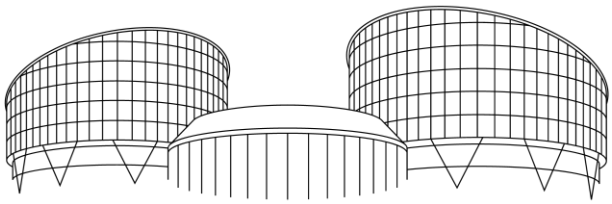

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF AHORUGEZE v. SWEDEN

(Application no. 37075/09)

JUDGMENT

STRASBOURG

27 October 2011

FINAL

04/06/2012

This judgment has become final under Article 44 § 2 (c) of the Convention. It may be subject to editorial revision.

In the case of Ahorugeze v. Sweden**,**

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Dean Spielmann, *President,*
Elisabet Fura,
Karel Jungwiert,
Boštjan M. Zupančič,
Isabelle Berro-Lefèvre,
Ganna Yudkivska,
Angelika Nußberger, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 4 October 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 37075/09) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Rwandan national, Mr Sylvère Ahorugeze ("the applicant"), on 15 July 2009.

2. The applicant was represented by Mr H. Bredberg, a lawyer practising in Stockholm. The Swedish Government ("the Government") were represented by their Agent, Mr C.-H. Ehrenkrona, of the Ministry for Foreign Affairs.

3. The applicant alleged that his extradition to Rwanda to stand trial on charges of genocide would violate Articles 3 and 6 of the Convention.

4. On 15 July 2009 the President of the Third Section decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings not to deport the applicant until further notice. The Government were also requested to submit certain factual information. The case was further granted priority under Rule 41 of the Rules of Court.

5. On 21 January 2010 the President of the Third Section decided to give notice of the application to the Government.

6. The Government and the applicant each filed written observations on the admissibility and merits of the case.

7. The Netherlands Government, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court), submitted third-party comments.

8. On 1 February 2011 the Court changed the composition of its Sections (Rule 25 § 1 of the Rules of Court) and the present application was assigned to the newly composed Fifth Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background

9. The applicant is a Rwandan citizen of Hutu ethnicity, who was born in 1956. He used to be the head of the Rwandan Civil Aviation Authority. He has claimed that he left Rwanda on 14 April 1994. In 2001 he took up residence in Denmark, where he was granted refugee status. Resident in Denmark are also his wife, his former wife and his three children.

10. In January 2006, a Danish public prosecutor opened a preliminary investigation in regard to a suspicion that the applicant had committed genocide and crimes against humanity in Rwanda in 1994. In particular, the preliminary investigation concerned one of the crimes allegedly committed by the applicant, a massacre of Tutsis on 7 April 1994. The Danish police made several visits to Rwanda and other countries and questioned numerous witnesses but finally, in September 2007, the preliminary investigation was discontinued because the prosecutor found that the evidence against the applicant was not sufficient for a conviction.

11. Subsequently, the Danish Ministry of Foreign Affairs received a request from the Rwandan authorities to have the applicant extradited to Rwanda to stand trial on charges including genocide and crimes against humanity. The Danish public prosecutor made a preliminary examination of the matter and presented his comments to the Danish Ministry of Justice. On this basis, the Ministry of Justice asked the Rwandan authorities to provide it with further information about the alleged crimes of which the applicant was suspected and, in particular, supporting material (such as forensic evidence and depositions). The reason for this was that, according to Section 3 of the Danish Extradition Act, a request for extradition may be denied if the evidence in support of the request is deemed insufficient. The Rwandan authorities did not respond and no decision has been taken by the Danish authorities on the request for extradition.

B. Extradition proceedings in Sweden

12. On 16 July 2008, after the Swedish police had been informed by the Rwandan Embassy in Stockholm that the applicant had visited them and that he was sought by the Rwandan authorities, the applicant was arrested in Stockholm in compliance with an international alert and warrant of arrest. The arrest order was confirmed by the District Court (*tingsrätten*) of Solna on 18 July and, on 21 July, the Ministry of Justice decided, pursuant to Section 23 of the Criminal Offences Extradition Act (*Lag om utlämning för brott*, 1957:668; "the 1957 Act"), to invite the Rwandan authorities to present a request for extradition by 22 August.

13. On 4 August 2008 the National Public Prosecution Authority in Rwanda made a formal request for the extradition of the applicant to Rwanda for purposes of prosecution. It invoked an international arrest warrant issued by the Rwandan Prosecutor-General on 17 July 2008 as well as an indictment according to which the applicant was charged with the following crimes, allegedly committed between 6 April and 4 July 1994: (1) genocide, (2) complicity in genocide, (3) conspiracy to commit genocide, (4) murder, (5) extermination, and (6) formation, membership, leadership and participation in an association of a criminal gang, whose purpose and existence were to do harm to people or their property. Allegedly, during the relevant period, the applicant had acted as a leader for the *Interahamwe* militia. He had trained and encouraged other government-connected civilian militias to kill Tutsis, to cause them serious bodily harm and to plunder their homes. He had also transported and distributed weapons to members of the *Interahamwe* and other militias. He had met with local officials to plan and organise the distribution of weapons and had incited civilians to kill and rape Tutsis. He had prepared, trained, equipped and organised militias in his home town. Furthermore, together with about 50 members of the *Interahamwe*, he had been actively involved in the murder of 28 Tutsis on 7 April 1994.

14. In the arrest warrant of 17 July 2008 and the extradition request of 4 August 2008, the Rwandan authorities referred to recent legislative changes concerning the criminal procedure and possible punishment in regard to transferred genocide suspects (which are further described below). They affirmed their "satisfactory assurances on human rights issues", claiming that, should the applicant be transferred to Rwanda, he would receive a fair trial in accordance with national legislation and in conformity with fair-trial guarantees contained in international instruments ratified by Rwanda. He would be tried, at first instance, by the High Court and, upon appeal, the Supreme Court. In regard to detention, the extradition request contained the following information:

> "If arrested, detained or imprisoned following [his] arrest and subsequent to the Rwandan jurisdictions, [the applicant] will be accorded adequate accommodation, at a prison which has been deemed by international observers to meet international standards. Transferred persons will be afforded nourishment and medical treatment, and will be treated in a humane and proper manner, in accordance with international accepted standards."

In a footnote, the detention facility was described in greater detail:

> "MPANGA Prison in the Southern Province has been designated as the primary detention centre. The ICTR [the International Criminal Tribunal for Rwanda] has acknowledged, after visiting the Prison, that it meets international standards. A transfer facility has also been established at Kigali central prison, and this facility will serve as a temporary detention centre for suspects appearing before the High Court of the Republic. ..."

15. In accordance with Section 15 of the 1957 Act, the Government referred the request to the Office of the Prosecutor-General. Since the applicant opposed the extradition, he was granted public defence counsel. Moreover, on 29 September 2008, the District Court decided to remand the applicant in custody on suspicion of genocide.

16. On 9 March 2009 the Prosecutor-General finished his investigation and referred the case to the Supreme Court (*Högsta domstolen*) for examination in accordance with Section 17 of the 1957 Act. He attached his opinion, according to which there was probable cause for believing that the applicant was guilty of the crimes referred to in the extradition request and, as – with the exception of the last charge (6 above) – they corresponded to crimes under Swedish law, the extradition request could be granted. The Prosecutor-General further submitted that, although the investigation could give cause for some doubt, there were no impediments to the extradition as the situation in Rwanda was not so serious that the applicant's rights under Articles 3 and 6 of the Convention would be violated.

17. Before the Supreme Court the applicant opposed the extradition and denied all of the charges against him. He alleged that the witness accounts which formed the basis of the charges were false and that there was a conspiracy against him. As concerned the alleged massacre on 7 April 1994, it had been investigated by the Danish police but the investigation had been discontinued as there was insufficient evidence against him. This lack of evidence applied to all the crimes of which he was accused. Moreover, in his view, the accusations were of a political nature as he was a Hutu and he was convinced that he would be seriously persecuted if returned. The applicant further claimed that the Rwandan justice system was corrupt and dysfunctional and lacking in independence and impartiality. In particular, it would be very difficult for him to call and question witnesses in his defence on an equal basis with witnesses called by the prosecution. Thus, he would suffer a flagrant denial of justice in violation of Article 6 of the Convention. He also referred to several decisions in which the ICTR had found that there were impediments to transferring genocide suspects to Rwanda and noted

that no other country had accepted such requests from Rwanda. Lastly, he invoked his poor health, stating that he had undergone a heart bypass operation and would be in need of another such operation within a few years.

18. On 26 May 2009, after having held an oral hearing, the Supreme Court took its decision. It first stressed that the examination was limited to the question of whether there were any impediments to the applicant's extradition. In carrying out this examination, the Supreme Court had to consider the 1957 Act as well as Articles 3 and 6 of the Convention. Turning to the circumstances of the case, the court first agreed with the Prosecutor-General's assessment that there was probable cause to believe that the applicant was guilty of the charges against him and that, since these crimes were also crimes under Swedish law, it was permissible to extradite him (exception was again made for the sixth charge for the same reason as above). The court further found that the crimes were not of a political nature and that, hence, this did not constitute an impediment. Furthermore, in regard to the applicant's Hutu ethnicity, which had been of great importance when the Danish authorities granted him asylum, the court noted that the definition of refugee status had been expanded in many countries. The court then noted that neither the Danish decision nor the investigation on which it was based had been adduced in the extradition matter. The court however found that the Danish decision was several years old and that the evidence at the court's disposal did not support the assessment that the applicant was at a real risk of persecution due to his ethnicity. The court also considered that the applicant's state of health did not pose any problem for the extradition. Thus, there were no impediments under the 1957 Act to the extradition of the applicant.

19. Turning to the examination under the Convention, the Supreme Court first found that the evidence at hand did not give reason to believe that the applicant would be subjected to torture or inhuman or degrading treatment contrary to Article 3 of the Convention upon return to Rwanda. As concerned Article 6, the court noted that, according to Strasbourg case-law, only a "flagrant denial of justice" in the receiving country could lead to a finding of a violation against the extraditing country. Hence there was no requirement to ensure that the person would be guaranteed a fair trial in all aspects. Moreover, it was for the applicant to show that there were substantial grounds for believing that he would suffer a flagrant denial of justice. In the instant case, the applicant had given information about Rwanda and had submitted a letter of 16 October 2008 from Amnesty International (see further below at §§ 41-43) and decisions by the ICTR of 28 May and 6 June 2008. He had also presented a decision by the Ministry of Justice of Finland of 20 February 2009 and a decision by the High Court in London of 8 April 2009, both of which declined to extradite some persons to Rwanda to stand trial. In this respect, the court noted that the

Finnish decision was based on ICTR's decisions. However, these decisions concerned transfer of suspects from the ICTR to the Rwandan national courts. According to Article 11 *bis* of the ICTR's Rules of Procedure and Evidence, extradition was possible if the tribunal was satisfied that the accused would receive a fair trial in the courts of the State concerned. This, in the Swedish Supreme Court's opinion, was clearly a much more rigorous demand than that under Article 6 of the Convention. ICTR's decisions could therefore not lead to the conclusion that the extradition of the applicant in the present case would be in violation of Article 6 of the Convention. In regard to the decision of the UK High Court, the Supreme Court noted that, contrary to the lower court, the High Court had found that the extradition of the persons in question would put them at real risk of suffering a flagrant denial of justice, with respect to both the difficulty of adducing evidence and the doubts pertaining to the independence and impartiality of the Rwandan judiciary. While this gave reason to doubt whether the extradition of the applicant would be possible, the Supreme Court observed nevertheless that, according to international sources and reports from the Swedish Ministry for Foreign Affairs and the Swedish Embassy in Kigali, the judicial system in Rwanda had made clear improvements after the above-mentioned decisions, although much remained to be done. For instance, a new witness protection programme had been launched and the punishment of life-time imprisonment in isolation had been abolished.

20. Having regard to all of the above, the Supreme Court found that there existed certain reasons to doubt that the applicant would be afforded a trial in Rwanda which fulfilled all requirements under Article 6 of the Convention, in particular whether his right to call witnesses would be equal to that of the prosecution. However, the circumstances of the case did not constitute a general legal impediment to the extradition of the applicant to Rwanda to stand trial on charges of genocide and crimes against humanity. The court then expressed that it assumed that consideration would be given to the need for further information before the Government made a final decision in the case.

21. On 7 July 2009 the Swedish Government decided that the applicant should be extradited to Rwanda to stand trial for genocide and crimes against humanity. However, it rejected the request in relation to the sixth charge. The Government first agreed with the Supreme Court that there were no impediments to the extradition under Swedish law. As concerned the examination under the Convention, the Government noted that the death penalty had been abolished in 2007 and that life imprisonment with special conditions (such as isolation) had been abolished in November 2008. A new prison had been built which was considered to reach an acceptable international standard and which, *inter alia,* was meant for persons convicted of genocide. There was also nothing to suggest that the Rwandan State sanctioned torture or inhuman treatment of convicted persons or

persons suspected of serious crimes. Thus, extradition would not be contrary to Article 3 of the Convention. In regard to Article 6, the Government observed that the standards set by the ICTR were more rigorous than the standard set by the Convention and the European Court's case-law. It noted that the judicial system in Rwanda had improved over the last couple of years and that new laws had been promulgated during the spring of 2009 to improve the witness protection programme and the possibility to hear witnesses who were not present in Rwanda. Hence, the Government concluded that the extradition would not violate Article 6 of the Convention and therefore approved it.

C. Events during the proceedings before the Court

22. On 13 July 2009 the applicant requested the Court to indicate to the Swedish Government under Rule 39 of the Rules of Court a suspension of his extradition to Rwanda. On 15 July the President of the Section to which the case had been allocated decided to apply Rule 39 and, on 20 July, the Swedish Government decided not to enforce the extradition until further notice.

23. Subsequently, on 21 July 2009, the President of the Section requested the Government to reply to certain factual questions in accordance with Rule 54 § 2 (a) of the Rules of Court. Specifically, the President wanted to know if the Government had obtained any guarantees from the Rwandan authorities that the applicant would receive a fair trial and be treated in a correct manner, if they knew where he would be detained and whether they intended to adopt measures to monitor and follow the future detention and trial of the applicant in Rwanda.

24. In a letter of 12 August 2009, sent following a request for information from the Swedish Ministry of Justice, Mr Tharcisse Karugarama, the Rwandan Minister of Justice confirmed the following:

> "1. If transferred to Rwanda, [the applicant] will primarily be placed in the Mpanga [Prison] during his pre-trial and detention during trial. The Kigali Central Prison, however, may serve as a temporary detention center for him while appearing before the High Court of the Republic.
>
> 2. If convicted in Rwanda, [the applicant] will be placed in the Mpanga Prison while serving the sentence.
>
> 3. Swedish authorities will be able to monitor and evaluate [the applicant's] conditions in Rwanda, in relation to his detention/imprisonment facilities, as well as in relation to his trial and proceedings conducted in Rwanda."

Mr Karugarama also assured that the applicant would not be subjected to solitary confinement once returned to Rwanda. The Death Penalty Abolition Law (see further below at § 35) excluded life imprisonment with special provisions (i.e. isolation) for those extradited from other states.

25. By a decision of 27 July 2011, the Supreme Court released the applicant from detention.

II. RELEVANT LAW AND PRACTICE

A. Swedish law

26. According to sections 1 and 4 of the 1957 Act, a person who in a foreign state is suspected or accused of or sentenced for an act that is punishable there may be extradited to that state following a decision by the Government. Such extradition may be granted only if the act for which it is requested corresponds to an offence for which imprisonment for one year or more is prescribed by Swedish law.

27. Sections 5-8 lay down certain limitations. Thus, an extradition request may not be granted for certain offences committed by members of the armed forces or for political offences. Furthermore, a person may not be extradited if, on account of his origin, belonging to a particular social group, religious or political views, or otherwise on account of political circumstances, he would run the risk, in the foreign state, of being subjected to persecution directed against his life or liberty or otherwise of a harsh nature. Also, the extradition cannot take place if the person in question is not protected against being sent to a state where he would run such a risk. Finally, a request may be refused if, having regard to the person's young age, state of health or other personal circumstances, the extradition would run manifestly counter to the demands of humanity. In the latter case, regard should be had also to the nature of the offence in question and the interests of the requesting state.

28. Section 14 stipulates that an extradition request is submitted in writing to the Ministry of Justice, accompanied by the documentation on which the request is based.

29. According to section 15, the Prosecutor-General gives his opinion in the extradition matter before the Government takes a decision. If the person concerned does not consent to being extradited, the case is also examined by the Supreme Court.

30. Section 16 prescribes that the Prosecutor-General is to conduct the necessary investigation in accordance with the rules applicable to preliminary investigations in criminal cases. Coercive measures are subject to the general rules prescribed for criminal cases. However, there are also some more specific rules outlined in section 23 of the Act, according to which a decision by a prosecutor to apply coercive measures must instantly be reported to a district court. Appeal against this court's decision lies directly to the Supreme Court.

31. According to section 17 and 18, the Prosecutor-General submits the case and the finished investigation, together with an opinion, to the Supreme Court. The Supreme Court then decides whether the extradition request may be lawfully granted. A hearing is held if it is considered necessary.

32. Under section 20, the matter is reported to the Government when the Supreme Court has issued its decision. If the Supreme Court has found that there is a legal impediment to the extradition, the request may not be granted.

33. The Swedish Supreme Court has examined several cases regarding extradition of suspected criminals. According to leading Supreme Court case-law (see NJA 2002 p 624, NJA 2007 not N36 and NJA 2007 s 574) the scope of the court's examination is not limited to an assessment of whether there are impediments to an extradition prescribed in the 1957 Act, but also includes an evaluation of the compliance of the extradition with the Convention.

B. Rwandan law

1. The Transfer Law

34. Organic Law no. 11/2007 of 16/03/2007 concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States ("the Transfer Law") was amended on 26 May 2009 (through Organic Law no. 03/2009 of 26/05/2009 Modifying and Complementing [the Transfer Law]), following criticism against the taking of evidence from witnesses expressed by the ICTR and by some countries and international organisations. The amended Transfer Law contains, *inter alia*, the following provisions (the 2009 amendments indicated in italics):

Article 2 – The competent Court

"Notwithstanding any other law to the contrary, the High Court shall be the competent court to conduct at the first instance the trial of cases transferred to Rwanda as provided by this Organic Law.

At the first instance, the case shall be tried by a single Judge.

However, the President of the Court may at his/her absolute discretion designate a quorum of three (3) or more judges assisted by a Court Registrar depending on his/her assessment of the complexity and importance of the case."

Article 13 – Guarantee of rights of an accused person

"Without prejudice to other rights guaranteed under the laws of Rwanda, including the Constitution of the Republic of Rwanda of June 4, 2003 as amended to date or

Laws relating to the Code of Criminal Procedure of Rwanda and the International Covenant on Civil and Political Rights, as ratified by the Decree Law no. 08/75 of February 12, 1975, the accused person in the case transferred by ICTR to Rwanda shall be guaranteed the following rights:

1. a fair and public hearing;

2. presumption of innocent until proved guilty;

3. to be informed promptly and in detail in a language which he/she understands, of the nature and the cause of the charge against him;

4. adequate time and facilities to prepare his/her defense;

5. a speedy trial without undue delay;

6. entitlement to counsel of his/her choice in any examination. In case he/she has no means to pay, he/she shall be entitled to legal representation;

7. the right to remain silent and not to be compelled to incriminate him/herself;

8. the right to be tried in his/her presence;

9. to examine, or have a person to examine on his/her behalf the witnesses against him/her;

10. to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her.

Without prejudice to the relevant laws on contempt of court and perjury, no person shall be criminally liable for anything said or done in the course of a trial."

Article 14 – Protection and assistance to witnesses

"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 Articles 53, 69 and 75 of the ICTR Rules of Procedure and Evidence.

In the trial of cases transferred from the ICTR, 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 with 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 the trials. The High Court of the Republic may establish reasonable conditions towards a witness's right of safety in the country. As such there shall be determination of limitations of movements in the country, duration of stay and travel."

Article 14 bis – Testimony of a witness residing abroad

"*Without prejudice to the generality of Article 14, where a witness is unable or, for good reason, unwilling to physically appear before the High Court to give testimony, the judge may upon request of a party order that the testimony of such witness be taken in the following manner:*

1. By deposition in Rwanda or in a foreign jurisdiction, taken by a Presiding Officer, Magistrate or other judicial officer appointed/commissioned by the Judge for that purpose;

2. By video-link hearing taken by the judge at trial;

3. By a judge sitting in a foreign jurisdiction for the purpose of recording such viva voce testimony.

The request for the taking of testimony in any of the modes described above shall indicate the names and whereabouts of the witness whose testimony is sought, a statement of the matters on which the witness is to be examined, and of the circumstances justifying the taking of testimony in such manner.

The order granting the taking of testimony of a witness in any of the modes prescribed above shall designate the date, time and the place at which such testimony is to be taken, requiring the parties to be present to examine and cross-examine the witness.

Testimony taken under this Article shall be transcribed and form part of the trial record and shall carry the same weight as viva voce testimony heard at trial."

Article 15 – Defence councel

"Without prejudice to the provisions of other laws of Rwanda, defence councel and their support staff shall have the right to enter into Rwanda and move freely within 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 councel and their support staff shall, at their request, be provided with appropriate security and protection."

Article 16 – Appeals

"Both the prosecution and the accused have the right to appeal against any decision taken by the High Court of the Republic upon one or all of the following grounds:

1. an error on a question of law invalidating the decision, or

2. an error of fact which has occasioned a miscarriage of justice.

The Supreme Court may uphold or invalidate some or all of the decisions of the High Court of the Republic. Where necessary, it may order the High Court of the Republic to review the case."

Article 21 – The heaviest penalty

"Life imprisonment shall be the heaviest penalty imposed upon a convicted person in a case transferred to Rwanda from ICTR."

Article 23 – Detention

"Any person who is transferred to Rwanda by the ICTR for trial shall be detained in accordance with the minimum standards of detention stipulated in the United Nations Body of Principles for the Protection of all persons under any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December, 1998.

The International Committee of the Red Cross or an observer appointed by the President of the ICTR shall have the right to inspect the conditions of detention of persons transferred to Rwanda by the ICTR and held in detention. The International Committee of the Red Cross or the observer appointed by the ICTR shall submit a confidential report based on the findings of these inspections to the Minister in charge of Justice of Rwanda and to the President of the ICTR.

In case an accused person dies or escapes from detention, the Prosecutor General of the Republic shall immediately notify the President of the ICTR and the Minister of Justice in Rwanda.

The Prosecutor General of the Republic shall conduct investigations on the death or the escaping of the person who was in detention and shall submit a report to the President of ICTR and the Minister of Justice in Rwanda."

Article 24 – Applicability of this Organic Law to other matters of transfer of cases between Rwanda and other states

"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."

2. Abolition of the death penalty

35. Rwanda abolished the death penalty through Organic Law no. 31/2007 of 25/07/2007 relating to the Abolition of the Death Penalty ("the Death Penalty Abolition Law"). This law was amended as of 1 December 2008 (through Organic Law no. 66/2008 of 21/11/2008 Modifying and Complementing [the Death Penalty Abolition Law]), following which the relevant provisions read as follows (the 2008 amendment indicated in italics):

Article 2 – Abolition of the Death Penalty

"The death penalty is hereby abolished."

Article 3 – Substitution of the Death Penalty

"In all the legislative texts in force before the commencement of this Organic Law, the death penalty is hereby substituted by life imprisonment or life imprisonment with special provisions as provided for by this Organic Law.

However, life imprisonment with special provisions as provided for by paragraph one of this Article shall not be pronounced in respect of cases transferred to Rwanda from the International Criminal Tribunal for Rwanda and from other States in accordance with the provisions of [the Transfer Law]."

Article 4 – Life imprisonment with special provisions

"Life imprisonment with special provisions is imprisonment with the following modalities:

1. A convicted person is not entitled to any kind of mercy, conditional release or rehabilitation, unless he/she has served at least twenty (20) years of imprisonment;

2. A convicted person is kept in isolation."

The law provides for the specific mode of enforcement and execution of life imprisonment with special provisions."

3. The gacaca courts

36. A traditional, community-based *gacaca* system of tribunals was established in 2002 to try people suspected of crimes during the 1994 genocide, in order to resolve the enormous amount of such cases (however, not the most serious, so-called "category I" cases – to which the applicant's case allegedly belongs –, which are still tried in the ordinary courts). The government's stated goal for the *gacaca* system was to ensure that those who had participated in the genocide were brought to trial, furthering the ends of justice, ending impunity and promoting national unity. The *gacaca* law provides for reduced sentences, including community service, for co-operation, and credit for time served.

37. After a pilot phase when approximately 700,000 individuals were identified for prosecution for having participated in the genocide, the *gacaca* courts began trials nationwide in July 2006. The trials have been public but there have been concerns about their fairness, among other things because of a perceived lack of impartiality and reports that defendants have not been given the opportunity to defend themselves. In addition, some courts have spent only a few hours hearing each case and poorly qualified, ill-trained and corrupt *gacaca* judges in certain districts have fuelled

widespread distrust of the system. There have been reports of local *gacaca* officials and citizens abusing the process to pursue personal matters and settle grudges unrelated to the genocide, including making false accusations in order to acquire land. However, in some reported cases where judges had acted inappropriately, *gacaca* officials have intervened and held that the procedure had been illegal.

C. Information from the Swedish Embassy in Kigali

38. On 16 June 2009, at the request of the Government, the Swedish Embassy in Kigali submitted, *inter alia*, the following.

39. In addition to the amendments that had been made to the Transfer Law, Rwanda was revising its 2005 witness protection scheme so that witness protection would fall under the Supreme Court and not, as was currently the case, under the National Public Prosecution Authority. It would apply to witnesses for both the prosecution and the defence.

40. The Embassy was of the opinion that the independence of the judiciary was slowly improving and that there was no direct proof that judges followed political orders. In this respect, it noted that Rwanda was aware that it was being observed by the international community, in particular in extradition cases concerning genocide. As concerned detention conditions, the Embassy observed that persons suspected of genocide and crimes against humanity were given priority by the Rwandan Government and that their detention conditions were good. Again, as the international community followed these cases, Rwanda made an effort to ensure good standards. Furthermore, persons convicted under this law would serve their sentences in the Mpanga Prison which had been recently built in line with international standards. The Embassy also noted that a Bar Association had been created which had about 350 members, although two-thirds of these were still in training.

D. Information from Amnesty International

41. In two letters, sent to the Swedish Prosecutor-General and the Swedish Government on 16 October 2008 and 30 June 2009, respectively, Amnesty International submitted comments on Rwandan legislation and practice in relation to international human rights law.

42. In Amnesty International's view, there was a serious risk that the applicant would not receive a fair trial in Rwanda, in violation of Article 6 of the Convention and Article 14 of the International Covenant on Civil and Political Rights ("ICCPR"). Amnesty International referred to one of its reports (*Rwanda: Suspects must not be transferred to Rwanda courts for trial until it is demonstrated that trials will comply with international standards of justice*, November 2007) in which serious concern was

expressed that people who were extradited there faced a real risk of being subjected to an unfair trial and to torture or inhuman treatment in detention centres.

43. Amnesty International referred also to the decisions of the ICTR, refusing to transfer suspects to Rwandan national courts, and to the reasons given in those decisions (see further below). It further stressed that no other country had transferred suspects to Rwanda but, on the contrary, had found it to be impermissible.

E. ICTR decisions on transfer to Rwanda

44. Pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence of the ICTR and that court's case-law, a designated Trial Chamber may order referral to a State that has jurisdiction over the charged crimes and is willing and prepared to accept the case. In assessing whether a State is competent under Rule 11 *bis*, it has to be established that it has a legal framework that criminalises the alleged conduct of the accused and provides an adequate penal structure. The penal structure must provide an appropriate punishment for the offence and conditions of detention must comply with internationally recognised standards. Prior to ordering referral, the chamber must be satisfied that the accused will receive a fair trial in the courts of the State and that the death penalty will not be imposed or carried out.

45. As regards the requirement of a fair trial, the accused must be accorded by the State concerned the rights set out in Article 20 of the ICTR Statute. Those rights in essence mirror the rights laid down in Article 6 of the Convention and Article 14 of the ICCPR.

1. The transfer cases of Munyakazi, Kanyarukiga, Hategekimana, Gatete and Kayishema

46. In 2008 the ICTR decided in five cases to refuse the transfer of genocide suspects for trial in Rwanda. In the first case, *Munyakazi*, the Trial Chamber found (on 28 May 2008) that there were three obstacles to a transfer: the applicable sentence would be life imprisonment in isolation without appropriate safeguards, the trial court's composition with a single judge involved a risk of its being unable to withstand direct or indirect pressure from the Rwandan Government, and the defendant would not be able to secure the attendance of and examine witnesses on his own behalf under the same conditions as the prosecutor's witnesses. Following an appeal by the ICTR Prosecutor, the Appeals Chamber upheld (on 8 October 2008) the Trial Chamber's first and third rulings. However, it granted the appeal in so far as the second ruling was concerned: it found that the trial chamber had erred in concluding that Rwanda did not respect the independence of the judiciary and that the composition of the Rwandan courts did not comply with the right to a fair trial. With respect to the issues

relating to witness testimony, the Appeals Chamber was satisfied – contrary to the trial chamber – that video-link facilities were available and would likely be authorised in cases where witnesses residing abroad genuinely feared to testify in person. However, the Appeals Chamber considered that such arrangements would not guarantee equality of arms "if the majority of Defence witnesses would testify by video-link while the majority of Prosecution witnesses would testify in person" (paragraph 42 of the decision). It also shared the concerns of the Trial Chamber in regard to the treatment of witnesses in Rwanda and their fears of harassment, arrest and detention. There were reports of murders of genocide survivors who had provided or intended to provide testimony in genocide trials. Moreover, there were justified fears among witnesses that their appearance would lead to indictments being issued against them, for instance for promoting "genocidal ideology", a term laid down in the Rwandan Constitution and given a wide interpretation by Government officials to cover an extended range of ideas, expressions and conduct, including those perceived to display opposition to Government policies.

47. In the second case, *Kanyarukiga*, the Appeals Chamber (on 30 October 2008) upheld the Trial Chamber's decision (of 6 June 2008) on the same grounds as in *Munyakazi*. As regards witnesses inside Rwanda, the Appeals Chamber stated the following (at paragraph 26):

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

48. The Appeals Chamber found that similar concerns applied to witnesses residing abroad, concluding that, despite the witness protection available under Rwandan law, the available information indicated that the defendant would not "be able to call witnesses residing outside Rwanda to the extent and in a manner which would ensure a fair trial if the case were transferred to Rwanda" (paragraph 31).

49. The next three cases – *Hategekimana* (Trial Chamber, 19 June 2008; Appeals Chamber, 4 December 2008), *Gatete* (Trial Chamber, 17 November 2008) and *Kayishema* (Trial Chamber, 16 December 2008) –

contained virtually identical reasoning. It appears that no appeals were made against the Trial Chamber's decisions in *Gatete* and *Kayishema*.

2. Transfer of case files from the ICTR Prosecutor to the Rwandan authorities

50. In 2010, the ICTR Prosecutor transferred several cases to Rwanda for further investigation and possible action. An ICTR press release of 8 June 2010 stated as follows:

> "Twenty-five cases of persons investigated but not indicted by the Tribunal were transferred from the Office of the Prosecutor (OTP) to Rwanda for further investigation and possible future action on 8 June 2010. This action was undertaken in accordance with UN Security Council Resolution 1503, which urges that appropriate cases be prosecuted in competent national jurisdictions. Justice Hassan Bubacar Jallow, Prosecutor of the ICTR, formally handed over electronic and hard copies of the cases to Prosecutor-General of Rwanda, Mr. Martin Ngoga. Justice Jallow said that the transfer emphasizes the partnership between the OTP and Rwanda's national jurisdiction. He commended the Rwandese government for the improvements it has made to Rwanda's judicial infrastructure and capacity. Justice Jallow also noted his intentions to continue pursuing the transfer of further cases to Rwanda, including a number of cases in which the subjects have already been indicted, pursuant to Rule11bis. Mr. Ngoga said that the transfer is "a vote of confidence", in Rwanda's past and present efforts at improvement. He noted that Rwanda remains ready to receive any future cases from ICTR. He also noted that though Rwanda, "did not succeed in the past," the government has now addressed the concerns raised by the Tribunal's Judges. Mr. Ngoga thanked the Office of the Prosecutor for its partnership and pledged to keep the Tribunal apprised of Rwanda's handling of the cases. 30 case files have been transferred to Rwanda previously, bringing the total number of dossiers transferred to 55."

3. The transfer case of Uwinkindi

51. On 28 June 2011 the ICTR decided for the first time to transfer an indicted genocide suspect for trial in Rwanda. In concluding that it was satisfied that the Government of Rwanda was now prepared to receive its first referral from the ICTR, a Referral Chamber took into account the amendments that had been made to Rwandan legislation since 2008 and found that the issues which had led to the earlier refusals had been addressed to some degree in the intervening period.

52. As regards the possible punishment imposed on a transferred suspect, the Chamber stated the following (at paragraph 51):

> "The Chamber finds that the current penalty structure of Rwanda is adequate as required by the jurisprudence of the Tribunal as it no longer allows for imposition of the death penalty or life imprisonment with solitary confinement. The Chamber is satisfied that the ambiguities which existed in previous Rule 11 *bis* applications regarding the nature and scope of the sentence for accused persons in cases referred to Rwanda have been adequately addressed by Rwanda."

53. It went on to draw the following conclusion as to the conditions of detention in Rwanda (at paragraph 60):

> "The Chamber notes that adequate detention conditions are guaranteed by the Transfer Law and considers that the Defence submissions that the conditions will be inadequate in practice are speculative at this juncture. The Chamber expects that the monitoring mechanism will conduct regular prison visits to ensure that both the detention conditions and treatment of the Accused in detention are satisfactory, and that it will immediately report any concerns to both the Prosecutor and the President of the Tribunal. Thus, the Chamber is convinced that the Accused will be detained in appropriate conditions if his case is referred to Rwanda."

54. With respect to the main issue concerning the availability and protection of witnesses, the Chamber first noted that it was not its role to determine whether the fears held by witnesses were legitimate, reasonable or well-founded but rather to assess the likelihood that the accused would be able to "obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witness against him or her" (as required by Article 20, paragraph 4 (e) of the ICTR Statute) if the case were to be transferred to Rwanda. As to witnesses residing in Rwanda, the Chamber stated the following (at paragraphs 99-103):

> "The Defence cites instances during the past two years in which the Tribunal's defence counsel have complained that their witnesses were unwilling to testify because of fears of intimidation or harassment. [Human Rights Watch] also refers to incidents in which defence witnesses in Rwanda have been jailed or victimised before or after testifying. Furthermore, many witnesses fear their appearance will lead to an indictment against them. Defence witnesses may fear being accused of "genocidal ideology", a crime referred to in the Rwandan Constitution but undefined under Rwandan law. It is the Chamber's view that the concerns of witnesses within Rwanda regarding their safety have been addressed by changes to the law over the past two years. The Chamber expects that Rwanda will ensure the safety of both prosecution and defence witnesses in a transfer case as has been stipulated in the new and amended laws.
>
> This Chamber notes the previous findings by the Appeals Chamber in Rule 11 *bis* decisions that witnesses in Rwanda may be unwilling to testify for the defence due to their fear that they may face serious consequences, including prosecution, threats, harassment, torture, arrest or even murder. The Chamber notes that in the 36 genocide cases tried in the High Court of Rwanda, the defence in most cases was able to secure the attendance of witnesses even without the safeguards available to cases transferred from the Tribunal. It is logical to assume that with the amendments made to the laws regarding witness immunity, the creation of a new witness protection programme, and the safeguards imposed by the Chamber on Rwanda, the Appeals Chamber's finding that witnesses may be unwilling to testify is no longer a compelling reason for denying referral.
>
> Although the concerns expressed by the Defence are materially the same as those expressed by defence teams in past referral cases, Rwanda has shown the willingness and the capacity to change by amending its relevant laws over the past two years. The amendment to Article 13 of the Transfer Law to include immunity for statements by witnesses at trial is a step towards allaying the fears of witnesses. This is

complemented by the improvements made to the Rwandan Victims and Witnesses Support Unit ("VWSU" which is sometimes also referred to as "WVSU") and the creation of the Witness Protection Unit ("WPU") under the Judiciary as discussed below.

The Chamber notes that in cases before the Tribunal some witnesses are still afraid of testifying despite the provision of multiple safeguards. The Chamber is therefore satisfied that Rwanda has taken adequate steps to amend its laws in this regard. The full implementation of these additional measures mandated by this Chamber would likely guarantee a fair trial for the Accused.

The Chamber further notes that the subjective fear of witnesses to testify cannot be addressed without implementing adequate legal safeguards to allay such fears. Where laws can neutralise the reasonable fears of individuals, the Chamber is of the opinion that they must be implemented and revised as needed. It is the considered opinion of this Chamber that it is impossible to evaluate the effectiveness of a reasonable law in the abstract. Accordingly, the relevant Rwandan laws must be given a chance to operate before being held to be defective."

55. The Chamber then addressed the situation of witnesses residing abroad and noted, *inter alia*, the following (at paragraphs 109-113):

"The Defence states that all of its 41 witnesses living abroad have indicated that they were not prepared to travel to Rwanda to testify or to appear before any Rwandan judge who might travel to their countries of residence. The Chamber notes that following the 2009 amendments to Article 14 of the Transfer Law, witnesses may now testify in three more ways in addition to providing *viva voce* testimony before the relevant High Court in Rwanda: via deposition in Rwanda; via video-link taken before a judge at trial, or in a foreign jurisdiction; or via a judge sitting in a foreign jurisdiction.

At the outset, the Chamber observes the use of any of these methods is not a right guaranteed to the Accused (or to any other party). These procedures are intended as an exception to the general rule of viva voce testimony before the court, and whether to provide for any of these measures remains within the sole discretion of the trial court. The law is silent as to whether or not the adverse party can make submissions on such a request and does not establish any criteria that may guide a judge in his or her decision when facing such a request. The law also does not stipulate whether the decision on such a request is subject to appeal, and if so, under which conditions.

The Defence submits that in the present case the reasons put forward by Defence witnesses in their affidavits may well be rejected by a Rwandan judge. For instance, it doubts that a judge would consider valid a witness' fear for his or her security if brought to Rwanda for testimony, the fact that his or testimony would incriminate the Rwandan Patriotic Front ("RPF"), or that he or she does not trust the Rwandan judiciary. Although the doubts expressed by the Defence are relevant the Chamber concludes that they are speculative at this juncture.

With respect to the prospect that witnesses living abroad could testify by video-link, the Appeals Chamber has previously held that "the availability of video-link facilities is not a completely satisfactory solution with respect to the testimony of witnesses residing outside Rwanda, given that it is preferable to hear direct witness testimony, and that it would be a violation of the principle of equality of arms if the majority of defence witnesses would testify by video-link while the majority of Prosecution

witnesses would testify in person." However, with regards to the witnesses who live outside Rwanda, this Chamber notes that, in addition to the possibility of hearing testimony via video-link, Article 14 of the amended Transfer Law allows testimony to be provided a) via deposition in Rwanda or in a foreign jurisdiction, taken by a Presiding Officer, Magistrate, or other judicial officer appointed for that purpose; or b) before a judge sitting in a foreign jurisdiction for the purpose of recording such testimony.

The Defence argues that for its 41 witnesses residing abroad, a judge sitting on the case would have to travel to nine different African countries to receive their testimonies meaning that the Accused would be absent for almost the entirety of his Defence case. The Defence recalls the right of the Accused to be "tried in his presence," as stipulated in Article 14 (3) (d) of [the International Covenant on Civil and Political Rights]. The Chamber notes the amendments to Article 14 of the Transfer Law which provide the option of hearing evidence from witnesses located outside Rwanda in order to ensure their protection. Even in an instance where the Accused wishes to exercise his right to examine or cross-examine a witness who is testifying in another location, he could avail himself of the video-link facilities already in place. Thus, there is no apparent impediment to the presence of the Accused during the sections of the trial that would take place outside Rwanda. The Chamber finds that the Defence argument that the Accused would be absent for the majority of his Defence case untenable and that the possibility that witnesses will testify outside Rwanda cannot be regarded as prejudicial to the right to a fair trial."

56. The Chamber further noted with satisfaction that, in addition to the witness protection programme administered by the Office of the Prosecutor-General ("VWSU"), Rwanda had recently taken steps towards the creation of a witness protection unit under the auspices of the judiciary ("WPU"). However, the terms of reference and effectiveness of the new unit could not be evaluated as it had been established to assist witnesses in transferred cases only, and there had not been such a case yet (paragraph 131).

57. As to the availability of defence counsel, the Chamber noted that many members of the Rwandan Bar had more than five years' experience, that five lawyers were enrolled in the ICTR's list of potential counsel, that Rwandan lawyers were obliged to provide *pro bono* services to indigent persons and that there was a legal framework as well as a budgetary provision for legal aid. Consequently, the Chamber was confident that defence counsel and legal aid would be available to the accused if transferred (paragraphs 139-140 and 144-146). While there were concerns about the working conditions for defence counsel – there had been instances of harassment, threats or even arrests of lawyers defending genocide suspects – the Chamber noted that such incidents could be brought to the attention of the Rwandan High Court or Supreme Court and that Article 13 of the Transfer Law, as amended in 2009, granted lawyers immunity from prosecution for statements linked to their activities as defence counsel (paragraphs 154 and 159).

58. On the issue of the independence and impartiality of the Rwandan judiciary, the Chamber was of the view that Rwandan judges, as professional judges, benefited from a presumption in their favour that could

not be lightly rebutted (paragraph 166). The judges of the High Court and the Supreme Court were considered qualified and experienced and in possession of the necessary skills to handle a transferred case (paragraph 178). Furthermore, the Rwandan legal framework guaranteed the independence and impartiality of the judiciary (paragraph 186). The submissions made in the case by the defence and by *amici curiae* in support of their contention that the judiciary lacked those qualities in practice, in the Chamber's opinion, mainly concerned cases of a political nature and did not reflect the conditions of the trial or the charges faced by the accused (paragraph 196). In addition, the information available to the Chamber did not give reason to conclude that the judiciary was unduly corrupt (paragraph 185).

59. In respect of most of the above issues, the Chamber noted that there were additional safeguards in the monitoring and revocation mechanisms available under Rule 11 *bis*. It requested the African Commission on Human and Peoples' Rights ("ACHPR"), which had already agreed to the arrangement, to monitor Mr Uwinkindi's trial in Rwanda and declared that the Commission should bring to the attention of the ICTR President any potential issues that may arise throughout the course of the proceedings (paragraph 213). The Chamber also emphasised that it was authorised to revoke the case from Rwanda as a last resort if necessary (paragraph 217).

60. The Chamber ended its decision with the following conclusion (at paragraphs 222-225):

> "Upon assessment of the submissions of the parties and the *amici curiae*, the Chamber has concluded that the case of this Accused should be referred to the authorities of the Republic of Rwanda for his prosecution before the competent national court for charges brought against him by the Prosecutor in the Indictment. In so deciding, the Chamber is cognizant that it is taking a view contrary to the views taken about two years ago by Referral Chambers of this Tribunal where upon assessment of the facts before them, they concluded that those cases should not be referred to Rwanda.
>
> This Chamber notes that, in the intervening period, Rwanda has made material changes in its laws and has indicated its capacity and willingness to prosecute cases referred by this Tribunal. This gives the Referral Chamber confidence that the case of the Accused, if referred, will be prosecuted consistent with internationally recognised fair trial standards enshrined in the Statute of this Tribunal and other human rights instruments. The Referral Chamber is persuaded to refer this case after receiving assurances that a robust monitoring mechanism provided by the ACHPR will ensure that any material violation of the fair trial rights of this Accused will be brought to the attention of the President of the Tribunal forthwith so that remedial action, including revocation, can be considered by this Tribunal, or if applicable, by the Residual Mechanism.
>
> The Referral Chamber is cognizant of the strong opposition mounted by the Defence and certain *amici curiae* to the proposed referral. The Chamber, however, considers that the issues that concerned the previous Referral Chambers, in particular, the availability of witnesses and their protection, have been addressed to some satisfaction

by Rwanda in the intervening period and that any referral with robust monitoring would be able to address concerns that the Defence and the *amici* have expressed.

Before parting with this Decision, the Chamber expresses its solemn hope that the Republic of Rwanda, in accepting its first referral from this Tribunal, will actualise in practice the commitments it has made in its filings about its good faith, capacity and willingness to enforce the highest standards of international justice in the referred cases."

61. The Referral Chamber's decision has been appealed against to the ICTR Appeals Chamber.

F. Decisions on extradition to Rwanda from national jurisdictions

1. France

62. Several requests by the Government of Rwanda for the extradition of persons suspected of various counts of genocide, crimes against humanity, murder or rape have been refused by the French courts. On 23 October 2008 the Court of Appeal of Toulouse declined to order extradition in the case of *Bivugarabago*. Following the ICTR's approach in *Munyakasi* and *Kanyarukiga*, the Toulouse court considered that a Rwandan tribunal would be sufficiently independent and impartial, but that it would not guarantee a fair trial, in particular with regard to the appearance and protection of defence witnesses. Similar concerns led to extradition requests being refused by the Court of Appeal of Mamoudzou (in the French overseas department of Mayotte) on 14 November 2008 in the case of *Senyamuhara*, by the Court of Appeal of Paris on 10 December 2008 in *Kamali* and by the Court of Appeal of Lyons on 9 January 2009 in *Kamana*. The Lyons court reiterated the problems concerning defence witnesses and also found that the possible punishment of imprisonment for at least 20 years in isolation contravened French public order as well as Article 3 of the Convention.

63. More recently, the appellate courts of Versailles and Bordeaux, on 15 September and 19 October 2010 respectively, refused extradition to Rwanda in the cases of *Rwamucyo* and *Munyemana*. The Versailles court found that the crimes of genocide with which Mr Rwamucyo was charged were not punishable under Rwandan law at the time when they were allegedly committed and that the "ordinary crimes" listed in the extradition request fell under a ten-year statute of limitations. The court further had regard to the May 2010 arrest and detention in Kigali of American attorney Peter Erlinder, defence counsel for several Rwandan suspects, on charges of "genocide denial" and concluded that Mr Rwamucyo, if extradited, would not benefit from fundamental procedural guarantees and the protection of the rights of defence.

2. Germany

64. Relying on the reasons for the refusals of the ICTR to transfer cases to Rwanda, an appellate court in Frankfurt/Main, on 3 November 2008, dismissed the requests for extradition of two genocide suspects, Callixte Mbarushimana and Onesphore Rwabukombe.

3. Finland

65. On 20 February 2009 the Finnish Ministry of Justice refused to extradite François Bazaramba, a former Rwandan pastor, to Rwanda to face prosecution for genocide and murder. The Ministry referred to several ICTR decisions and their conclusion that the right to a fair trial, in particular the right of the defence to call and hear witnesses, could not be guaranteed in Rwanda. According to the Ministry, it had neither any reason to question the conclusions of the ICTR nor any grounds to assess the prevailing circumstances in Rwanda any differently than the ICTR. As Finland, by acceding to the European Convention, had committed itself to guaranteeing a fair trial to persons within its jurisdiction, the Ministry was of the view that Finnish authorities could not, through their own actions, contribute to a trial in a foreign State which raised justified concerns as to whether the trial would be conducted in a fair manner.

66. Instead, on 1 June 2009, Mr Bazaramba was charged with genocide and murder before the Finnish courts, on the basis of universal jurisdiction laid down in Finnish law. The trial began in September 2009 and, on 11 June 2010, after hearing witnesses in Finland, Rwanda and Tanzania, the Porvoo District Court found Mr Bazaramba guilty of genocide and of having murdered or incited others to murder at least five persons. An appeal has been made against the conviction.

4. United Kingdom

67. In August 2006 the Government of Rwanda issued arrest warrants on suspicion of genocide in respect of four men residing in the United Kingdom. Following an extradition hearing before the City of Westminster Magistrates Court, District Judge Evans, on 6 June 2008, sent the matter to the Secretary of State who, on 1 August 2008, signed orders that the four suspects be extradited to Rwanda for genocide proceedings. Appeals were made to the High Court against the judge's decision and the Secretary of State's orders.

68. On 8 April 2009 the High Court (Lord Justice Laws and Lord Justice Sullivan) delivered its judgment (*Brown and others v. the Government of Rwanda and the Secretary of State for the Home Department*). While it did not contest that there was a *prima facie* case against all four appellants, on the principal issue of whether they would receive a fair trial in Rwanda its assessment of the facts and evidence differed sharply from that of the

District Judge. The High Court stated (at paragraphs 24 and 33) that the legal test for the fair trial issue – under Article 6 of the Convention – was "whether the appellants would suffer a real risk of a flagrant denial of justice if they were extradited for trial in Rwanda". While the District Judge had correctly stated that the burden of proving that there was such a risk rested with the defence, he had erred in concluding that the appellants had to prove this on the balance of probabilities. According to the High Court, this was not the accurate meaning of "real risk"; rather, the term implied "a risk which is substantial and not merely fanciful; and it may be established by something less than proof of a 51% probability", thus the same approach as that taken in refugee cases (paragraph 34).

69. As to the merits of the issue of fair trial, the High Court referred extensively to the conclusions drawn in the ICTR transfer decisions. It noted that there was no specific provision in the procedural law of Rwanda for witnesses to give evidence via video-link and that, in the circumstances, there was at least a substantial risk that such facilities would not be available. Thus, the High Court found it likely that the appellants would be unable to call supporting witnesses who declined to give evidence in person out of a professed fear of reprisals (paragraphs 64-66). Furthermore, having regard, *inter alia*, to a report by Human Rights Watch of July 2008 and the testimony given by three expert witnesses, the High Court concluded that there was evidence of judicial interference by the Rwandan executive and that the appellants would suffer a flagrant denial of justice also in regard to the judiciary's impartiality and independence (paragraphs 119-121). Accordingly, the appeals of all four appellants were granted and their extradition denied. They were released from detention and cannot be tried by the UK courts.

5. Switzerland

70. By a decision of 1 July 2009, the Swiss Government refused to extradite Gaspard Ruhumuliza, a former Rwandan minister, to Rwanda.

6. United States

71. Following the refused request for a stay of deportation by the United States Supreme Court on 4 November 2010, the U.S. Immigration and Customs Enforcement, on 26 January 2011, proceeded to deport Jean-Marie Vianney Mudahinyuka to Rwanda to face trial on genocide charges.

7. Norway

72. On 11 July 2011 the Oslo District Court granted a request for extradition to Rwanda of Charles Bandora, another genocide suspect. It first noted that there were reasonable suspicions against Mr Bandora for the

crimes with which he was charged. It also considered that there was no reason to assume that, if extradited to Rwanda, he would be subjected to persecution that would threaten his life or freedom or otherwise be of a serious character. The court noted that the Norwegian police (as well as, apparently, Mr Bandora's counsel) had visited the Mpanga Prison (where, if convicted, Mr Bandora would be incarcerated) and had found that the conditions there, including medical care, corresponded to international standards – a conclusion that had been shared by the ICTR. Mr Bandora would also be able to receive regular visits from his family in Rwanda. The court thus concluded that the extradition would not run counter to humanitarian considerations or Article 3 of the Convention.

73. As to the main issue in the case – the fairness of the trial in Rwanda – the Oslo court noted that improvements had been made in recent years to Rwandan legislation and administration – including the witness protection programmes – in an attempt to meet international fair-trial requirements. While Mr Bandora's counsel had claimed that problems persisted in practice in regard to the independence of the judiciary and the equality of arms, the court found that the legislative and other changes, as well as the possibility for observers to follow the trial, meant that there was no real risk that the trial would be unfair. There was thus reason to reach a different conclusion than that drawn in earlier ICTR transfer decisions and in the judgment of the UK High Court. The court also took into account that the Norwegian police had made ten investigative visits to Rwanda since September 2009 and had interviewed a total of 149 witnesses in the country in regard to four different cases. According to the report of the police, there had been no indication that the witnesses – whether testifying for or against the suspects in question – had been influenced or instructed by the Rwandan authorities to give particular statements or that they had been threatened in any way. Nor had any of the witnesses expressed a fear of the authorities or a reluctance to give testimony to the Norwegian police. In the court's view, these findings – together with the Rwandan witness protection guarantees and the alternative ways of giving testimony in cases transferred to Rwanda – indicated that Mr Bandora's fear that witnesses would refuse to give testimony on his behalf if his case were to be tried in Rwanda was not sufficiently justified.

74. The Oslo court further found that the ICTR Referral Chamber's decision in the case of *Uwinkindi* had to be accorded great weight, in particular due to the ICTR's knowledge of the conditions in Rwanda and since the threshold was higher for transfers from the ICTR (the chamber had to be satisfied that the accused would receive a fair trial) than for extraditions examined under Article 6 of the Convention (which were impermissible only if there would be a "flagrant denial of justice"). While the court noted that the Referral Chamber had taken into account the monitoring it had ordered and the revocation mechanism it had at its

disposal, the court stressed that the chamber had considered revocation only as "a remedy of last resort" and that it had generally been satisfied that the material changes in Rwandan legislation would render the trial fair.

75. Mr Bandora has appealed against the decision.

THE LAW

I. ADMISSIBILITY

76. The Court considers that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

II. MERITS

A. Alleged violation of Article 3 of the Convention

77. The applicant complained that his extradition to Rwanda, to stand trial for charges of genocide, would violate Article 3 of the Convention, which reads as follows:

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

1. The submissions of the parties

(a) The applicant

78. The applicant claimed that he was suffering from heart problems and would have to undergo heart bypass surgery in a few years. There was a serious risk that he would not be able to get that surgery in Rwanda. He also claimed that he risked persecution because he is a Hutu.

79. Moreover, the applicant asserted that the conditions in Rwandan detention and imprisonment would violate his rights under Article 3. He would face a real risk of torture and ill-treatment in detention. Further, while the Rwandan authorities had stated that he would serve a possible prison sentence at Mpanga Prison, nothing prevented the Rwandan authorities from placing him in another prison. The Swedish Government would not be able to take any measures against such a change.

(b) The respondent Government

80. The Swedish Government submitted that it had not been substantiated by a medical certificate or any other evidence that the applicant needed to undergo heart bypass surgery. In any event, it had not been shown that his medical condition was serious enough to render an enforcement of the expulsion order contrary to the Convention. The Government further pointed out that the applicant had not invoked any specific circumstances in support of his allegation that he ran the risk of persecution due to his ethnicity. In the Government's view, the general situation in Rwanda did not lend itself to concluding that people of Hutu origin risked being subjected to treatment contrary to Article 3 solely on the basis of their ethnicity.

81. As regards the prison conditions in Rwanda, the Government referred to the Rwandan arrest warrant of 17 July 2008 and the extradition request of 4 August 2008, in which Rwanda "guaranteed" that, if the applicant were to be arrested, detained or imprisoned following extradition, he would be placed in a prison that met international standards (see paragraph 14 above). They also referred to information from the Swedish Office for Development Cooperation, according to which the conditions in detention centres and prisons for this specific type of arrested or convicted person were assessed as good or very good and that these detainees were the Rwandan Government's highest priority. Rwanda was expected to give these detainees the best possible care due to the great interest from the international community. The Swedish Office for Development Cooperation had also asserted that genocide convicts coming under the Transfer Law would serve their sentences in the newly built Mpanga Prison. Its international section contained 26 individual cells built in accordance with international standards, as confirmed by the ICTR as well as the Special Court for Sierra Leone (which had recently decided to allow eight people convicted of war crimes to serve their sentences at that prison). The Government further submitted that a temporary transfer facility, which also met international standards, had been set up at Kigali Central Prison. Moreover, they pointed out that, following legislative changes, the applicant could not be sentenced to life imprisonment in isolation. Finally, noting that the applicant had only alleged a risk of torture or ill-treatment in general terms, the Government held that their investigation did not point to any facts suggesting the occurrence in Rwanda of systematic or state-sanctioned torture or inhuman treatment of crime suspects or convicted offenders.

(c) The third-party intervener

82. The Netherlands Government submitted that, while there had been international criticism of the conditions in the ordinary Rwandan prisons, genocide suspects and convicts were to be detained in the Mpanga Prison,

which fully complied with international standards and which currently hosted persons convicted by the Special Court for Sierra Leone.

2. The Court's assessment

(a) The relevant principles

83. The Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see, among other authorities, *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, p. 34, § 102).

84. It is the settled case-law of the Court that extradition by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question would, if extradited, face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has – as a direct consequence – the exposure of an individual to proscribed ill-treatment (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, pp. 35-36, §§ 89-91, and *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I, § 67).

85. It would hardly be compatible with the "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a person to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture or inhuman or degrading treatment or punishment (see the above-cited *Soering*, pp. 34-35, § 88, and *Mamatkulov and Askarov v. Turkey*, § 68).

86. In determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to Article 3 exists, the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu*. If the applicant has not been extradited or deported when the Court examines the case, the relevant time for the assessment of the existence of such a risk will be that of the proceedings before the Court (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V,

p. 1856, §§ 85-86, and *Mamatkulov and Askarov v. Turkey*, cited above, § 69).

87. Furthermore, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration and its physical or mental effects (see the above-cited *Vilvarajah and Others*, p. 36, § 107, and *Mamatkulov and Askarov v. Turkey*, § 70). Allegations of ill-treatment must be supported by appropriate evidence (see, *mutatis mutandis*, *Klaas v. Germany*, judgment of 22 September 1993, Series A no. 269, pp. 17-18, § 30).

88. Aliens who are subject to removal cannot, in principle, claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by that State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the case of *D. v. the United Kingdom* (judgment of 2 May 1997, *Reports of Judgments and Decisions* 1997-III) the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support (see also *N. v. the United Kingdom* [GC], no. 26565/05, § 42, 27 May 2008).

(b) Application of the above principles to the present case

89. The Court notes that the applicant has invoked heart problems, stating that he needs to have bypass surgery in a few years. While it appears that he had bypass surgery some years ago, no medical certificates have been submitted which indicate that he has to undergo such surgery again. In any event, the threshold for a medical condition to raise an issue under Article 3 is, as shown by the case-law referred to above, a very high one. At this moment, the applicant's heart problems cannot be considered so serious as to raise an issue under that Article and there are no compelling humanitarian grounds against his extradition to Rwanda due to his medical condition.

90. The applicant has further claimed that he would risk persecution in Rwanda because of the fact that he is a Hutu. The Court notes that none of

the decisions by the ICTR and national jurisdictions refusing transfer or extradition to Rwanda has been based, even in part, on such considerations. Nor has any evidence been submitted or found which gives reason to conclude that there is a general situation of persecution or ill-treatment of the Hutu population in Rwanda. Moreover, the applicant has not pointed to any particular personal circumstances which would indicate that he risks being subjected to treatment contrary to Article 3 due to his ethnicity.

91. Turning to the issue of the conditions of detention and imprisonment in Rwanda, the Court first notes that Rwanda's extradition request of 4 August 2008 and the letter of 12 August 2009 from the Rwandan Minister of Justice state that the applicant will be detained and serve a possible prison sentence at the Mpanga Prison and, temporarily during his trial before the High Court, at the Kigali Central Prison. It is true, as pointed out by the applicant, that the Rwandan authorities would be able to place him in a different prison without the Swedish Government having any means to prevent it. However, given the provisions of the Transfer Law and the repeated assurances by the Rwandan authorities, the applicant's observation must be considered as no more than speculative.

92. The respondent Government have submitted that the two mentioned detention facilities meet international standards. This assessment is shared by, for instance, the ICTR (see § 53 above), the Netherlands Government (§ 82) and the Oslo District Court (which took into account observations made by the Norwegian police following visits to the Mpanga Prison; § 72). The Court has regard also to the fact that the Special Court for Sierra Leone has sent several convicted persons to the Mpanga Prison to serve their sentences there. The Special Court must accordingly have found the conditions in the prison to be satisfactory. Moreover, there is no evidence in the case that the applicant would face a risk of torture or ill-treatment at the Mpanga Prison or the Kigali Central Prison.

93. The Court further notes that, pursuant to Article 3 of the Death Penalty Abolition Law, as amended in 2008, no persons transferred from other states under the Transfer Law may be sentenced to life imprisonment in isolation.

94. The Court is mindful of the fact that the ICTR Referral Chamber, in the *Uwinkindi* case, accorded certain weight to the regular prison visits to be conducted by the appointed monitors of ACHPR and to their immediate reporting should they discover any matter of concern. Although the Rwandan authorities have invited the Swedish Government to monitor the applicant's detention conditions, this mechanism or guarantee has not been formalised in the applicant's case and it is not clear whether the Swedish Government would actually monitor the applicant's situation in Rwanda. However, in the Court's opinion, the monitoring carried out by the ACHPR must be seen as merely an extra safeguard and the fact that the ICTR

ordered such monitoring does not change its general finding that the detention conditions, as set out in the Transfer Law, were adequate.

95. Thus, in the light of the material before it, the Court is not able to conclude that substantial grounds exist for believing that the applicant faces a real risk of treatment proscribed by Article 3.

Consequently, the applicant's extradition to Rwanda would not involve a violation of Article 3 of the Convention.

B. Alleged violation of Article 6 of the Convention

96. The applicant complained that a trial in Rwanda would amount to a flagrant denial of justice. He relied on Article 6 of the Convention, which provides the following:

> 1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and 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;
>
> ..."

1. The submissions of the parties

(a) The applicant

97. The applicant maintained that, although Rwanda had introduced legislative changes aimed at improving the rule of law, there was no evidence that these changes had had an effect in practice. For instance, the majority of the applicant's witnesses were living outside Rwanda and were not willing to travel to the country in order to testify. The possibility of examining witnesses via video-link had not solved the problem of witnesses

who were too afraid to come forward. Those who were willing to testify via video-link had to sign a statement revealing their residential address and those who had fled Rwanda did not dare to do so. Furthermore, it was not likely that this type of testimony would carry the same weight as testimony given in court.

98. Another problem facing the applicant if he were to stand trial in Rwanda was the lack of qualified lawyers that could defend him.

99. Moreover, the applicant asserted that the Rwandan judiciary was not impartial or independent from the executive. According to the Organization for Peace, Justice and Development in Rwanda ("OPJDR"), a former judge at the Higher Instance Court of Butare-Rwanda had stated that the applicant was on a list of Hutu intellectuals against whom a number of prosecutors, still in service, had been instructed to collect and fabricate accusations.

100. The applicant's personal situation was further compounded by the fact that he had given testimony for the defence in several cases that had been or were about to be adjudicated by the ICTR. He was therefore of great interest to the Rwandan authorities. Furthermore, as former head of the Rwandan Civil Aviation Authority, the ruling party in Rwanda, FPR, might want to silence the applicant, believing that he has knowledge of the circumstances surrounding the shooting down on 6 April 1994 of the plane carrying President Habyarimana.

101. On 17 August 2010 the applicant submitted two copies of judgments dated 6 January and 24 May 2008, respectively, allegedly from *gacaca* courts in Rwanda, in which the applicant had been found guilty of having destroyed and looted other people's property and had been ordered to pay damages. One of the judgments specified that the crimes had been committed during the 1994 genocide. The courts had ordered the seizure and public auction of the applicant's house to cover the damages, which in total equalled about 130,000 US dollars. In the applicant's opinion, these judgments showed that sentences had already been passed against him and that, consequently, he would not get a fair trial in Rwanda.

102. In regard to the decision of the ICTR Referral Chamber of 28 June 2011 in the case of *Uwinkindi*, the applicant pointed out that the decision was not final. Moreover, the Referral Chamber had stressed that the nature of extradition and referral proceedings were materially different; whereas the extraditing State had no control over the trial of the extradited person, the ICTR retained the power to revoke its decision and had also ordered the referral pursuant to a stringent monitoring mechanism. In the applicant's view, it was clear that the Referral Chamber had relied heavily on the monitoring programme, which would ensure that detention conditions were satisfactory and evaluate the ability for the accused to present his line of defence. Both these issues being of concern to the applicant, he pointed out that the Swedish Government would not exercise any control over the trial after an extradition. Moreover, even if they were to receive information

about violations of his rights, they would not be able take any remedial action.

(b) The respondent Government

103. The Swedish Government submitted that the Rwandan Transfer Law, as amended in 2009, fulfilled the internationally accepted minimum requirements of the rule of law. By amending its legislation, Rwanda had responded directly to the criticism expressed by the ICTR and other countries and international organisations, in particular in regard to its witness protection system. The amendments had been introduced in May 2009, thus after the decision of the Finnish Ministry of Justice and the judgment delivered by the UK High Court, refusing to allow extraditions to Rwanda.

104. Of decisive importance were the legislative changes adopted which allowed the defence to call and examine witnesses – in Rwanda or elsewhere – under the same conditions as the prosecution, using various alternative means of giving testimony, and without there being a risk that the witnesses would be prosecuted themselves for anything said or done during the trial. In the Government's view, there was no indication that these amendments would not be adhered to in practice. According to the Swedish Office for Development Cooperation, international organisations and foreign missions considered that Rwanda's efforts in witness protection had been successful. The Office had also stated that there were no technical obstacles in Rwanda to the use of video-links. The Government added that testimony via video-link was an accepted and commonly used measure within international legal co-operation in cases where witnesses were unable to travel to a court and was often a natural consequence of the transfer of proceedings to other states. Having regard to the alternative ways of giving testimony and the development of the witness protection system, the Government held that the applicant's claim that his witnesses would not be able to come forward was unsubstantiated.

105. Moreover, among the guarantees in the Transfer Law was the right to defence counsel, provided for free if the accused had no means to pay for counsel. The Government pointed out that, in their extradition request, Rwanda had stated that all accused persons were informed of their right to counsel of their choice.

106. The Government further stated that there was no indication that the courts or proceedings in Rwanda would be biased or lack the impartiality or independence required in a case of the present character. Extradited suspects were heard by the High Court of the Republic at first instance, with a possibility to appeal to the Supreme Court which, according to the Rwandan Constitution, sat with three judges. The Constitution guaranteed judicial independence and the judiciary's financial and administrative autonomy. The judges were professional and bound by ethical rules. The Government

pointed out that none of the ICTR Prosecutor's requests for referral to Rwanda had been refused due to a lack of independence and impartiality of the Rwandan judiciary. The chambers of the ICTR had noted that no evidence had been found to suggest that there was a significant risk that the Rwandan Government would interfere in transfer cases before the High Court and the Supreme Court.

107. The Government maintained that, as their extradition decision was not based on guarantees made by Rwanda but, instead, on an assessment that the extradition of the applicant – regardless of guarantees – would be consistent with Article 6, the issue of monitoring commitments was not relevant. However, in the letter of 12 August 2009 (see § 24 above), the Rwandan Minister of Justice had confirmed that Swedish authorities were welcome to monitor and evaluate the conditions of the applicant's detention or imprisonment in Rwanda as well as his trial. While not considering that Sweden had an obligation to do so under international law, the Government stated that, due to the circumstances of the case, Sweden was prepared, if necessary, to take measures to monitor the legal proceedings and the applicant's situation as a detainee.

108. The Government stressed that, in accordance with the provisions of the Transfer Law and the repeated confirmations by the Rwandan authorities in the applicant's case, the applicant would not be tried in the *gacaca* courts. The documents from *gacaca* courts, introduced by the applicant late in the proceedings, concerned damages, and the applicant had not explained the connection, if any, between the acts mentioned in those documents and the criminal acts pertinent to the extradition proceedings. In the Government's view, the documents submitted had no bearing on the present case.

109. In regard to the decision of the ICTR Referral Chamber in the *Uwinkindi* case, the Government submitted that it supported their observations regarding the positive developments of the justice system in Rwanda as well as their position that the enforcement of the extradition decision would not violate the applicant's rights under the Convention. They noted that the standard applied by the ICTR (that the accused should receive a fair trial) was more stringent than the standard applied by the Court when determining whether an act of extradition is compatible with the Convention.

(c) The third-party intervener

110. The Netherlands Government submitted that, as a strong material supporter of the build-up of the Rwandan justice system after the genocide, they had closely witnessed the developments. Furthermore, the Netherlands had been investigating genocide cases in Rwanda since 2006 and Dutch detectives, prosecutors and investigating magistrates frequently visited Rwanda for this reason. The co-operation of the Rwandan judicial

authorities, including on the issue of witness protection, had been exemplary and there were no indications of interference with the investigating teams or with witnesses. The officials never inquired about the witnesses or about the content of their testimonies.

111. In the opinion of the Netherlands Government, Rwanda had made substantial and fundamental progress in furthering the rule of law. They referred to recent legal amendments as well as changes in judicial and legal practice, including the abolition of the death penalty, the introduction of the possibility to use remote witness testimony in court and the building of the Mpanga Prison. Furthermore, the Rwandan judiciary attached great importance to its impartiality and Rwandan ordinary court judges were generally – also by their European and ICTR peers – considered to be impartial.

112. The Netherlands Government pointed out that the decisions to refuse transfers and extraditions of genocide suspects preceded the changes in the Rwandan justice system. They further stated, in regard to criticism levelled by, for instance, Human Rights Watch, at the *gacaca* proceedings, that extradited genocide suspects would not appear before the *gacaca* courts.

2. The Court's assessment

(a) The relevant principles

113. According to the Court's case-law, an issue might exceptionally arise under Article 6 by an extradition decision in circumstances where the individual would risk suffering a flagrant denial of a fair trial in the requesting country. The principle was first set out in *Soering v. the United Kingdom* (cited above, § 113) and has been subsequently confirmed by the Court in a number of cases (see, for instance, *Mamatkulov and Askarov*, cited above, §§ 90-91).

114. The term "flagrant denial of justice" has been considered synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein (see, among other authorities, *Sejdovic v. Italy* [GC], no. 56581/00, § 84, ECHR 2006-II).

115. It should be noted that, in the twenty-two years since the *Soering* judgment, the Court has never found that an extradition or expulsion would be in violation of Article 6. This indicates that the "flagrant denial of justice" test is a stringent one. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.

116. In executing this test, the Court considers that the same standard and burden of proof should apply as in the examination of extraditions and expulsions under Article 3. Accordingly, it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the Government to dispel any doubts about it (see, *mutatis mutandis*, *Saadi v. Italy* [GC], no. 37201/06, § 129, ECHR 2008-...).

(b) Application of the above principles to the present case

117. The Court reiterates that, in 2008 and early 2009, the ICTR as well as courts and authorities of several national jurisdictions refused to transfer or extradite genocide suspects to Rwanda due to concerns that the suspects would not receive a fair trial in that country. The decisions mainly focused on the difficulties for the defence to adduce witness testimony, on account of the fears of witnesses to appear for fear of reprisals and the risk that remote defence testimony would not be given the same weight by the courts as evidence for the prosecution given in person. While the ICTR found no reason to criticise the impartiality and independence of the Rwandan judiciary or the composition of the courts, the UK High Court concluded that there was evidence of judicial interference by the Rwandan executive. Several decisions also found that the possibility of life imprisonment in isolation constituted an impediment to transferring the suspects to Rwanda.

118. Since these decisions were taken, several amendments have been made to the Rwandan legislation. The respondent Government and the third-party intervener have submitted that there have been additional improvements in legal practice. Consequently, it needs to be determined whether these changes are sufficient to conclude that, if the applicant is now extradited to Rwanda, he would not be subjected to a real risk of a flagrant denial of justice.

119. As noted above in regard to the applicant's complaint under Article 3, he cannot be sentenced to life imprisonment in isolation (see § 93). Thus, this particular issue need not be examined further.

120. The Court considers that the central issue in the present case is the applicant's ability to adduce witnesses on his behalf and obtain an examination of testimony by the courts that reasonably respect the equality of arms vis-à-vis the prosecution.

121. As regards the fears of reprisals that the applicant's witnesses may have, it is, as noted by the ICTR in *Uwinkindi*, not determinative whether those fears are reasonable or well-founded but rather whether there are objective reasons to believe that witnesses would refuse to come forward. In this respect, the Court first notes that, through a May 2009 amendment to Article 13 of the Transfer Law, witnesses – as well as other participants in the proceedings – are afforded immunity from prosecution for statements

made or actions taken during a trial. Furthermore, in addition to the witness protection programme previously in existence under the auspices of the Office of the Prosecutor-General ("VWSU"), Rwanda has recently made arrangements for an additional witness protection unit under the direction of the judiciary ("WPU"). The Court also takes into account the submissions made by the Netherlands Government, according to which, during Dutch investigations of genocide cases in Rwanda, the Rwandan officials had never inquired about the witnesses or their statements. Similar assessments, recorded in the Oslo District Court's judgment of 11 July 2011, had been made by the Norwegian police after having interviewed 149 witnesses in Rwanda since September 2009.

122. Furthermore, the introduction of Article 14 bis of the Transfer Law provides for the possibility of witnesses residing outside Rwanda to give testimony through the use of several alternative means, without having to appear in person at a trial. Besides the possibility of making depositions before a judge in Rwanda or abroad, the most important development is perhaps that the law now provides for the hearing of witnesses during the trial via video-link. Already in its first referral case, *Munyakazi*, the ICTR Appeals Chamber was satisfied that video-link facilities were available and would likely be authorised in cases where witnesses residing abroad genuinely feared to testify in person. In the present case, the respondent Government have submitted that there are no technical obstacles to the use of video-links in Rwanda. In this connection, the Court reiterates that it has previously held that the use of video-link testimony is as such in conformity with Article 6 (see, for instance, *Kabwe and Chungu v. the United Kingdom* (dec.), nos. 29647/08 and 33269/08, 2 February 2010). Furthermore, in view of the legislative changes providing for alternative ways of giving testimony, the Court cannot find any basis for concluding that statements thus made would be treated by the courts in a manner inconsistent with the respect for the equality of arms.

123. In conclusion, the Court finds no reason to conclude that the applicant's ability to adduce witness testimony and have such evidence examined by the courts in Rwanda would be circumscribed in a manner inconsistent with the demands of Article 6.

124. The applicant has further claimed that there were no qualified lawyers able to defend him in Rwanda. The Court finds that this claim is unsubstantiated. It appears that the applicant would be free to appoint foreign defence counsel. More importantly, reference is made to the decision in the *Uwinkindi* case, where the Referral Chamber noted, *inter alia*, that many members of the Rwandan Bar had more than five years' experience, that Rwandan lawyers were obliged to provide *pro bono* services to indigent persons and that there was a legal framework as well as a budgetary provision for legal aid.

125. Turning to the independence and impartiality of the Rwandan judiciary, the Court takes note of the concerns expressed by some international organisations as well as the UK High Court. However, in its referral cases, the ICTR has concluded that the Rwandan judiciary meets these requirements. In *Uwinkindi*, the Referral Chamber considered that the judges of the High Court and the Supreme Court were qualified and experienced and in possession of the necessary skills to handle a transferred case. Furthermore, both the ICTR and the respondent Government have pointed to the legal and constitutional guarantees of the judiciary's independence and impartiality. The experience of the Dutch investigative teams and the Norwegian police – that Rwandan authorities had not in any way interfered with their work or with the witnesses they heard – points in the same direction. The Court therefore concludes that there is no sufficient indication that the Rwandan judiciary lacks the requisite independence and impartiality.

126. As to the applicant's personal situation, the Court finds that it has not been substantiated that his trial would be conducted unfairly because of his having given testimony for the defence in trials before the ICTR or because of his former position as head of the Rwandan Civil Aviation Authority. Furthermore, in regard to the decisions allegedly taken by *gacaca* courts in 2008, the Court first notes that they were invoked only in August 2010, more than two years after their date of issuance and more than a year after the introduction of the present application. Even assuming that they are genuine, the Court notes that they relate to damages that the applicant had been ordered to pay as compensation for having destroyed and looted property. It has not been shown that there is a connection between the acts for which he was ordered to pay damages and the acts covered by the charges in Rwanda's extradition request. Moreover, according to the provisions of the Transfer Law and the statements made by the Rwandan authorities in connection with the extradition request, extradited genocide suspects – including the applicant – will have their criminal liability tried by the High Court and the Supreme Court and not by the *gacaca* courts.

127. The Court has in the foregoing referred to the ICTR Referral Chamber's decision in *Uwinkindi*. While noting that the decision is not final, the Court nevertheless considers that its conclusions have to be given considerable weight. It is the first transfer decision taken by the ICTR since the legislative changes in Rwanda. The Chamber found that the issues that had led to the decisions in 2008 to refuse transfers had been addressed to such a degree in the intervening period that the Chamber was confident that the accused would be prosecuted in a manner consistent with internationally recognised fair trial standards enshrined in the ICTR Statute and other human rights instruments. While the Chamber also relied on the monitoring it ordered and its ability to revoke the transferred case if necessary, this does not, as noted above in regard to the complaint under Article 3, change the

conclusions drawn. In this connection, the Court notes that Sweden has declared itself prepared to monitor the proceedings in Rwanda and the applicant's detention.

128. It must also be emphasised that the decision to transfer *Uwinkindi* for trial in Rwanda was made pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence of the ICTR which, among other things, stipulate that the referring chamber must be satisfied that the person in question will receive a fair trial in the courts of Rwanda. The standard thus established clearly set a higher threshold for transfers than the test for extraditions under Article 6 of the Convention, as interpreted by the Court.

129. In conclusion, having regard to the above considerations, the Court finds that the applicant, if extradited to stand trial in Rwanda, would not face a real risk of a flagrant denial of justice.

Consequently, the application does not reveal a violation of Article 6 of the Convention.

III. RULE 39 OF THE RULES OF COURT

130. The Court reiterates that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber, or (b) three months after the date of the judgment, if referral of the case to the Grand Chamber has not been requested, or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

131. It considers that the indication made to the Government under Rule 39 of the Rules of Court must remain in force until the present judgment becomes final or until the Panel of the Grand Chamber of the Court accepts any request by one or both of the parties to refer the case to the Grand Chamber under Article 43 of the Convention (see *F.H. v. Sweden*, no. 32621/06, § 107, 20 January 2009).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that the applicant's extradition to Rwanda would not involve a violation of Article 3 of the Convention;

3. *Holds* that the extradition would not involve a violation of Article 6 of the Convention;

4. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to extradite the applicant until such time as the present judgment becomes final.

Done in English, and notified in writing on 27 October 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President