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HOC CRIMINAL TRIBUNALS AND NATIONAL PROSECUTING
AUTHORITIES

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PANEL 3

THE CHALLENGES OF EXTRADITION FOR INTERNATIONAL CRIMES

THE UK

Caveat

This paper is prepared by the Crown Advocate of the Special Crime Division of the Crown Prosecution Service of England and Wales, with conduct of the current extradition proceedings in the UK. As such she acts for the Government of Rwanda in those proceedings as opposed to representing the United Kingdom per se.

1. **Introduction**

- 1.1. The United Kingdom received requests from the Government of Rwanda in 2006 for the arrest of four men accused of genocide namely Vincent Bajinya aka Brown, Celestine Ugirashebuya, Charles Munyanesa and Emmanuel Nteziryayo.
- 1.2. Following their arrests in England in December 2006 lengthy extradition proceedings commenced in the City of Westminster Magistrates Court, which is the court where all extradition requests commence for persons arrested in England and Wales. The cases were listed before a specialist extradition judge, District Judge Anthony Evans who had conduct of the cases until the date of Judgement in June 2008.

- 1.3. During the intervening period there were 19 Case Management hearings, A challenge to the High Court on Habeas Corpus, 42 days of live witness testimony , thousands of pages of evidence served on the court, both prosecution and defence, and several days set aside for final oral submissions in May. The District Judge announced that he would deliver his judgement on the 6th June 2006.
- 1.4. On the 28th May 2008 the Munyakazi decision was announced, refusing transfer to Rwanda. This was circulated to the defence and the court.
- 1.5. On the 6th June 2008 District Judge Evans, in a Judgement spanning 129 pages ruled that the cases should be sent to the Secretary of State for consideration that extradition be ordered. He indicated in open court that he had not taken the Munyakazi decision into account.
- 1.6. On the same day that his decision was announced, the ICTR refused transfer of the second case Kanyarukiga. On the 19th June transfer was refused on Hategekimana.
- 1.7. At the beginning of August 2008 the Secretary of State informed all four men of her decision, namely that she was ordering their extradition to Rwanda.
- 1.8. The four men have lodged appeals against the decision of the District Judge and the Secretary of State to order extradition and the Appeals are listed in front of the High Court from the 1st December 2008 and are expected to conclude on the 19th December.

- 1.9. It will come as no surprise that the defence seek discharge of the men on the basis of the ICTR decisions not to transfer the cases of Munyakazi, Kanyarukiga, Hategekimana and now Jean Baptiste Gatete to Rwanda.
- 1.10. The four men have been held in custody since 2006 and bail applications were made on behalf of Vincent Bajinya directly on the back of the Appeals Chamber decision to uphold the decision in Munyakazi not to transfer to Rwanda. The decision to withhold bail was upheld by the High Court in July.
- 1.11. The consolidated bundles of core reading for the appeal run to an estimated 11,000 pages based on materials before the magistrates court. On top of that we now have approximately 2000 pages based on the ICTR decisions and those that have come out in Europe in recent weeks which appear to have been greatly influenced by the decisions taken in Arusha.
- 1.12. Appeal papers and bundles are being served in the same week as this forum is taking place with an exchange of a common appellant skeleton and four separate appellant skeletons and respondents skeleton all taking place on the 26th November.
- 1.13. In the circumstances I offer my apologies that I cannot be at the conference to deliver this paper personally and trust that you can appreciate why my time is required in London as we prepare the respondents case.

1.14. The paper will cover the following areas;

- lack of local jurisdiction to try the crimes;
- lack of extradition Treaty
- Investigations prior to and during the hearing;
- Differences between the UK proceedings and the ICTR

2. **Jurisdiction in the UK**

2.1. The four men sought by Rwanda are not co-accused. They are accused of conduct that occurred in different parts of Rwanda with different witnesses and victims.

2.2. The Government of Rwanda was required to submit a prima facie case in respect of each fugitive. And according to the Judgement of District Judge Evans, they did just that.

2.3. For the purpose of dual criminality, we had to identify from the conduct detailed in the requests, what the equivalent offences would have been had the conduct occurred in the UK.

2.4. In the main the conduct reflected charges of genocide, conspiracy to commit genocide, aiding and abetting genocide, inciting genocide, soliciting to murder and murder. If the men were not to be extradited, could they be prosecuted in the UK for genocide? Current thinking in the UK appears to be no.

2.5. **Statute**

2.6. The Genocide Act 1969, now repealed, was silent on jurisdiction, giving rise to the common law presumption that the Act was territorial in effect.

2.7. The International Criminal Court Act 2001 “the ICCA” repealed the Genocide Act 1969, and enabled UK courts, by virtue of section 51, to exercise jurisdiction where genocide has been committed outside the UK. The ICCA received Royal Assent on 11 May 2001 and gives effect to the ICC Statute, which the UK signed on 30 November 1998. The ICCA provides for offences under the law of England & Wales and Northern Ireland corresponding to offences within the jurisdiction of the ICC.

2.8. The ICCA is not retrospective in effect and, it does not assist with the current cases of Munyaneza, Bayinya, Ugireshebuya and Nteziryayo as the offences with which they are wanted for the purpose of prosecution for all took place in 1994.

2.9. UK Courts’ Jurisdiction over the Offence of War Crimes

2.10. UK courts are able to exercise extra-territorial jurisdiction over war crimes committed in an international armed conflict by virtue of the Geneva Conventions Act 1957, which came into force on 31 July 1957. It is important to note, however, that the 1957 Act only applies to international armed conflicts, as opposed to internal armed conflicts. The Act would not apply, therefore, to the conflict in Rwanda, which is generally recognised as internal in character.

2.11. UK Courts’ Jurisdiction over the Offence of Torture

2.12. Unlike the offence of genocide, UK courts’ jurisdiction in relation to the offence of torture is not confined to UK nationals or residents. The UK can claim jurisdiction over individuals whose crimes were committed outside its territorial boundaries, regardless of these individuals’ nationality, country of residence, or any other relationship with the prosecuting country (the so-

called 'universal jurisdiction' principle). This is possible because, unlike the Convention on the Prevention and Punishment of the Crime of Genocide 1948, the Convention Against Torture 1984 - which the UK signed in 1985 and ratified in 1988 - expressly provides for the principle of universal jurisdiction under Article 5. This was recognised in the judgment of *R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte* [1999] 2 All ER 97-192. The recent trial of the Afghan warlord Faryadi Sarwar Zardad was also brought under this principle (*R. v. Zardad (Faryadi Sarwar)* [2007] EWCA Crim 279).

2.13. In the present cases before the courts, it is the opinion of those with conduct of the cases that none of the incidents described by the witnesses could in all good conscience be described as torture. Nor was it ever advanced by any of those representing the accused before District Judge Evans that the conduct amounted to torture and not genocide.

2.14. Summary: instances where UK courts cannot exercise jurisdiction in respect of the offence of genocide

2.15. Where the acts in question were committed before 11 May 2001, the UK courts are not able to exercise jurisdiction where the offence was committed outside UK territory. Where the acts in question were committed on or after 11 May 2001, the UK courts are only able to exercise jurisdiction where the accused is either a UK national or a UK resident.

2.16. **Forum Considerations.**

2.17. Even if the UK did have jurisdiction to prosecute alleged genocidaires circa 1994 Rwanda, that does not necessarily mean that it should.

USA -v- Cotroni [1989] 1 S.C.R. 1469 the Canadian Supreme Court check listed these factors:

- where was the impact of the offence felt or likely to have been felt,
- which jurisdiction has the greater interest in prosecuting the offence,
- which police force played the major role in the development of the case,
- which jurisdiction has laid charges,
- which jurisdiction has the most comprehensive case,
- which jurisdiction is ready to proceed to trial,
- where is the evidence located,
- whether the evidence is mobile,
- the number of accused involved and whether they can be gathered together in one place for trial,
- in what jurisdiction were most of the acts in furtherance of the crime committed,
- the nationality and residence of the accused,
- the severity of the sentence the accused is likely to receive in each jurisdiction.

As a result of Rauca to which case Cotroni refers, the same principles can be applied in the war crimes.

2.18 In the UK proceedings District Judge Evans made the following comment at paragraph 551, page 129 of his judgement in response to submissions that extradition to Rwanda was contrary to article 8 of the ECHR

“ 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 that 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 trials to take place in Rwanda and that is not a disproportionate response”;

3. Lack of Extradition Treaty

3.1 The Extradition Act 2003 which operates in the UK was in part a direct response to the Framework Decision on the European Arrest Warrant and also in part an attempt to simplify the process of extradition by removing duplication between the executive and the courts and to reduce the role of the Secretary of State.

3.2 Countries normally fall under either part of the Act by the Secretary of State issuing a Statutory Instrument called a designation order. Territories designated under Part 2 are either member of the European Convention on Extradition, the London Scheme for Extradition within the Commonwealth or else they are parties to bilateral treaties with the UK. At the present time 94 territories are listed. Rwanda is not a Treaty partner with the UK at the present time.

3.3 It has been treated as if it were a category 2 territory by a two stage process;

- by the Government of the United Kingdom and the Government of Rwanda entering into a Memorandum of Understanding in respect of each named accused;
- By the Secretary of State recognising that a special arrangement has been entered into by the two countries and by issuing a certificate under section 194 of the Extradition Act 2003.

Once that was in place the act was to be applied in respect of each persons extradition to the territory *as if* it were a category 2 territory.

3.4 It is submitted that the Memorandum of Understanding has no real role in the process once the certificate under section 194 is issued. That is because the District Judge is required to apply the provisions of the Extradition Act 2003 to the case and not the terms of the Memorandum of Understanding.

3.5 The defence have sought to make play of the fact that we have an MOU with Rwanda rather than a Treaty and that the court should draw distinctions accordingly. The areas that they sought to argue the point was in the area of disclosure and the test to be applied to human rights. This approach was rejected by the District Judge.

3.6 The use Memorandums of Understanding have proved to be useful tools for the UK and for prosecutors seeking extradition from fugitives abroad where it was not possible to negotiate a Treaty in the timescales allowed. We have successfully extradited a suspect accused of a murder in London from Kosovo by entering into an agreement with UNMIK and the return of a suspect accused of armed robbery and the murder of a police officer from Somalia. The MOU with Rwanda was the first time it had been used for an “export case” and it

is currently being considered for a number of other cases with countries in Asia and the Middle East.

4. Investigations: Prior to and during the hearing.

4.1 Three of the four men sought from Rwanda started life off as ICTR investigations. The fourth, Bajinya, was a name known to the OTP in 1999. Filed in the UK proceedings was a letter from the OTP to the Government of Rwanda, the relevant extracts of which are as follows;

Vincent Bajinya was as of June 1999 on our list of persons suspected of having participated in genocide in Rwanda between April and July of 1994;

Owing however to the large number of suspects and the prioritisation of our investigations given the limited mandate of the tribunal, further inquiry into the involvement of this and many other suspects was never pursued by this office;

We focused on the most senior amongst the most responsible as required by the completion strategy approved by the UN Security Council in 2003;

Until the adoption of the strategy, the pursuit of fugitives had essentially been carried out by the OTP/ICTR.

In 2005 we transferred 35 case files of suspects whom we had investigated but were unable to indict at the tribunal because of the completion strategy;

We requested the Government of Rwanda to pursue further investigations building on the evidence we had shared with a view to indicting and prosecuting those fugitives;

Among the case files transferred to your government were the files of Charles Munyanesa, Emmanuel Nteziryayo and Celestin Ugirashebuja”

4.2 The Government of Rwanda did what was asked of it by the OTP and commenced further investigations into the three case files and a complete investigation into Bajinya so that by 2006 it was in a position to circulate arrest warrants on the Interpol system. The conduct of the men was classed as category 1, the most serious according to the Parquet General categorisation. The Crown Prosecution Service then advised the Government of Rwanda as to the documents that would be required in support of a request for extradition.

4.2 It is established in extradition proceedings that it is up to the requesting state as to which evidence it seeks to adduce in order to establish a prima facie case. We had a team in Kigali to assist the prosecutors and investigators produce witness statements for the request that were in a form recognisable to our common law system, containing as much evidence that was possible without straying into hearsay, and corroborated by other witnesses and or documents where possible.

4.3 One of the main challenges was the translation of the statements from Kinyarwanda to English- who could do it and the time it would take for it to be completed.

4.4 All four men were provisionally arrested in December 2006. There were reasons for this that need not trouble the current audience but satisfied the District Judge who issued their arrest warrants. The end result of this meant that all four requests had to be submitted to the UK by the 2nd April, the Secretary of State having modified the MOU to allow 95 days for Rwanda to submit their requests.

4.5 Each request contained about 12 witnesses as well as the usual statements of law and identification material. We managed to get all of the statements translated in time with the assistance of the Government of Rwanda and the Registry of the ICTR. The requests were actually received ahead of schedule on or around the 12th March.

4.6 Rebuttal

4.7 Of course the investigations did not end there. Every prosecutor knows that there is a continuing duty to review. By November 2007 the defence had instructed their own investigators to travel out to Kigali and elsewhere in Rwanda in order to build defence cases and also to seek to undermine where possible the prosecution evidence..

4.8 It was the defence objective to produce evidence that would render the prosecution evidence so worthless that it should not be taken into account by the Judge because of the following legal principles.

- In the passage from *Osman* that was approved by the House of Lords Lloyd LJ described the role of the extradition court as follows: 'In our judgment, it was the magistrate's duty to consider the evidence as a whole and to reject any evidence which he considered worthless. 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 trial. It follows that the magistrate was not concerned with the inconsistencies or contradictions in Jaafar's evidence, unless they were such as to justify rejecting or eliminating his evidence altogether.'

- As a matter of law at the extradition stage the court must take the prosecution evidence at its highest. It follows that unfairness can only result from the admission of the witnesses' evidence if the evidence is so manifestly unreliable so that it is worthless. Only in that circumstance would it cause unfairness to the defendant if oral evidence was denied. No unfairness can be caused if the defence evidence or submissions on the prosecution evidence merely gives rise to a triable issue. Defence evidence simply giving rise to triable issues would not be sufficient to establish unfairness to the defendant in the context of an extradition hearing.

4.9 The defence team for Bajinya also provided witnesses statements from defence trial Counsel working on other unrelated cases at the ICTR and from those indicted by the ICTR as part of its case. It was said that defence counsel had checked the database and nothing was known or held regarding Vincent Bajinya. The defence were trying to establish that the case against him had been fabricated and that it was as a result of political pressure that his extradition had been sought.

4.10 We were able to ask the OTP to check the database held by them and as a result we were able to establish that the name of Vincent Bajinya had been known to the OTP as far back as 1999 well before the requests for extradition had been made and also that they had a positive hit on the database by means of a document that had uncovered as part of a different investigation. The document was minutes of a meeting retrieved from the house of Aloys Ngirabatware, who was also an attendee of that meeting. The minutes show (contrary to the defence case) that Dr. Vincent Bajinya, among other people, was named in the minute and was (according to the record) elected as a committee member of a youth group who were to go and

popularize the MRND party throughout Rwanda. Bajinya's response to this document was that it must be a forgery.

4.11 There was also an overlap in the Munyanesa case in that the defence indicated that they believed that a number of the Prosecution witnesses against their client had previously testified in Arusha as protected witnesses and sought access to those witnesses in order to ask questions of him/her in relation to the present case and have their protection status revoked. This was dealt with in our proceedings as a form of Admission.

4.12 Disclosure

4.13 Although it is for the requesting state to determine what evidence it submits, Prosecutors representing the Government of Rwanda owe and continue to owe a duty of candour to the court in terms of disclosure. For that reason all of the material that the defence submitted as part of its investigations was re-reviewed by the investigators and prosecutors at the Parquet General with the assistance of the UK team. The Policy is as follows;

The CPS, pursuant to its obligations under section 3(2)(ea) of the Prosecution of Offences Act 1985, intends to adopt the approach to disclosure set out in Knowles v Government of USA [1997] 1 WLR 47.

The requesting state is under no general duty of disclosure similar to that imposed on a prosecutor in English criminal proceedings. It does, however, owe the court of the requested state a duty of candour and good faith (as was made clear in Serbeh v Governor of Brixton Prison CO/2853/2002 at para 40, for the purposes of any subsequent argument that the state is abusing the process of the court, there is a fundamental assumption that the requesting state does act in good

faith). Therefore, while 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, renders worthless or very severely undermines the evidence on which it relies.

If such material is brought to the attention of the CPS by the requesting state, it will be disclosed (subject to any overriding immunity consideration, if applicable). The CPS is under no general duty, however, to inspect material held by the requesting state or by any other agency or to pursue lines of inquiry of whatever nature (unlike in relation to the duties imposed on police officers under the Code of Practice issued under Part II of the CPIA 1996, and on prosecutors under the Attorney General's Guidelines). It will however undertake reasonable steps to relay defence requests for disclosure to the requesting state for the latter's consideration.

Thereafter, it is for the party seeking to resist extradition to establish a breach of duty of disclosure by the requesting state. In such circumstances, the CPS will invite the court to adopt the procedure set out by the Administrative Court in R(USA) v Senior District Judge [2006] EWHC 2256 (Admin) at paras 89-93"

The District Judge who heard the case in the magistrate's court was of the opinion that that duty of disclosure had been carried out correctly and that no breach had been established by the defence.

At paragraph 36 Judge Evans commented

“ there is no evidence that the Rwandan authorities have in their possession material which will destroy or severely undermine their

case...there has been no evidence nor submission that comes anywhere near it. In brief it has been a fishing expedition...”.

This is something perhaps to bear in mind when the defence have complained about non-disclosure from the Government of Rwanda...

4.14 Authentication of documents from the ICTR

4.15 I should mention that although we have received a great deal of assistance from the Registry of the ICTR and from the OTP in connection with the extradition proceedings in the UK for which we are grateful, we have had difficulties in obtaining the evidence in a form that is admissible in the UK.

4.16 According to the Extradition Act 2003 statements are authenticated if and only if they comply with section 202 namely;

That a document is issued in a category 1 or category 2 territory;

- It purports to be signed by a judge, magistrate or other judicial authority of that territory;
- It purports to be certified by seal or otherwise, by the Ministry or department of the territory responsible for justice or foreign affairs;
- It purports to be authenticated by the oath or affirmation of a witness

4.17 Although based in Arusha, Tanzania which is a part 2 territory the ICTR views itself as a separate entity and therefore was not prepared for any of its officials to swear any evidence before a Judge in Tanzania. Further we were told that if we wanted witness statements we would have to seek permission from the UN for that to occur. For that reason, the evidence that was obtained from the OTP and the Registry has been done in the form of exchange of letters that has then been exhibited by a Rwandan official and authenticated. There must be an easier way for this to be achieved.

5. Impact of the ICTR decisions on the UK proceedings.

5.1 The short answer is that only time will tell once the appeal hearings are concluded at the end of December. We already know that the defence are using them as the main stay of their applications inviting discharge of the cases.

5.2 There are differences between the two sets of proceedings which I will summarise as follow. *For a more detailed approach I recommend reading an Article by Professor William Schabas entitled Transfer and Extradition of Suspects to Rwanda:*

- The ICTR decisions are based on procedural law on rule 11 bis transfer whereas the UK proceedings are based on the application of statute namely the 2003 Extradition Act and case-law developed with a view to compliance with the E Ct HR.
- The ICTR cases were based on written submissions. Apart from a day on the Munyakazi case where a number of witnesses were invited to answer some questions from the Tribunal [not under cross examination and under strict time limits according to the

transcript of proceedings that I have seen] the UK proceedings took place over one and a half years with 42 days of evidence provided, including 1042 pages of live note on human rights evidence from Schabas, Reyntjens, Sands and Damascene.

- Diplomatic assurances have been given by the Government of Rwanda to the effect that none of the men subject to transfer would be subject to life imprisonment with solitary confinement and that fair trial would be observed. If those guarantees are honoured there is no reasonable likelihood of any human rights violation or a relevant breach of fair trial right. The starting point in extradition proceedings is to assume that there is good faith on behalf of the requesting state to honour its assurances.
- Different legal tests have been applied based on different materials.

5.3 Re human rights:

5.4 The question for the court in the UK is therefore whether there is a real risk that those guarantees will not be honoured. The impact of such guarantees has been considered recently by the Court of Appeal in AS and another (Libya) v Secretary of State for the Home Department [2008] EWCA Civ 289 and Othman (Jordan) v Secretary of State for the Home Department 2008] EWCA Civ 290. The Court of Appeal in those two cases emphasised the difference in analysis that must be performed by the courts depending on whether the right is absolute and non-derogable (such as rights to life) or qualified and derogable (as in the case of fair trial rights).

5.5 In the case of absolute rights the approach of the court was said to be that described in R (Ullah) v Special Adjudicator [2004] UKHL 26, [2004] 2 AC 323, where, after reviewing the Strasbourg jurisprudence, Lord Bingham said at [24]: "In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment".

5.6 Lord Bingham referred to a number of Strasbourg cases including Soering. In the jurisprudence of the ECtHR the test is whether there are 'substantial' grounds for believing that there is a real risk of torture. This test is rigorous. Thus in Saadi v Italy [2008] All ER (D) 432 (Feb) the Strasbourg court said: "Furthermore, the Court has frequently indicated that it applies rigorous criteria and exercises close scrutiny when assessing the existence of a real risk of ill-treatment in the event of a person being removed from the territory of the respondent State by extradition, expulsion or any other measure pursuing that aim. Although assessment of that risk is to some degree speculative, the Court has always been very cautious, examining carefully the material placed before it in the light of the requisite standard of proof (see paragraphs 128 and 132 above) before indicating an interim measure under Rule 39 or finding that the enforcement of removal from the territory would be contrary to Article 3 of the Convention. As a result, since adopting the Chahal judgment it has only rarely reached such a conclusion."

5.7 The reference to rigorous criteria underlines the fact that there must be strong or substantial grounds, based on evidence, for believing that there is a real risk of torture or other ill-treatment contrary to article 3. Thus the examination of the evidence must be rigorous and there must be serious reasons (motifs sérieux et avérés) to believe in the risk of ill-treatment. The threshold is, therefore, a high one. In relation to art 3, it must be shown that there are strong

grounds for believing that the Appellants would face a real risk of being subjected to torture or inhuman or degrading treatment or punishment.

5.8 It is submitted that there is no real risk that any of the men wanted to stand trial in Rwanda for genocide will be subject to life imprisonment with solitary confinement.

5.9 In relation to arts 5 and 6, it must be shown that there is a real risk of a flagrant breach of their ECHR rights. In making any assessment of the fair trial rights available in Rwanda, regard must also be had to the fact that the juridical and political history of that country has demanded particular solutions to the problem of delivering justice. It is not for the UK courts to impose standards developed in the less challenging atmosphere of the United Kingdom. An example of this principle in action can be seen in State of Brunei Darussalam and another v Prince Jefri Bolkiah and others [2007] UKPC 62 where the Privy Council observed that there was no single and uniform standard of fairness applicable everywhere irrespective of circumstances. As stated in R v H [2004] UKHL 3, [2004] 2 AC 134, para 11, “Fairness is a constantly evolving concept ... it is important to recognise that standards and perceptions of fairness change, not only from one country to another but also, sometimes, from one decade to another.”

5.10 When interpreting the European Convention, the Strasbourg court has not laid down hard-edged and inflexible statements of principle from which no departure can be sanctioned in any circumstances: Brown v Stott (Procurator Fiscal, Dunfermline) [2003] 1 AC 681, 704. The requirement to assess the fairness of any trial does not permit or require preclude the importation of foreign principles wholly alien to the culture and traditions of Rwanda.

5.11 The sole question for the UK court is not whether the Rwandan justice system delivers a fair trial by English standards but whether these four defendants will suffer a real risk of a flagrant denial of justice. This means that the rights set out in Article 6 of the ECHR will be denied or nullified. There is no doubt that the Organic Law of 2007 (“the Organic Law”) and the guarantees set out in the MOU, and the diplomatic assurances meet the requirements of Article 6 of the ECHR and there is no, or no sensible dispute with that position. Further the conditions in which these four defendants would be kept and serve their sentences if returned and convicted also meets these standards

5.12 Re Witnesses

5.13 In the ICTR proceedings the defence were not obliged to disclose if they actually had any witnesses residing outside of Rwanda and therefore there was no specific enquiry as to the fairness of the trial itself subject to the transfer request what reasons had been given for their reluctance to testify. The Appeals Chamber held that, in relation to defence witnesses inside and outside Rwanda, some witnesses might be unwilling to testify for the defence in Rwanda as a result of fear, although the Appeals Chamber acknowledged their fears may not well-founded.

5.14 The Appeals Chamber accepted that Rwanda’s witness protection service could properly be administered by the Office of the Prosecutor General supported by the police although it also accepted the Trial Chamber finding that the service currently lacked resources and is

understaffed. The Appeals Chamber held that the Trial Chamber had erred in holding that Rwanda had not taken any steps to secure the attendance or evidence of witnesses from abroad, or the cooperation of other states. The Appeals Chamber found that video-link testimony was available and would likely be authorized in cases where witnesses residing outside Rwanda were genuinely feared to testify in person. The Appeals Chamber remaining concern was the impact that the use of this form of testimony on the principle of equality of arms.

5.15 In the UK there is an actual Practice Direction that the Judge's give when video testimony is used that makes it clear that the jury are to give that evidence equal weight as if the person had actually testified in the court itself.

5.16 .The fact that the Appeals Chamber concluded that there was no reasonable basis for concluding that there was any sufficient risk of government interference with the Rwandan judiciary to warrant an adverse conclusion as to the independence, impartiality or competence of the Rwandan judiciary should be considered. This is of significance since an independent, impartial and competent judiciary can be expected to make adjustments in the course of any trial process and in its assessment of evidence so as to remove any injustice that might be caused by difficulties in relation to witnesses or any imbalance in the arms available to the parties.

5.17 In relation to cases before the UK the Judge found that all of them had found defence witnesses on their behalf and statements taken and therefore there would be no prejudice caused to them that would make it unjust to extradite. The court also allowed the defence to adduce statements by hearsay notices for those witnesses that could not travel to the UK for a variety of reasons such as they were abroad, detained in prison or could not for personal reasons leave Rwanda at that time.

5.18 Status of NGO material

5.19 In the ICTR proceedings HRW filed an amicus brief. This document was based on a number of sources relating to fair trial and human rights. However on analysis many of these sources rely on the same limited number of concrete examples, in relation to which bad faith has often been presumed but not proved. None of the footnotes were ever produced.

5.20 The limited number of examples also illuminates the point that many criminal justice systems will experience instances of failure in legal protection and breaches of human rights norms, the more so in a society which is emerging from autocratic rule, genocide and civil disorder.

5.21 However there is no indication of the circumstances deteriorating. On the contrary the overwhelming pattern is of improvement which provides tangible evidence in support of the proposition that the Rwandan Government can be relied upon to abide by the obligations contained in the Organic law and in the specialty and other protections contained in the Memorandum of understanding.

5.22 Other examples given frequently assume Governmental misconduct where none has been proved. For example defence investigators and experts frequently cited attacks on witnesses without acknowledging that the attacks are in the main aimed at genocide survivors giving evidence for the prosecution and in any event appears to be a reflection of the strong emotions engendered by the genocide .It certainly does not reflect any governmental policy, nor in the light of the strains on Rwanda government resources can it

seriously be suggested that deaths are the result of the failure by the Government to take reasonably practicable protective steps.

5.23 District Judge Evans commented at paragraph 542 of the judgement

“ although certain criticisms and allegations have been made in this case regarding the attitude and actions of the government towards human rights organisations, the reality is that they still work in the country and produce critical reports”

At paragraph 536 he said

“ the burden is on the defence to satisfy the court that there is a real risk of a flagrant denial of justice . On the evidence they have produced they have failed to satisfy on the balance of probabilities, the high test that has been set. Reliance was placed on the amicus brief of HRW but the conclusions reached do not justify the reliance placed on it in its conclusions when dealing with the question of fair trial. The brief states on seven occasions that the matters in question, vis article 20 of the ICTR, Article 14, state is 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. “

5.24 One further phenomenon is for the defence to call evidence in relation to proceedings before the ICTR which they suggest prove misconduct and worse by the Rwandan authorities. There are two points about this line of evidence and argument. First, if there were widespread misconduct in relation to ICTR proceedings, one would expect to find that reflected in public comments by the office of the prosecutor and the ICTR. It is not.

5.25 The second point is that overall the proceedings in the ICTR have demonstrated the commitment of the Rwanda Government to providing fair trial rights and human rights protections. The reality is that witnesses for both prosecution and defence have been protected by the Victim and Witness support service which is substantially manned by Rwandan nationals. Anonymous witnesses for the defence have been traced interviewed and transferred to the ICTR with the full co-operation of the Rwanda authorities.

6. Conclusions

- In relation to the UK proceedings the Government of Rwanda completed the investigations started by the OTP and submitted four prima facie cases in order that the men could be returned to face trial in Rwanda. The cases are advanced and their appeals will be heard in December 2008.
- The focus of the defence appeals is the refusal of the ICTR to transfer cases to Rwanda.
- There are differences in approach between the ICTR and the UK Courts when it comes to the test to be applied to human rights and in-particular Article 3 and Article 6. *May* violate or real risk test?
- The UK has no domestic law in force to prosecute for genocide circa 1994
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7. Finally some thoughts

- It would be helpful for the Appeals court on the remaining case to hear oral representations and to set out with clarity, what it expects the Government of Rwanda to do to meet the concerns of the ICTR in relation to witness protection issues;
- With respect, it cannot be right that the ICTR expects from Rwanda, to create a justice model based on the international courts when it has not expected that from other national jurisdictions on rule 11 bis transfer
- There are many fugitives believed to be living in the UK and in Europe, and *if* the impact of the ICTR decisions is to derail all attempts of extradition back to Rwanda, then efforts need to be renewed to assist the Government of Rwanda meet transfer or else risk the creation of an impunity gap and hamper efforts of reconciliation.

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