, duration of stay and travel".

484. He continues:

> "These provisions make no mention of transfers from other jurisdictions other than the ICTR".

485. He appears, in saying this, to have overlooked Article 24:

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

486. I am satisfied, therefore, that this witness protection provision would apply in cases of this type.

487. As far as physical violence towards witnesses is concerned, he refers in Paragraph 125 to a news report of 18th October 2007 of the deaths of three witnesses. What he does not highlight, however, is that two of the witnesses or a relative had given evidence on behalf of the prosecution, and the position of the third is not stated.

488. In its brief to the ICTR, HRW confirms the establishment of a witness protection service in 2005, but the funding comes from foreign donors, but this has, to date, been limited. There were sixteen staff members, four of whom are jurists. As at November 2007, it had assisted more than nine hundred persons. In fact, it is a referral agency, as all cases of threats and intimidation are reported to the local police. As it is in reality part of the national prosecutor's office, it is thought that people may, in any event, be unwilling to contact it.

489. The brief points out that prosecution witnesses have suffered attacks and threats and at least eight survivors were murdered in 2007 and some were related to evidence they had given. Although there are also similar reports in respect of defence witnesses in respect of both threats and worse, but there is no systematic method of recording these, as there is for prosecution witnesses.

490. Mr Lake, the investigator instructed on behalf of Mr Nteziryayo, encountered similar difficulties to those found by Ms Nerad with regard to people willing to be witnesses.

491. His main brief was to find out how the prosecution took statements from witnesses, but only two out of twenty nine paragraphs in his report appear to deal with this.

492. There is also a suggestion that the Rwandan authorities were being difficult in dealing with him, and being obstructive and that this was indicative of the attitude to the defence. Although an investigator of many years standing, his work until mid-2007 had always been in the employ of official bodies such as the Australian Army and other Australian organisations and the ICTR. He became independent in 2007 and this was his first international brief.

493. His evidence was indicative of a lack of certainty in his own position when conducting his enquiries as he appeared to be constantly referring back to his solicitors for instructions. As an official investigator, he had been used to effectively unrestricted access to prisons, but as a defence investigator he had to make the appropriate applications. Having been granted permission, he was issued with a letter of authority to visit on a particular day. There was an error in the letter, and when he turned up on the day he thought had been agreed, without, it would appear, checking the letter, and was refused access, this was interpreted as obstruction on the part of the prison authorities. Even the bureaucracy he found difficult to cope with.

494. There appeared also to be a certain superficiality in his approach.

495. As indicated earlier, he appeared to be unaware of "free recall" as a method of obtaining a statement. The court has also had concerns as noted earlier, about the methods of the interpreter. In addition, however, he describes attempting to obtain access to the Gacaca records. In the end, he was not granted the access, although no explanation is given. On the other hand, Mr Brazell, Dr Bajinya's solicitor, appears to have encountered no difficulties. In his statement of 26th October 2007, he describes speaking to a person on 27th August "that I can now recognize as Emmanuel Nwgiraneza", and later that day he gave him a letter formally confirming the application. Nowhere does he state the basis for his recognition. On 30th August, the interpreter spoke on the telephone to someone at that office, whom he (the interpreter) believed to be the same person, but could not remember the name. As a result of that conversation, which was in Kinyrwandan, the interpreter tried to withdraw his services. The translation, as provided by the interpreter, appears to have been accepted without more.

496. In a further statement, he describes a visit to Gikongoro Central Prison on 26th October 2007. In addition to seeing the director in his office, there was present another Rwandan. He was introduced as a colleague. The statement continued "I later learnt from my interpreter that this man was the District Head of the National Intelligence Service". When asked in cross-examination if he was aware of the interpreter's reason for saying this, he replied that the interpreter had said that everyone knew that. In fact, there is a statement from the man in question showing that he held a position in the prison service.

497. When prisoners changed their minds about seeing Mr Lake, this was put down to pressure by the prison authorities. For the reasons stated above, Mr Lake's conclusion must be viewed with a certain caution.

498. Professor Schabas agreed that if there were difficulties with witnesses that this would be a matter of concern, but appeared to be more

optimistic of the outcome. In his report to the Security Council in June 2007, Judge Dennis Byson, President of the ICTR said "I am also pleased to re-iterate that Rwanda has continued to co-operate with the Tribunal by facilitating the flow of witnesses and by providing documents to the prosecution and the defence".

499. Further, Mr Jallow, the Chief Prosecutor, said in his report: "Rwanda continues to co-operate effectively with the ICTR. Its support in facilitating access to witnesses, to sites and to evidence has contributed significantly to the steady pace of trials in Arusha".

500. These are the factors to be taken into account in dealing with the question of availability of witnesses to the defence.

501. The final matter is representation. The difficulties facing the defendants are set out in the HRW brief. As at January of this year the Rwanda Bar Association lists 274 members. The size of itself is not a disabling factor. What is important is whether representation can be given to the defendants. A number of examples are given by HRW of barristers being threatened (2) and three fleeing Rwanda because of threats after defending persons accused of genocide or related crimes. What is not stated, however, is who was responsible for the threats.

502. As part of his investigations on behalf of Dr Bajinya, Mr Brazell spoke to two members of the Kigali Bar, although it was made clear to him that they felt unsafe in doing so. They remain anonymous and no statement was taken. A great deal of the time seems to have been spent discussing the gacaca courts, which are irrelevant for the purposes of this case, What is also noticeable is that in his statement Mr Brazell does not mention any comment being made by them about the question of remuneration if the cases were taken on. What was mentioned by them was the case of a lawyer imprisoned by a judge for an occurrence during the hearing of a trial. This is mentioned elsewhere, and the details vary, but what is not in doubt is that the judge imprisoned the advocate for twelve months, following an exchange between them.

503. There was an immediate protest by the Bar, followed by what amounted to strike action, which resulted in the barrister being released by the Court of Appeal the following day. Whilst this can be regarded as unfair treatment, it is again an isolated example, and, without knowing any further details, could well be due to the personality of the judge concerned and nothing more.

504. In 2002 Amnesty International estimated that approximately forty per cent of accused persons had legal representation. This was at a time when the Bar was much smaller and the legal system was in a far more chaotic state.

505. When Professor Schabas carried out his field trip in 2007 members of the Bar to whom he spoke were confident that the provisions of the Organic Law would be respected. Article 13(b) states|:

> "The accused shall be entitled to counsel of his choice in any examination. In case he or she has no means to pay, he or she shall be entitled to legal representation".

506. Lawyers who were interviewed by HRW said that they would be willing to take on cases, provided that there was adequate remuneration. Those interviewed by Professor Schabas went further and said that they would be prepared to do so pro bono but whether this would be practical or realistic in such complicated cases remains a moot point.

507. A possible solution to the lack of numbers at the Bar is the briefing of foreign lawyers. Article 15 provides:

> "Without prejudice to the provisions of other laws of Rwanda, Defence Counsel and their support staff shall have the right to enter into Rwanda to perform their duties. They shall not be subject to search, seizure, arrest or detention in the performance of their legal duties. The Defence Counsel and their support staff

shall, at their request, be provided with appropriate security and protection".

508. This does not, however, solve the problem of remuneration. There is a legal aid fund which is almost in penury. It has been dependent for its funds on donations from foreign governments. The importance of donations generally was mentioned by the ICTR personnel at the meeting of the Security Council in June 2007. The importance of it to the Rwandan justice system was stressed, and a plea made for it to continue. Both Professor Schabas and Professor Reyntjens were of the view that it would continue, although the latter put it down to a post-colonial guilt on the part of European powers.

509. Even if defendants are represented they must still be given adequate time and facilities for the preparation of their defence, including proper access to their legal representatives. This is governed by Article 13(4) of the Organic Law and the Rwandan Code of Criminal Procedure provides that counsel for the defence "is allowed to read the case file as well as communicate with the accused".

510. According to a telephone conversation between Jean Basco Mutangana, a Senior Prosecutor, and Professor Sand's research assistant: "All prisons have a defence lawyers' room where prisoners can access their lawyers whenever their lawyer sees fit. Access is very much dependent on the defence lawyer who can request to see his client when he wants, even if he wants to see him three times a day, so long as it is in office hours".

511. It is agreed on all sides that prison conditions in Rwanda are generally extremely bad. If such facilities are available in the ordinary prisons, then, presumably, they will be even better in the newly built remand facilities.

512. Finally, it is clear from the amicus brief of HRW that Avocats sans Frontieres have been able to provide assistance, in the past, but whether

they would be able to do so in cases of this complexity remains unknown.

513. Having considered the three elements in some detail, the question to be answered is whether the defendants have shown that they have satisfied the test with regard to a breach of Article 6. As was pointed out by Sir Anthony Clarke MR in **Oltman** such an application has never succeeded in Strasbourg, even in **Soering** where no legal aid available for capital cases in Virginia.

514. The court here is concerned with the question whether there is a real risk of a flagrant denial of a fair trial. Lord Steyn in his judgement in **Ullah** said that in those circumstances Article 6 may be engaged (emphasis added). The Court must look at the position of these defendants and certain matters must be excluded as irrelevant.

515. Great play has been made by the defence, defence experts and NGOs of the position in the gacaca courts. The defendants will not be tried in the gacaca courts. Those courts were established as a pragmatic solution to try to resolve the problem of the backlog of the vast numbers awaiting trial. In his evidence Mr Brazell listed fourteen functions which these bodies carry out, only one of which is judicial.

516. The judges have no legal training and lawyers are not allowed. They are not a lower court in a ladder of courts of a related jurisdiction such as Magistrates' Courts in England, but are of a completely different nature. It was suggested by Professor Reyntjens that if acquitted by the High Court, the defendants might then be tried in the gacaca courts, but this was pure speculation on his part .

517. The background of human rights abuses in the country, which are agreed by all parties to exist, does not have a direct bearing on the question of a fair trial, because what must be looked at is what safeguards have been put in place.

518. Finally, related to that is the fact that the court must look at the present position. Many of the examples cited in support of arguments on behalf of the defence were of historical interest only and should be disregarded.

519. One further argument that has been mentioned, albeit not with any force, is the question of "special treatment" for the defendants. In his report Professor Sands suggested that one piece of evidence in support of the argument that the system in Rwanda did not meet international standards was that the Organic Law, by laying down that extradited and transferred defendants were to be tried in the High Court, treated such defendants differently from others accused of genocide, and, as such, this meant that an unfair system was in place. Similarly, it has been said that the provisions of special remand and detention facilities is also evidence of the unfair system, both of which support the Article 6 argument.

520. As it would appear that these defendants will be better treated, and the question is the fair trial of these defendants that argument can be disregarded.

521. Turning to the three elements, the first is the independence of the judiciary. In support of the argument that the executive influence the judiciary, what had been lacking is hard evidence. The only case which had been advanced in support of this is Bizimungu.

522. The defence have pointed at statements from the President and other members of the executive with regard to acquittals and the issue of foreign warrants, but with the one exception, cannot point to any cases. Even in the Bizimungu case although there was speculation about what had occurred, the only evidence is the hearsay statement mentioned by Professor Schabas.

523. The High Court Bench consists of twenty six professional trained judges, although there is an unfortunate lack of evidence about their

performance. However, in its Report on Rwanda 2007 the United States State Department says

> "The constitution and law provide for an independent judiciary, and the judiciary operated in most cases without government interference; however, there were constraints on judicial independence. Government officials sometimes attempted to influence individual cases, primarily in gacaca cases. Members of the National Bar Association noted increased judicial independence during the year, citing the increased willingness of judges to rule against the government and a high standard of judicial education and training".

524. In his statement, Mr Brazell at Paragraph 64, quoting the members of the Local Bar to whom he spoke said:

> "They did say that they had witnessed and contributed to progress in recent years. Judges are now better qualified than they were. Judicial corruption has been greatly reduced, they believe as a result of paying a proper salary to judges and as incentive on at least a degree level qualification".

525. On the basis of the evidence put forward in this case I am not satisfied that the defence has shown that the independence of the judiciary is now so compromised that it would support their argument in respect of Article 6.

526. Under Article 6(3)(d) it is said:

> "to examine and have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

527. There are the same rights under the Rwandan Criminal Law Procedure and witness protection is under the aegis of the protection system set up

in 2005. Although doubts have been expressed as to its utility, on the figures produced by HRW, nine hundred people made use of its services in two years.

528. It is accepted that defence witnesses have subjective fears for their own safety if they were to be identified as defence witnesses. Witnesses have been attacked and even killed, but this applies to both prosecution and defence. What is not clear is how many of the physical threats may be described as “officially based” and how many came from other members of the community and may be related to other factors which were based on a social level and the giving of evidence is used as an excuse to settle those scores.

529. There is no doubt that defendants have been able to find witnesses to give evidence, both in Rwanda itself and in Arusha at the ICTR.

530. On figures produced by the Danish Human Rights organisation, the acquittal rate in Rwanda was running at over 21% and Professor Schabas estimates that this has now risen to 30%. This is indicative not only of the availability of witnesses, but also of the independence of the courts.

531. What is not known is what percentage of witnesses are threatened or harassed and how widespread the problem is.

532. The related problem associated with people who are reluctant or unwilling to be witnesses is that they are afraid of being accused of genocide minimalisation. There are certainly cases where people have been arrested for this but then released without charge. In other cases people have been charged with it, but again evidence has been lacking as to the detail of these cases and how justified the charges were. Reliable statistics are again unavailable. How real or merely perceived this difficulty is again hard to judge.

533. The related problem is that of defence representation. The Bar at the moment is in the region of two hundred and seventy members as opposed to thirty five ten years' ago. I do not accept the argument that the size of the Bar is an argument against fair trial. What is important is not the size but the willingness of the members to take on the representation of these defendants. Members have indicated that they are prepared to do so, provided that there is adequate remuneration and some of those to whom Professor Schabas spoke were willing to do so pro bono, although there may be practical difficulties in this course of action. The Organic Law does provide, in addition, for representation by foreign lawyers.

534. It appears, therefore, that representation will be possible, as, indeed, has happened in genocide cases other than those in the gacaca courts. Although the question has been raised as to how it is possible that counsel could be imprisoned for genocide minimalisation, the only case quoted is the one mentioned above, which did not give the impression of a cowed or frightened Bar.

535. Allied to the question of representation is that of remuneration. There is a legal aid fund but it is depleted and is dependant on foreign donors for its funding.

536. The burden is on the defence to satisfy the court that there is a real risk of a flagrant denial of justice or fair trial. On the evidence produced they have failed to satisfy on a balance of probabilities the high test which has been set. Reliance was placed on the amicus brief of HRW, but the conclusions reached do not justify the reliance placed on it when seeking to cross the high hurdle which the defence have to. In its conclusions, when dealing with the question of fair trial the brief states on seven occasions that the matters in question, viz Article 20 of the ICTR, Article 14; state unable to provide legal assistance; funding of representation; facilities for Defence team; impediments to Defence; threats of violence or harassment, may lead to a violation. It is put no higher than that and does not come near the higher Article 6 test.

537. Other criticisms which are levelled are inadequate protection for Defence witnesses and safe and secure travel for these witnesses. This ignores the fact that this is provided for in the Organic Law of 2007. What is surprising is that the only mention of that law which is meant to govern the trials of people transferred from the ICTR is in a footnote which quotes from the Chief Prosecutor. The brief is dated 3rd January 2008 and this failure to mention the Law seriously undermines the conclusions in the Brief.

538. Similarly, Mr Brazell did not raise the question of the law when discussing the situation with the NGOs.

539. It has been a noticeable feature of this case from the defence perspective how little attention has been paid to the Organic Law even though any trial will take place under its procedure. Even with the experts it has either not been mentioned, not read or read and instantly dismissed as a blind or smokescreen. Article 13 sets out the rights of the defendant in the ten paragraphs which correspond with Article 6 of the ECHR and the corresponding Article 14 of the ICCDR; Article 14 deals with witness protection and Article 15 the safeguards for defence representatives, and the last two meet other objections put forward by HRW in its brief.

540. This Law and the slightly earlier one abolishing the death penalty have been passed specifically so that the Rwandan justice system is in a position to deal with cases of this sort. African Watch has agreed to monitor any trials which take place and, there is no doubt that this will be intensive international focus on any such trials. If Rwanda were not to honour its commitments under the Act it must be aware that it will prevent any further transfers or extraditions.

541. Further evidence appears in the State Department report which at page 1 says:

"The government took demonstrable concrete steps to advance human rights which resulted in a June law that abolished restrictions on political party organizational efforts at local level, a dramatic drop in reports of the torture and abuse of suspects, and passage of legislation that significantly expedited the gacaca process. In April President Kagame pardoned the former President Pasteur Bizimungu, who was serving a 15 year sentence for trying to establish an opposition party in 2002".

542. Further, it is noticeable that although certain criticisms and allegations have been made in this case regarding the attitude and actions of the government towards Human Rights organizations, the reality is that they still work in the country and produce critical reports.

543. The extradition jurisdiction is based on trust that the requesting State will conduct itself properly in any trials that follow a successful extradition application. In this case the defence have not satisfied me on their Article 6 point and it does appear that the Rwandan authorities have taken proper steps to ensure that the defendants' rights will be respected both in respect of the trial process and by the construction of remand facilities which correspond to international standards.

544. The new law is yet untested but that is not an argument for not extraditing as that applies to any legislation anywhere in the world until the first case governed by that law is heard.

545. A final point which was raised by Mr Jones on behalf of Dr Bajinya relates to Article 8. Article 8 is as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the

> interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others".

546. Mr Jones submitted that there is provision in English Law for the defendant to be prosecuted for torture and conspiracy to torture. Without deciding whether this argument as to English jurisdiction is right, and I do not think that it is necessary to do so, it should be pointed out that the allegations against Dr Bajinya go beyond this.

547. It was also suggested that there is a United Kingdom obligation "to prosecute or extradite". However, Article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide states:

> "Persons charged with genocide or any of the other acts emunerated in article III shall be tried by a competent tribunal of State in the territory in which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

548. This appears to deal with the question of genocide.

549. To return to the original argument, Mr Jones submitted that any interference with family life under Article 8(2) must be proportionate. As there is jurisdiction to prosecute in England the interference with his family life by extraditing him to Rwanda to stand trial would be disproportionate.

550. A similar argument, although not on precisely the same ground, was advanced in the case of **Birmingham et Ors. v Director of Serious Fraud Office and Her Majesty's Attorney General [2006] EWHC 200 (Admin)** where it was rejected by Laws L.J.

551. In the present case it is acknowledged on all sides that it is proper for the Rwandan government to wish to prosecute the alleged perpetrators of the genocide in their own country. The enormity of the scale of the killings in the genocide and the prosecution of those involved would not be appropriately dealt with in any other jurisdiction other than the ICTR which was established for the purpose. Apart from the logistical and practical difficulties of bringing witnesses both prosecution and defence from Rwanda, it is the correct course of action for the trials to take place in Rwanda and that is not a disproportionate response.

552. In all these circumstances, these cases will be sent to the Secretary of State for her consideration and decision.

Anthony Evans
Designated District Judge
City of Westminster Magistrates' Court
6th June 2008