

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-59-ES

Date: 11 August 2026

Original: English

The President

Before: Judge Graciela Gatti Santana, President

Registrar: Mr. Abubacarr M. Tambadou

Date: 11 August 2026

PROSECUTOR

v.

GRÉGOIRE NDAHIMANA

Public Redacted Version

PETITION FOR EARLY RELEASE

The Office of the Prosecutor:

Ms. Laurel Baig, Officer-in-Charge, Arusha branch

Pro Bono Counsel for Mr. Grégoire Ndahimana:

Ms. Kate McInnes

1. Grégoire Ndahimana respectfully petitions the President of the International Residual Mechanism for Criminal Tribunals (“President” and “Mechanism”, respectively) for early release. This petition is filed pursuant to paragraph 5 of the *Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, the ICTY, or the Mechanism* (“Practice Direction”), and Rule 150 of the Rules of Procedure and Evidence (“Rules”).
2. As set forth below, Mr. Ndahimana submits that he meets the criteria for early release, based on having served two-thirds of his sentence; his plan for release, coupled with family support; his sustained good conduct throughout 17 years in detention; and humanitarian considerations, including his age, his health, and the prospect of serving the remainder of his sentence in Rwanda upon closure of the Mechanism.

I. BACKGROUND AND PROCEDURAL HISTORY

3. Grégoire Ndahimana was born in 1952. He is married and the father of eleven children. Almost all of his family hold [REDACTED] citizenship and live in [REDACTED].
4. In June 1993, Mr. Ndahimana was elected *bourgmestre* of Kivumu commune, Kibuye Prefecture, Rwanda. He assumed this position in October 1993 and held it until he left Rwanda in July 1994.¹
5. On 11 August 2009, Mr. Ndahimana was arrested in the Democratic Republic of Congo. He was transferred to the custody of the International Criminal Tribunal for Rwanda (“ICTR”) on 20 September 2009.²

¹ *Prosecutor v. Grégoire Ndahimana*, ICTR-01-68-T, Judgement and Sentence (30 December 2011), para. 1.

² *Ibid*, para. 2.

6. On 30 December 2011, the Trial Chamber, by majority, found Mr. Ndahimana guilty of genocide and extermination as a crime against humanity, and sentenced him to 15 years' imprisonment.³
7. On 16 December 2013, the Appeals Chamber affirmed Mr. Ndahimana's convictions, revised his mode of liability from aiding and abetting to joint criminal enterprise, and increased his sentence to 25 years' imprisonment.⁴
8. Mr. Ndahimana has been serving his sentence at Akpro-Misséréte Civil Prison in the Republic of Benin since his transfer from the United Nations Detention Facility in Arusha on 28 February 2018.⁵
9. Mr. Ndahimana previously submitted requests for early release to the Registry *pro se*, on 22 April 2026 and 22 June 2026. This is his first application for early release filed with the assistance of counsel.

II. LAW

10. Rule 150 provides that the President shall, upon receipt of a direct petition from the convicted person, determine whether pardon, commutation of sentence, or early release is appropriate.
11. Rule 151 provides that, in making that determination, the President shall take into account, *inter alia*, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, and any substantial cooperation of the prisoner with the Office of the Prosecutor ("Prosecutor").

³ *Ibid*, paras. 846-848, 872.

⁴ *Grégoire Ndahimana v. Prosecutor*, ICTR-01-68-A, Appeal Judgement (16 December 2013), para. 254.

⁵ "Order Designating State in which Grégoire Ndahimana is to Serve His Sentence" MICT-13-59-ES (21 September 2017).

12. Paragraph 8 of the Practice Direction provides that a convicted person will generally be eligible for consideration of early release only upon having served two-thirds of his sentence.

13. Paragraph 10 of the Practice Direction indicates that the President may direct the Registry to collect information relevant to this determination, including reports on the convicted person’s behaviour in detention, psychiatric or psychological evaluations, medical reports, the convicted person’s intended place of residence, a report from the Prosecutor on any cooperation, whether the convicted person is separately eligible under the law of the enforcement State, and any other information the President considers relevant.

III. APPLICATION

A. Eligibility

14. Mr. Ndahimana has been in continuous custody since his arrest on 11 August 2009, which is 17 years ago as of the date of this petition. Having been sentenced to 25 years’ imprisonment, the two-thirds threshold under paragraph 8 of the Practice Direction — 16 years and 8 months — was reached on or about 11 April 2026. He is accordingly eligible for early release.

15. Further, under Article 810 of Benin’s Code of Criminal Procedure,⁶ a prisoner in Benin is eligible for conditional or early release after serving little more than half of his sentence, provided he has behaved well and shown signs of rehabilitation. This is a threshold Mr. Ndahimana has long since surpassed.

B. Factors Considered in Granting Early Release

16. As noted, Rule 151 sets out a list of four factors to be considered in granting early release. These four factors are non-exhaustive, and the President’s discretion is informed by the

⁶ Law No. 2012-15 (Annex A).

totality of the circumstances in each case.⁷ The Mechanism’s practice has also given weight to humanitarian considerations, familial support, health, and the convicted person’s willingness to abide by conditions of release.⁸

1. Gravity of Crimes

17. Mr. Ndahimana does not seek to diminish the gravity of the crimes committed against the Tutsi population of Kivumu commune, for which he was held responsible.

18. He notes, however, that his liability was not premised on his having personally killed or ordered killings, but on his participation, as a local administrative official, in a joint criminal enterprise. This factor is reflected in the sentence the Appeals Chamber ultimately imposed.⁹

2. Treatment of Similarly-Situated Prisoners

19. All persons convicted by the ICTR, the International Criminal Tribunal for the former Yugoslavia (ICTY), or the Mechanism, and who are serving sentences under the Mechanism’s supervision, are similarly situated for the purposes of this factor.¹⁰

20. The vast majority of ICTR and ICTY convicts who have served two-thirds of their sentence have been granted early release.¹¹ Equal treatment weighs in favor of release, particularly because Mr. Ndahimana’s sentence was imposed with the understanding, based on this consistent practice, that he might only serve two-thirds of it — a threshold he has now exceeded.

3. Demonstration of Rehabilitation

⁷ *Prosecutor v. Ćorić*, MICT-17-112-ES.4 (16 January 2019), para. 38.

⁸ *Prosecutor v. Simba*, MICT-14-62-ES.1 (7 January 2019), paras. 51, 77-78.

⁹ Appeal Judgment, *supra* note 4, at para. 252-253.

¹⁰ *Simba*, *supra* note 8, para. 31.

¹¹ *Ćorić*, *supra* note 7, para. 38.

i. Behaviour in Prison

21. Mr. Ndahimana affirms that he has not been the subject of any disciplinary incident, complaint, or unfavourable report during the entirety of his detention.
22. The President is respectfully requested, pursuant to paragraph 10 of the Practice Direction, to direct the Registry to collect information on Mr. Ndahimana's behaviour during his 17 years in detention to support this submission. This includes approximately eight and a half years at the United Nations Detention Facility pending trial and appeal, and approximately eight and a half years at Akpro-Missérété Prison.

ii. Acceptance of Responsibility

23. Remorse is not a determinative or required factor in an early release determination. Many applicants have been released absent any express acceptance of responsibility.¹² Rehabilitation has no settled definition in the context of atrocity crimes, and no applicant is expected to satisfy every indicator identified in the Mechanism's jurisprudence.¹³
24. Mr. Ndahimana reserves his position on this issue pending review of the material collected by the Registry.

iii. Prospects of Successful Reintegration

25. As described in Section III(C)(2), Mr. Ndahimana is unable to return to Rwanda. Accordingly, he is not required to demonstrate the higher degree of rehabilitation that is required of those who intend to return to the region where the crimes were committed.¹⁴

¹² See *Simba*, *supra* note 8, para. 44.

¹³ *Prosecutor v. Bralo*, MICT-14-78-ES (31 December 2019), paras. 37-39.

¹⁴ *Prosecutor v. Bralo*, MICT-14-78-ES (28 December 2023), para. 53.

26. Mr. Ndahimana's preference is to reside with his family in [REDACTED] upon release. Should [REDACTED], he [REDACTED]. [REDACTED].¹⁵

27. Under either scenario, he will have the support of his wife and children. He will provide a detailed release plan, addressing his proposed residence and means of support, in his submissions responding to the material collected by the Registry pursuant to paragraph 13 of the Practice Direction.

4. Substantial Cooperation with the Prosecutor

28. Mr. Ndahimana was never asked to cooperate with the Prosecutor and has not done so. Where cooperation was not sought, this factor is treated as neutral.¹⁶

C. Further Considerations

29. Mr. Ndahimana respectfully advances two further considerations which militate in favour of early release: his health, and the risk that he will be forcibly transferred into the custody of Rwanda, a state where he faces a real risk of persecution, arbitrary detention, torture, and death.

1. Health

30. Mr. Ndahimana suffers from [REDACTED], for which he has required regular [REDACTED] follow-up and [REDACTED] medication throughout his detention. [REDACTED].

31. Mr. Ndahimana has no other significant health conditions to report. He requests that the President consider these medical circumstances as part of the totality of factors bearing on this petition.

¹⁵ **Confidential Annex B.**

¹⁶ *Prosecutor v. Munyakazi*, MICT-12-18-ES.1 (22 July 2015), paras. 20-21.

2. Risk of Refoulement

32. Beyond the factors ordinarily considered in an early release application, Mr. Ndahimana submits that the prospect of the Mechanism transferring responsibility for the enforcement of his sentence to Rwanda constitutes an exceptional and compelling circumstance weighing in favour of early release.
33. Rwanda has offered to assume responsibility for the enforcement of sentences of Rwandan nationals currently serving their sentences in Benin and Senegal. The 2025 Report of the Secretary-General notes that the President “has the authority to designate Rwanda as an enforcement State,” and the Security Council is able to encourage or direct that outcome.¹⁷
34. Mr. Ndahimana is one of the Rwandan nationals whose transfer has been contemplated in this process. He is a signatory to the letter sent by the detainees at Akpro-Misséréte Prison to the President of the Security Council on 6 April 2026, detailing their collective and individual fear of persecution, arbitrary detention, torture, and death, should they be transferred into Rwandan custody.¹⁸
35. Mr. Ndahimana has consented to this argument being raised in his public early release petition, noting that this is a pressing concern he shares with his fellow ICTR/Mechanism convicts detained in Benin and elsewhere.

i. The Principle of Non-Refoulement and Rwanda’s Human Rights Record

36. The prohibition on transferring a person to face a real risk of torture, cruel treatment, arbitrary detention, or persecution is a cornerstone of international law, enshrined in Article

¹⁷ “Transfer of the functions under articles 25 (2), 26 and 28 (3) of the Statute of the International Residual Mechanism for Criminal Tribunal – Report of the Secretary-General” S/2025/786 (1 December 2025), paras. 30-32.

¹⁸ Memorandum to the UN Security Council, 6 April 2026 (**Annex C**).

3 of the Convention Against Torture, Article 7 of the International Covenant on Civil and Political Rights, Article 33 of the Refugee Convention, other international and regional treaties, and customary international law.

37. Importantly, diplomatic assurances cannot neutralise a real risk of torture, particularly where the practice of torture is systematic, post-return monitoring has proven no guarantee against torture, and the assurances themselves carry no legal effect or accountability if breached.¹⁹

38. Rwanda’s documented record of serious human rights violations, particularly in respect of those who are perceived as opponents of the incumbent authorities, is extensive. A portion of this record is provided at **Annexes D to N**. In brief:

- Independent monitors, including Amnesty International²⁰ and Human Rights Watch,²¹ report that Rwanda does not conduct credible investigations into extrajudicial executions, enforced disappearances, arbitrary detention, or torture;
- National courts have independently found that Rwanda’s assurances are insufficient to displace a real risk of an unfair trial or refoulement. Dutch appellate courts and the Supreme Court of the Netherlands have, since at least 2023, repeatedly declined to extradite genocide suspects who are identified as political opponents, citing fair trial concerns.²² Separately, in the analogous context of

¹⁹ “Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment” A/60/316 (30 August 2005) at para. 51 (**Annex D**); Margit Ammer and Andrea Schuechner, “Article 3: The Principle of Non-Refoulement” in Manfred Nowak, Moritz Birk, and Guiliana Monina (eds), *The United Nations Convention against Torture and its Optional Protocol: A Commentary* (2nd edition, OUP 2019) at paras. 7, 79 (excerpt provided at **Annex E**).

²⁰ “Rwanda: Authorities must immediately release detained journalist and members of political opposition” Amnesty International (5 December 2024) (**Annex F**).

²¹ “‘We Will Force You to Confess’: Torture and Unlawful Military Detention in Rwanda” Human Rights Watch (10 October 2017) (**Annex G**).

²² These include the cases of Pierre-Claver Karangwa (Supreme Court of the Netherlands, ECLI:NL:HR:2023:864, 6 June 2023 – **Annex H**); Joseph Mugenzi (Appeals Court of The Hague, ECLI:NL:GHDHA:2023:2469, 21 December 2023 – **Annex I**; appeal denied by the Supreme Court of the Netherlands, ECLI:NL:HR:2025:664, 25 April 2025); and Jean Baptiste Nyabusore (Appeals Court of The Hague, ECLI:NL:GHDHA:2023:2470, 21 December 2023 – **Annex J**; appeal denied by the Supreme Court of the Netherlands, ECLI:NL:HR:2025:592, 25 April 2025). See also

removal to a purportedly safe third country, the UK Supreme Court has unanimously held that Rwanda’s assurances did not eliminate a real risk of refoulement, citing systemic deficiencies in Rwanda’s asylum and justice processes;²³

- Rwandan authorities have demonstrated willingness to closely manage or foreclose independent oversight of matters challenging its official narrative of the 1994 genocide and its treatment of perceived opponents. In 2016, for example, Rwanda withdrew its Article 34(6) declaration permitting individuals to bring cases directly before the African Court on Human and Peoples’ Rights, just days before a scheduled hearing in the case of opposition politician Victoire Ingabire Umuhoya, who the Court ultimately ruled had had her rights to a fair trial and freedom of expression violated;²⁴ and
- Protected witnesses and defence counsel alike have historically been unable to travel safely to Rwanda, and the ICTR’s own Rule 11*bis* jurisprudence has recognised the historical risk of intimidation and reprisals in Rwanda.²⁵

ii. *Mr. Ndahimana’s Vulnerability*

39. Mr. Ndahimana, like the other ICTR convicts in Benin and elsewhere, is not an ordinary prisoner. His conviction is permanently and publicly tied to the Rwandan authorities’ official narrative of the 1994 genocide. Transfer would endanger his physical safety and would materially impede his ability to exercise his legal rights, including sentence review, family contact, and access to counsel.

Maarten Bolhuis, “‘No Safe Haven’ and the Politics of Accountability: The Extradition and Exclusion of Rwandan Genocide Suspects” (2026) *Refugee Survey Quarterly*, p. 15-16 (excerpt at **Annex K**).

²³ *R (AAA (Syria) and others) v Secretary of State for the Home Department* [2023] UKSC 42 (**Annex L**).

²⁴ *Ingabire Victoire Umuhoya v. Republic of Rwanda*, Application 003/2014, Merits Judgment (24 November 2017) (**Annex M**); see also Oliver Windridge, “Assessing Rwexit: The Impact and Implications of Rwanda’s Withdrawal of its Article 34(6) Declaration Before the African Court on Human and Peoples’ Rights” (2018) 2 *African Human Rights Yearbook* 243-258 (**Annex N**).

²⁵ *Prosecutor v. Kanyarukiga*, ICTR-2002-78-R11bis (6 June 2008); *Prosecutor v. Munyakazi*, ICTR-97-36-R11bis (8 October 2008).

40. In the recent decision denying early release to Mr. Jean de Dieu Kamuhanda, who likewise claimed that potential transfer to Rwanda constituted a humanitarian consideration under the Mechanism’s early release framework, the President of the Mechanism noted that “a possible transfer to a new enforcement State does not constitute a compelling or exceptional circumstance in relation to whether a convicted person should be released early”.²⁶ That observation addresses the disruption or inconvenience of transfer to some other enforcement State in the abstract. It does not address the distinct concern raised here: transfer specifically to Rwanda, where Mr. Ndahimana and others like him face a real risk of persecution. The principle of non-refoulement is engaged by the identity of the receiving state, not the mere fact of transfer.
41. The Mechanism’s jurisprudence establishes that “exceptional or compelling circumstances” — including those bearing on a convicted person’s safety and welfare — may independently justify early release even before a convicted person has reached the two-thirds threshold, and has applied the standard to grant release in rare cases on medical or humanitarian grounds alone.²⁷ Mr. Ndahimana does not ask the President to apply that higher, pre-threshold standard: he has already served in excess of two-thirds of his sentence and is eligible for release on the ordinary Rule 151 factors set out above. He instead respectfully raises the risk of an unsafe and involuntary transfer to Rwanda as an additional, independently compelling circumstance that reinforces his eligibility and supports granting this petition without delay, so that the question of his transfer does not arise at all.
42. Mr. Ndahimana reserves the right to supplement this section with further submissions once the Security Council’s intentions regarding the future enforcement of Mechanism sentences become clearer, and in response to any material collected by the Registry pursuant to the Practice Direction.

²⁶ MICT-13-33-ES.1 (23 July 2026), p. 3.

²⁷ *Prosecutor v. Franko Simatović*, MICT-15-96-ES.1, Decision on the Application for Early Release of Franko Simatović, (29 August 2023), para. 16.

IV. CONCLUSION

43. Mr. Ndahimana respectfully requests that the President direct the Registry to collect the information described in paragraph 10 of the Practice Direction, including reports from the authorities at Akpro-Missérété Prison and records of his time at the United Nations Detention Facility in Arusha.
44. Mr. Ndahimana understands that the President may receive and consider information from the Prosecutor, the Government of Rwanda, the Witness Support and Protection Unit, and possibly other third parties in connection with this petition.
45. Mr. Ndahimana will respond to all such information and submissions, once it has been provided to him and his counsel, as contemplated by paragraph 13 of the Practice Direction.
46. At the conclusion of that process, Mr. Ndahimana respectfully requests that the President grant him early release.

Word count: 2984



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Pro bono counsel for Grégoire Ndahimana

Respectfully submitted this 10 day of August 2026
Vancouver, Canada

ANNEX A

LOI N° 2012-15 DU 18 MARS 2013

portant code de procédure pénale en
République du Bénin.

L'Assemblée Nationale a délibéré en sa séance du 30 mars 2012, puis en sa séance du 17 décembre 2012, pour mise en conformité avec la Constitution suite à la décision DCC 12-153 du 04 août 2012.

Suite à la Décision de conformité à la Constitution DCC 13-030 du 14 mars 2013 de la Cour Constitutionnelle,

Le Président de la République promulgue la loi dont la teneur suit :

LIVRE PRELIMINAIRE DES PRINCIPES GENERAUX DE LA PROCEDURE PENALE

I-La procédure pénale doit être équitable et impartiale. La procédure pénale doit être contradictoire. Elle doit préserver l'équilibre des droits des parties.

Elle doit garantir la séparation des autorités chargées de l'action publique et des autorités de jugement. La procédure pénale garantit l'égalité des justiciables devant la loi ;

Les personnes se trouvant dans des conditions semblables et poursuivies pour les mêmes infractions doivent être jugées selon les mêmes règles sauf dérogation prévue par la loi.

II-Toute autorité en charge de la procédure à divers niveaux a le devoir d'informer les parties de leurs droits. Elle en assure la garantie au cours de toute la procédure.

III-Toute personne suspectée ou poursuivie est présumée innocente tant que sa culpabilité n'a pas été établie. Les atteintes à sa présomption d'innocence sont prévenues, réparées et réprimées dans les conditions prévues par la loi.

Elle a le droit d'être informée des charges retenues contre elle et d'être assistée d'un défenseur, de se faire examiner par un médecin de son choix, de contacter et de recevoir un membre de sa famille.

Les mesures de contraintes dont cette personne peut faire l'objet sont prises sur décision ou sous le contrôle effectif de l'autorité judiciaire. Elles doivent être strictement limitées aux nécessités de la procédure, proportionnées à la gravité de l'infraction reprochée et ne pas porter atteinte à la dignité de la personne.

Il doit être définitivement statué dans un délai raisonnable sur les faits mis à la charge de cette personne. 



Dans les prisons établies pour peines, ce régime sera institué en vue de favoriser l'amendement des condamnés et de préparer leur réinsertion sociale.

TITRE III DE LA LIBERATION CONDITIONNELLE

Article 810 : Les condamnés ayant à subir une ou plusieurs peines privatives de liberté peuvent bénéficier d'une libération conditionnelle s'ils ont donné des preuves suffisantes de bonne conduite et présentent des gages sérieux de réadaptation sociale.

La libération conditionnelle est réservée aux condamnés ayant accompli trois (03) mois de leur peine, si cette peine est inférieure à six (06) mois, et la moitié de la peine dans le cas contraire.

Pour les condamnés en état de récidive légale, le temps d'épreuve est porté à six (06) mois si la peine est inférieure à neuf (09) mois et aux deux tiers de la peine dans le cas contraire.

Pour les condamnés à une peine perpétuelle, le temps d'épreuve est de trente (30) années.

Article 811 : Le droit d'accorder la libération conditionnelle appartient au ministre en charge de la justice, sur avis de la commission de surveillance prévue à l'article 808 alinéa 3 du présent code.

Le dossier de proposition comporte les avis du chef de l'établissement dans lequel l'intéressé est détenu et du ministère public près la juridiction qui a prononcé la condamnation.

En matière criminelle, en cas de rejet de la demande par le ministre en charge de la justice, aucune autre demande ne peut être formulée dans un délai d'un (01) an à compter de la date de notification du rejet.

Pour donner suite à la demande de libération conditionnelle, le ministre en charge de la justice dispose d'un délai d'un (01) mois.

Article 812 : Le bénéfice de la libération conditionnelle peut être assorti de conditions particulières ainsi que des mesures d'assistance et de contrôle destinées à faciliter et à vérifier la réinsertion du libéré.

Article 813 : L'arrêté de libération conditionnelle fixe, s'il y a lieu, les modalités d'exécution et les conditions auxquelles l'octroi ou le maintien de la liberté est subordonné, ainsi que la nature et la durée des mesures d'assistance et de contrôle.

Cette durée ne peut être inférieure à la durée de la peine non subie au moment de la libération s'il s'agit d'une peine temporaire ; elle peut la dépasser pour une période maximum d'un (01) an.

Toutefois, lorsque la peine en cours d'exécution est une peine perpétuelle, la durée des mesures d'assistance et de contrôle est fixée pour une période qui ne peut être inférieure à cinq (05) années ni supérieure à dix (10) années.

Pendant toute la durée de la liberté conditionnelle, les dispositions de l'arrêté de libération peuvent être modifiées.

Article 814 : En cas de nouvelle condamnation, d'inconduite notoire, d'infraction aux conditions ou d'inobservation des mesures énoncées dans la décision de mise en

liberté conditionnelle, le ministre en charge de la justice peut prononcer la révocation de cette décision.

En cas d'urgence, l'arrestation peut être provisoirement ordonnée par le ministère public, à charge de saisir immédiatement le ministre en charge de la justice.

Après révocation, le condamné doit subir, selon les dispositions de l'arrêté de révocation, tout ou partie de la durée de la peine qui lui restait à subir au moment de la mise en liberté conditionnelle, cumulativement, s'il y a lieu, avec toute nouvelle peine qu'il aurait encourue ; le temps pendant lequel il a été placé en état d'arrestation provisoire compte toutefois pour l'exécution de sa peine.

Si la révocation n'est pas intervenue avant l'expiration du délai prévu à l'article précédent, la libération est définitive. Dans ce cas, la peine est réputée terminée depuis le jour de la libération conditionnelle.

TITRE IV

DU SURSIS

Article 815 : En cas de condamnation à l'emprisonnement ou à l'amende, si le condamné n'a pas fait l'objet de condamnation antérieure à l'emprisonnement pour crime ou délit de droit commun, les cours et tribunaux peuvent ordonner, par le même jugement et par décision motivée, qu'il sera sursis totalement ou partiellement à l'exécution de la peine principale.

Article 816 : Si pendant le délai de cinq (05) ans à dater du jugement ou de l'arrêt, le condamné n'a encouru aucune poursuite suivie de condamnation à l'emprisonnement ou à une peine plus grave pour crime ou délit de droit commun, la condamnation assortie de sursis sera comme non avenue.

Dans le cas contraire, cette condamnation sera d'abord exécutée sans qu'elle puisse se confondre avec la seconde.

Article 817 : La suspension de la peine ne s'étend pas au payement des frais du procès et des dommages-intérêts.

Elle ne s'étend pas non plus aux peines accessoires et aux incapacités résultant de la condamnation.

Toutefois, les peines accessoires et les incapacités cessent d'avoir effet le jour où, par application des dispositions de l'article précédent, la condamnation assortie de sursis est réputée non avenue.

Article 818 : Le président de la cour ou du tribunal doit, après avoir prononcé la décision de condamnation assortie de sursis total ou partiel, avertir le condamné qu'en cas de nouvelle condamnation, la première peine sera exécutée sans confusion possible avec la seconde et que seront encourues, les peines de la récidive.

TITRE V

DES CONFUSIONS DE PEINES

Article 819 : Lorsqu'à l'occasion d'une même procédure, la personne poursuivie est reconnue coupable de plusieurs infractions en concours punissables des peines de même nature, il ne peut être prononcé à son encontre qu'une seule peine de cette nature dans la limite du maximum légal le plus élevé.

CONFIDENTIAL
ANNEX B

[REDACTED].

ANNEX C

Apro-Missérété, le 6 avril 2026

Prisonniers de l'ONU/MTPI
 Prison d'Apro-Missérété
 B.P 45 Apro-Missérété
 République du Bénin

Excellence Monsieur le Président du Conseil de Sécurité de l'ONU

Objet : Mémoire sur la perspective de transfert du contrôle de l'exécution des peines imposées par le TPIR/MTPI aux États dont le Rwanda

Excellence Monsieur le Président,

1. Nous soussignés, prisonniers relevant de la compétence du MTPI et purgeant nos peines au Bénin, avons l'honneur de nous adresser à votre haute autorité pour vous soumettre ce mémoire afin d'exprimer nos inquiétudes et vives profondes préoccupations suite à la perspective de transfert du contrôle de l'exécution de peines prononcées par le Tribunal Pénal International pour le Rwanda (TPIR) et le Mécanisme pour les Tribunaux Pénaux Internationaux (MTPI) aux États dont le Rwanda.
2. Lors de la présentation du Treizième rapport annuel par la Présidente du Mécanisme à l'Assemblée Générale de l'ONU le 22 octobre 2025, il a été question de cette perspective. A cette occasion le Rwanda s'est proposé en disant « être prêt à exécuter le mandat du Mécanisme en assumant ses responsabilités en ce qui concerne les 25 personnes condamnées. « Pour le Rwanda, l'exécution des peines n'est pas un fardeau mais le prolongement de l'expérience nationale de justice, de réconciliation et de primauté de l'état de droit entamée après 1994. »
3. Dans son rapport S/2025/786 du 1^{er} décembre 2025 au Conseil de Sécurité (ci-après rapport), le Secrétaire Général de l'ONU développe cette question de transfert des activités du Mécanisme aux États à la fin de son mandat.
4. Relativement aux condamnés rwandais relevant du Mécanisme, le rapport dit que le Mécanisme a demandé au Bénin et au Sénégal s'ils pourraient assumer la responsabilité des activités courantes de contrôle des conditions de détention. Après avoir souligné que ces deux pays reçoivent d'importantes contributions financières et un appui logistique et administratif considérable de la part du Mécanisme et sans parler de leur réponse, le rapport recommande que les consultations doivent se poursuivre (paragraphe 30 du Rapport). Il faut noter que le Sénégal héberge les condamnés rwandais de l'ONU depuis 2017 aujourd'hui au nombre de 8 tandis qu'au Bénin où les premiers sont arrivés en 2009, ils sont 15 à y purger présentement leurs peines.
5. Ensuite le rapport évoque la possibilité qui serait de transférer ce rôle au Rwanda. L'emphasis est mise sur les bonnes dispositions de ce pays qui s'est dit prêt à accueillir ses ressortissants détenus relevant du Mécanisme sous prétexte qu'il a signé un accord avec le TPIR, qu'il dispose des infrastructures, qu'il jouit d'une expérience pour avoir accueilli les prisonniers de la Sierra Leone et que, contrairement au Sénégal et au Bénin, le Rwanda offrirait de supporter

tous les coûts qui étaient à la charge du Mécanisme et assumerait davantage de responsabilités administratives (paragraphe 31 du Rapport).

6. Enfin, le rapport dit que la Présidente du Mécanisme a le pouvoir de désigner le Rwanda comme État chargé de l'exécution de peines, et le Conseil de sécurité peut décider d'inviter celle-ci à procéder à cette désignation ou prendre une décision contraignante à cet effet (paragraphe 32 du Rapport).
7. Lors de la réunion du Conseil de sécurité du 10 décembre 2025 consacrée au Mécanisme à laquelle avait été invité le Représentant du Rwanda, celui-ci saisit l'opportunité pour ressasser la campagne de son pays en réaffirmant que le Rwanda est prêt à assumer l'exécution de toutes les peines restantes sur son territoire et qu'il prendra en charge tous les coûts (Conseil de Sécurité : séance du 10 décembre 2025 (S/PV.10059).
8. Dans les lignes qui suivent, notre mémorandum s'articule sur les points suivants :
 - Rappel de quelques antécédents sur l'immixtion incessante du gouvernement rwandais dans le fonctionnement du TPIR/MTPI ;
 - La Directive du MTPI du 15 mai 2020 et son impact sur les libérations anticipées ;
 - Dénonciation de l'offre du gouvernement rwandais et la nécessité de prendre en compte d'autres critères objectifs ;
 - Autres options possibles ;
 - La nécessité de rétablir la vérité sur le drame rwandais.

a. Rappel de quelques antécédents sur l'immixtion incessante du gouvernement rwandais dans le fonctionnement du TPIR/MTPI

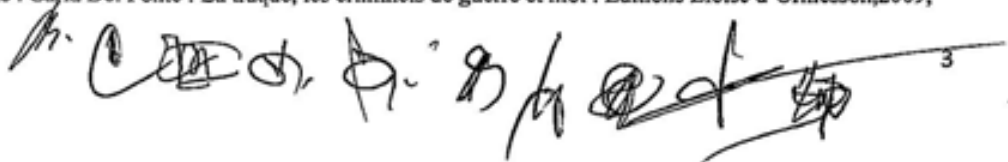
9. A prime abord, il faut rappeler que le mandat du TPIR était de poursuivre les deux parties en conflit et que le régime de Kagame (en place depuis juillet 1994 jusqu'aujourd'hui) puissamment protégé n'a pas lésiné sur les moyens pour faire obstruction à toute tentative de traduire en justice les criminels présumés du FPR y compris les auteurs de l'attentat contre l'avion du Président Habyarimana, acte terroriste déclencheur du génocide rwandais.
10. Dans un premier temps, le régime de Kagame a tout fait pour avoir la mainmise sur le TPIR en réclamant qu'il soit installé à Kigali. Ce qui n'a pas fonctionné. Dès lors, il a tout fait pour s'immiscer dans le fonctionnement du TPIR et est parvenu à y faire accréditer son représentant.¹ Une des missions de ce représentant officiel de Kigali était de coordonner de faux témoignages fabriqués par les autorités rwandaises contre les accusés devant le TPIR afin d'asseoir la thèse propagandiste du FPR accusant les Hutus d'avoir planifié le génocide. Même si la planification du génocide par l'ancien régime n'a pas été établie par le TPIR/MTPI, le mal a été fait car nombreux sont ceux qui ont été condamnés sur base de faux témoignages.
11. Le représentant du gouvernement rwandais devant le TPIR était généralement chargé de lui rendre compte pour que celui-ci prenne des mesures afin d'éviter la poursuite des membres du FPR responsables des violations graves du droit international humanitaire commises au

¹ Relatant la rencontre qu'elle a eue avec le président Kagame à Kigali le 28 juin 2002, l'ancienne Procureure du TPIR, Madame Carla Del Ponte, parle de Martin Ngoga- qui occupait cette fonction en ces termes : « Kagame était entouré de Gérard Gahima, le procureur général du Rwanda, de Martin Ngoga -les yeux et les oreilles du Rwanda à Arusha et de divers officiers de l'armée ». Carla Del Ponte : La traque, les criminels de guerre et moi : Éditions Éloïse d'Ormesson, 2009, page 372. Entendez que c'est ce même Ngoga Martin qui est l'actuel Représentant du régime Kagame aux Nations Unies.

Rwanda entre le 1^{er} janvier et le 31 décembre 1994. C'est ainsi que le gouvernement de Kigali a multiplié des menaces, chantages et harcèlement envers le Tribunal pour atteindre cet objectif.

12. Une des grandes actions de sape du régime FPR fut de bloquer les enquêtes qu'avait initiées l'ancienne Procureur du TPIR, Madame Carla Del Ponte. Dans plusieurs de ses témoignages et ses écrits, celle-ci décrit en détails comment Kagame personnellement et son régime de même que leurs puissants supporters l'ont empêchée de jouer son rôle et comment elle a été écartée de son poste pour que les justiciables parmi les membres du FPR ne soient pas poursuivis par le TPIR. Pourtant, selon elle, assurer l'impunité au FPR revenait à hypothéquer dangereusement la réconciliation des rwandais.
13. Dans son livre, Madame Carla Del Ponte dit : « *Le mandat du tribunal consistait donc à enquêter sur des crimes de guerre commis par toutes les parties belligérantes du conflit du Rwanda et, si les preuves le permettaient, de poursuivre les plus hauts responsables, dans un camp comme dans l'autre. Il était également chargé de dresser un rapport des événements susceptibles de contribuer à la réconciliation des communautés hutues et tutsies. Ne pas enquêter sur les exactions du Front patriotique rwandais serait revenu à admettre et proclamer que les dirigeants tutsis étaient couverts par l'impunité, qu'ils étaient au-dessus de la loi, et que les victimes innocentes de leurs violences ne comptaient pas. Une telle défaillance augurerait très mal de l'avenir du Rwanda et du sort de Rwandais dispersés dans toute l'Afrique orientale et au-delà* ».²
14. Depuis 2004 jusqu'aujourd'hui, le régime du FPR a mené une campagne musclée pour que les prisonniers rwandais condamnés ou en procès devant le TPIR soient transférés au Rwanda pour y être incarcérés ou jugés. En même temps, il fait depuis lors, sans relâche, des pressions politiques sur les États ayant accordé asile aux familles des personnes acquittées ou libérées anticipativement par le TPIR/MTPI pour que ceux-ci ne puissent pas rejoindre leurs familles. Le gouvernement de Kigali s'oppose même à ce que les dépouilles des condamnés, libérés et même acquittés ne puissent être transférés dans les pays ayant accordé asile à leurs familles pour y être enterrées.
15. Le cas le plus flagrant est celui des acquittés et libérés du TPIR/MTPI relocalisés au Niger sur Accord entre le Gouvernement du Niger et l'ONU daté du 15 novembre 2021. Arrivés au Niger le 05 décembre 2021, ces relocalisés se sont vu subitement frappés d'une décision d'expulsion du Niger pour des raisons diplomatiques en date du 27 décembre 2021. Il est vite apparu que le gouvernement rwandais était derrière ce volte-face du gouvernement du Niger. Grâce à l'intervention énergique du MTPI, la décision d'expulsion a été suspendue mais la menace d'expulsion demeure. Entretemps, le gouvernement rwandais continue ses manœuvres pour que ces relocalisés soient transférés au Rwanda contre leur gré.
16. Le gouvernement rwandais ne s'est pas arrêté là. Fidèle à sa stratégie de manipulation, il s'est toujours opposé avec véhémence aux libérations anticipées légalement prises par le TPIR/MTPI jusqu'à faire pression pour qu'il soit toujours consulté avant de statuer sur chaque cas. Devant la résistance du Président du MTPI, l'honorable Juge Theodor Meron, le gouvernement rwandais parvint à le contourner, comme à l'accoutumée, en mettant à profit son invitation à participer aux travaux du Conseil de Sécurité de l'ONU pour faire passer une résolution encourageant le MTPI à imposer des conditions aux requérants pour pouvoir bénéficier de la libération anticipée.

² Carla Del Ponte : Carla Del Ponte : La traque, les criminels de guerre et moi : Éditions Eloïse d'Ormesson, 2009, page 299



17. C'est ainsi que dans sa Résolution 2422 du 27 juin 2018, le Conseil de sécurité « *encourage le Mécanisme à rechercher une solution satisfaisante, notamment en envisageant la mise en place de conditions de libération anticipée dans les cas qui s'y prêtent* » (Voir le paragraphe 10 de la Résolution).³
18. Faisant référence à cette résolution, le juge Theodor Meron a pris une décision favorable de libération anticipée de Simba Aloys, alors que celui-ci n'avait pas accepté sa responsabilité dans les crimes pour lesquels il avait été condamné. La décision relève que : « *..., il a été fait droit à de nombreuses demandes de libération anticipée alors que les accusés n'avaient pas clairement exprimé de remords et, dans certains cas, alors que la personne condamnée avait expressément nié les crimes pour lesquels elle avait été condamnée*⁴ ».
19. Longtemps sous la pression de Kigali qui l'accusait de tous les maux même traité de génocidaire par certains, le juge Meron quitta son poste de Président du MTPI le 19 janvier 2019. Ses successeurs allèrent tout bouleverser en exigeant un plaidoyer de culpabilité comme condition sine qua none d'obtenir une libération anticipée.

b. La Directive du 15 mai 2020 et son impact sur les libérations anticipées

20. La Directive Pratique Relative à l'Appréciation des demandes de grâce, de commutation de peine ou de libération anticipée des personnes condamnées par le TPIR, le TPIY ou le Mécanisme a été adoptée par les Juges le 15 mai 2020, c'est-à-dire environ deux ans après la Résolution du Conseil de Sécurité de l'ONU du 27 juin 2018. La nouveauté de cette modification, lourde de conséquences, est que la nouvelle Directive prévoit, en son article 20, que « *l'octroi d'une libération anticipée peut être soumis à conditions* ».
21. Il convient de souligner que pendant ces deux années d'attente de cette nouvelle Directive, toutes les requêtes déposées par les requérants qui remplissaient les conditions conformément à l'ancienne Directive et à la jurisprudence en la matière ont été gelées sans dire pourquoi aux intéressés, à l'exception de Simba Aloys libéré par le Juge Président Theodor Meron en janvier 2019.
22. A travers les décisions qui ont été rendues par la suite sur base de la Directive du 15 mai 2020, nous avons compris que pour sortir de la prison, le requérant doit désormais plaider coupable des crimes pour lesquels il a été condamné ; ce qui est injuste et inéquitable par rapport à ceux qui ont bénéficié de la libération anticipée avant l'adoption de cette nouvelle directive. Les plus à plaindre sont ceux-là dont les requêtes ont été gelées pendant environ deux ans en attendant la sortie de la nouvelle directive et cela en violation du principe de la non-rétroactivité de la loi pénale.
23. Il est important de souligner aussi que la libération anticipée avant la Directive du 15 mai 2020 était équivalente à une commutation de peine sans conditions. Ce traitement inéquitable des condamnés du TPIR/MTPI est incompréhensible et aberrant.

³ La Résolution N°2422 du Conseil de sécurité de l'ONU datée du 27 juin 2018 stipule à l'Article 10 ce qui suit : « *Prend note des vues et des préoccupations exprimées par certains États Membres, lors du débat du Conseil de sécurité tenu le 6 juin 2018, au sujet de la position actuelle du Mécanisme en ce qui concerne la libération anticipée des personnes condamnées par le TPIR, et encourage le Mécanisme à rechercher une solution satisfaisante, notamment en envisageant la mise en place de conditions de libération anticipée dans les cas qui s'y prêtent* ». En lisant le rapport sur les débats du 6 juin 2018, on constate clairement que c'est sur base de l'insistance excessive de la Représentante du gouvernement rwandais que la libération sous condition a été retenue.

⁴ MTPI : Décision du Président du 7 janvier 2019 relative à la libération anticipée d'Aloys Simba, paragraphe 44

24. L'impact le plus sérieux de cette nouvelle Directive est qu'il y a eu un blocage systématique des libérations anticipées suite au fait de conditionner la libération à la reconnaissance de sa culpabilité et à la demande de pardon pour les crimes pour lesquels la personne a été condamnée contrairement au passé et cela suite aux pressions politiques du gouvernement rwandais. En tout état de cause, cette exigence d'une confession en aval des procédures judiciaires est inique pour une personne dont les juges ont fixé la sentence en tenant compte de ce qu'elle a plaidé non coupable et en tenant compte de la gravité des crimes. Nous estimons que cette façon d'arracher la plaidoirie de culpabilité aux condamnés à cette étape n'est pas compréhensible car cela gomme complètement la possibilité de révision du jugement pourtant prévu dans le Statut du Tribunal.

c. Dénonciation de l'offre du gouvernement rwandais et la nécessité de prendre en compte d'autres critères objectifs

25. Nous constatons que le Secrétaire Général, dans son rapport au Conseil de Sécurité de l'ONU, privilégie le Rwanda sur les deux autres pays (Sénégal et le Bénin) sous le seul critère que le Rwanda est prêt à prendre en charge les coûts d'entretien des prisonniers rwandais condamnés par le TPIR/MTPI sans tenir compte d'autres critères objectifs. Il poursuit en disant que « *La Présidente du Mécanisme a le pouvoir de désigner le Rwanda comme État chargé de l'exécution de peines, et le Conseil de sécurité peut décider d'inviter celle-ci à procéder à cette désignation ou prendre une décision contraignante à cet effet* » (voir paragraphe 32 du Rapport).

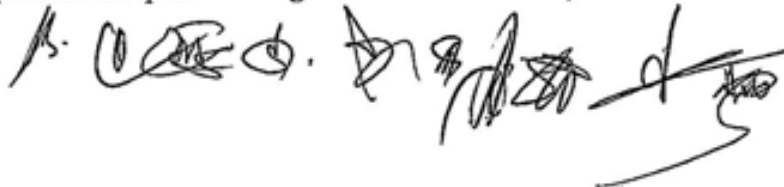
26. Pourtant, la Directive relative à la procédure de désignation d'un Etat dans lequel un condamné purgera sa peine d'emprisonnement en vigueur depuis le 7 mai 2025 prévoit au paragraphe 4 que le Président peut recueillir, directement ou par l'intermédiaire du Greffier, et prendre en considération toute une série d'informations y compris toute « *observation pertinente de la part du condamné* ». Ceci signifie que pour désigner un État, il ne faudrait pas tenir compte seulement de sa capacité de supporter les charges d'entretien des prisonniers alors que toute décision de transfert doit impérativement respecter les obligations internationales applicables surtout les articles 7 et 10 du pacte international relatif aux droits civils et politiques garantissant respectivement l'interdiction des traitements inhumains et le respect de la dignité des personnes privées de liberté.

27. Ainsi, toute mesure de transfert doit être précédée d'une évaluation rigoureuse, indépendante et transparente portant notamment sur :

- Les conditions de détention dans un État concerné ;
- L'indépendance effective du système judiciaire ;
- Les garanties concrètes et solides contre toutes formes de traitement inhumain ou dégradant ;
- L'existence de mécanisme de contrôle et de recours effectifs.

28. Par ailleurs, dans un souci de conformité aux standards internationaux et de préservation de la crédibilité de la justice internationale, il est indispensable que :

- Toute décision de transfert soit conditionnée à des garanties effectives, vérifiables et continues ;
- Un mécanisme de supervision internationale soit maintenu.
- Les inspections indépendantes régulières soient assurées ;

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- Un mécanisme permettant le retrait ou le transfert des détenus soit activable en cas de violation des droits fondamentaux.
29. Or, le Rapport d'Amnesty International de 2024 sur le Rwanda souligne que le Rwanda a encore une fois failli de ratifier la Convention internationale pour la Protection de toutes les personnes contre la disparition forcée⁵ tandis que l'ONG *Human Rights* a, dans son rapport pour l'année 2023, relevé plusieurs violations des droits de la personne humaine commises au Rwanda et souligné le fait que le gouvernement rwandais a failli de mener des investigations sur ces abus et de poursuivre les auteurs. D'autre part, l'ONG *Human Right Watch* (HRW) a, dans son Rapport du 18 juillet 2025, relevé de façon plus consistante et plus détaillée, que les droits de l'homme et des prisonniers en particulier sont bafoués au Rwanda (voir particulièrement les paragraphes 1, 4, 6, 15, 21, 23, 26, 29, 30, 31, 32 du Rapport).⁶
30. En ce qui nous concerne, il ne faudrait pas surtout oublier le fait que certains d'entre nous ont occupé des postes de hautes responsabilités politiques et militaires et que ceux-là sont toujours considérés par le gouvernement rwandais comme leurs ennemis. Il va de soi qu'ils seront traités comme tels, persécutés, humiliés et torturés jusqu'à ce que mort s'en suive.
31. Il conviendrait de signaler que la plupart d'entre nous ont été jugés *in absentia* par les tribunaux *Gacaca* du Rwanda et notre présence sur place sera l'occasion de faire exécuter ces jugements. Il ne faut pas non plus oublier que certaines autorités civiles et militaires se sont emparé de nos biens (maisons, propriétés...) et que par conséquent si nous sommes transférés au Rwanda nous serons des éléments trop gênants pour ces gens avec un grand risque d'être éliminé d'une manière ou d'une autre.
32. Une autre conséquence grave du transfert au Rwanda des rwandais condamnés par le MTPI/TPIR est que nos familles réfugiées dans différents pays ne pourront plus nous rendre visite étant donné leur statut de réfugiés et le fait que leur protection ne serait pas garantie au Rwanda sous le régime FPR. L'idéologie véhiculé par celui-ci et *Ibuka* que « *l'enfant d'un génocidaire est un génocidaire* » ne fera qu'augmenter le risque pour les membres de nos familles de se retrouver eux aussi en prison suite aux accusations fondées sur la fabrication de preuves. Lors de sa rencontre avec la jeunesse le 30 juin 2013 à Kigali, le Président Kagame a déclaré que les enfants Hutu doivent demander pardon car, selon lui, ceux qui ont commis le génocide l'ont fait en leurs noms : « *Même si tu n'as pas tué, lève-toi pour demander pardon pour ceux qui ont tué en ton nom...* ». C'est ce même Kagame qui a déclaré le 25 mars 2010 que « *s'il faut utiliser un marteau pour tuer la mouche, nous le ferons* ». Par ailleurs, nos parents proches qui vivent au Rwanda sont des rescapés des massacres du FPR. Ils sont persécutés et vivent dans la peur et la terreur du régime. Ils n'oseront donc pas nous rendre visite par peur de représailles.
33. Il sied de signaler que les idéologues du FPR dont Monsieur Bizimana Jean Damascène, l'actuel Ministère de la Réconciliation et de l'Unité Nationale, ont monté des stratégies pour neutraliser tout Hutu et toute autre personne non inféodés au régime. C'est ainsi que, dans l'histoire du génocide qu'ils ont écrite entre 2015 et 2020 « *AMATEKA YA JENOSIDE YAKOREWE ABATUTSI* » (Ndr : *Histoire du génocide contre les Tutsi*) préfecture par

⁵ Version originale : « *Rwanda again failed to ratify the International Convention for the Protection of All Persons from Enforced Disappearance* »

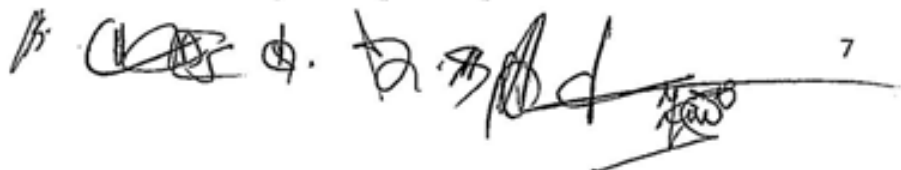
⁶ Au paragraphe 26, HRW dit : *However, Human Rights Watch research shows that the government does not conduct credible and effective investigations into most allegations of extrajudicial executions, enforced disappearances, arbitrary detention, torture and ill-treatment, or prosecute alleged perpetrators. Rwandan authorities continued to arrest and detain people in unofficial military detention centers, where scores of detainees have been tortured in recent years*.

préfecture, on voit qu'ils inventent ou déforment les faits. Sur base de faux témoignages ils établissent les listes des supposés planificateurs et exécutants du génocide sur lesquels tous les accusés devant le TPIR (acquittés ou condamnés) sont chaque fois repris en tête. Malheureusement, c'est ce qui est enseigné dans les écoles et répétés dans des meetings officiels et à l'occasion de la commémoration annuelle du génocide. En mettant en cause les libérations décidées par le TPIR/MTPI, ces idéologues appellent les rescapés du génocide qu'au cas où ils ne seraient pas satisfaits des décisions de justice, ils doivent se mobiliser pour se faire justice contre ceux qu'ils appellent des génocidaires. Il ne faudrait donc pas nous livrer à la vindicte populaire orchestrée par ces extrémistes

34. Il faut être dupe pour croire que le FPR peut respecter la règle de la protection de nos documents confidentiels et surtout de nos témoins protégés ainsi que la confidentialité des procédures devant le MTPI en cas de demande de révision du jugement. L'éventualité de remettre au régime du FPR les prisonniers rwandais condamnés par le TPIR/MTPI serait la voie facile pour mettre un point final à la révision des jugements pourtant prévue dans le statut du TPIR/MTPI. Le gouvernement fera tout pour faire capoter la procédure ou faire disparaître des éléments nouveaux voire même de supprimer les requérants ou les témoins avant que la procédure ne se termine. Les membres du FPR ne reculent devant rien quand il s'agit de se protéger contre toute poursuite.
35. Bref, les conditions générales d'emprisonnement et les règles régissant la sécurité et la liberté dont il est question à l'article 4(f) de la Directive de la Présidente du MTPI datée du 7 mai 2025 ne peuvent pas être remplies pour nous par le Rwanda, raison pour laquelle nous dénonçons énergiquement la demande du Rwanda d'être désigné pour accueillir les rwandais condamnés par le TPIR/MTPI et de lui transférer le contrôle de l'exécution de leurs peines et la conservation des archives du TPIR/MTPI.
36. Compte tenu de ces critères objectifs et de tous ces antécédents mentionnés plus haut, nous préférons rester au Bénin, le pays qui nous héberge depuis plusieurs années et qui nous traite humainement plutôt que d'être envoyés au Rwanda où nous risquons d'être soumis à la torture et à une mort atroce. Comme il est dit au paragraphe 28 du Rapport du Secrétaire Général de l'ONU, « ... le Mécanisme pourrait dès à présent transférer à chaque État chargé de l'exécution des peines le contrôle des conditions de détention des différentes personnes condamnées. Il faudrait que chaque État soit prêt à accepter cette responsabilité et que le Statut, le Règlement de procédure et de Preuve et les accords d'exécution de peines soient modifiés en conséquence. » Quant aux tâches judiciaires et autres, il est pour nous logique qu'elles soient exercées par une juridiction internationale indépendante pour préserver l'égalité et l'équité.

d. Autres options possibles

37. En supprimant les conditions qui compromettent la possibilité d'introduire les demandes de révision de jugement, le déblocage des libérations anticipées serait levé. Cette option permettrait de réduire très sensiblement le nombre de prisonniers à prendre en charge et automatiquement réduire le budget pour les entretenir.
38. Actuellement, les personnes éligibles peuvent atteindre environ la moitié des effectifs des prisonniers rwandais exécutant leurs peines au Sénégal et au Bénin. Ceci veut dire qu'à la première vague de libération anticipée après la levée du blocage, le budget pour entretenir ceux qui seraient en train d'attendre leur tour, va diminuer d'environ de moitié. Dans ces conditions, il serait irrationnel que le souci de l'ONU d'économiser 250 000 US dollars soit placé au-dessus du droit à la vie et à une justice équitable que réclament les condamnés du



TPIR/MTPI. Nous estimons donc que l'ONU devrait continuer les pourparlers avec les pays qui nous hébergent. Nous recommandons de maintenir le financement des frais de subsistance et les dépenses médicales des condamnés.

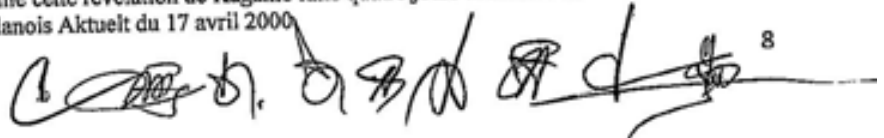
39. Par ailleurs, il est anormal que les personnes condamnées par le TPIR/MTPI n'aient pas droit à l'aménagement de peines.

e. La nécessité de rétablir la vérité sur le drame rwandais

40. Nous estimons qu'au moment où les langues commencent à se délier et que la vérité sur les violations graves du droit international humanitaire commises par les membres du FPR au Rwanda et en République Démocratique du Congo (RDC) depuis plus de trente ans est en train d'être mise à nu par des témoins crédibles qui ont été obligés de se conformer pendant longtemps au narratif imposé par les supporters puissants du régime FPR, la juridiction internationale devrait accomplir la mission qui lui a été confiée et saisir l'occasion de redresser la barre et de rendre justice à toutes les victimes de cette tragédie.
41. In fine, accepter de transférer au Rwanda les prisonniers rwandais condamnés par le TPIR/MTPI serait une décision très lourde et de conséquences graves. En effet, une telle décision reviendrait à consacrer la justice du vainqueur alors que le Général Kagame et ses troupes (l'autre partie en conflit) sont toujours justiciables devant les rwandais, la communauté internationale et devant l'histoire. L'on se souvient que depuis qu'ils sont au pouvoir jusqu'aujourd'hui, Kagame et ses lieutenants sont toujours hantés par le souci d'étouffer la vérité et d'occulter leur rôle dans le drame rwandais en faisant tout pour mettre définitivement leurs propres crimes sur le dos de leurs adversaires dont plusieurs condamnés du TPIR/MTPI. Dès lors, leur livrer équivaldrait à sceller définitivement l'impunité aux coupables présumés du FPR alors qu'il existe des preuves abondantes de leur responsabilité dans le drame rwandais.
42. A titre indicatif, il est important d'évoquer la confiance que le Général Kagame a livrée au Général Roméo Dallaire, commandant de la MINUAR, le 02 avril 1994. Dans son livre, Général Dallaire écrit : « *J'ai regardé son visage. Jamais, je ne l'avais jamais vu si sombre. Il a seulement ajouté que nous étions à la veille d'un cataclysme et qu'une fois enclenché, aucun moyen ne permettrait de le contrôler* »⁷ Le cataclysme a été déclenché le 06 avril 1994 en abattant l'avion du Président Habyarimana et l'on sait que le régime de Kagame se bat toujours pour mettre ce forfait fatidique sur le dos de ses adversaires. Pourtant des preuves pertinentes et solides sur l'attentat mettent en cause le FPR et son chef.
43. Également, il faudrait garder à l'esprit l'importante déclaration de l'ancienne Procureure du TPIR, Madame Carla Del Ponte qui, environ un an après sa prise de fonction au TPIR a dit : « *s'il était établi que c'est le FPR qui a descendu l'avion du Président Habyarimana, l'histoire du génocide serait réécrite* ».⁸ Malheureusement, le Tribunal a fermé ses portes sans avoir jugé les membres du FPR mis en cause dans cet attentat.
44. Des erreurs ont déjà été commises en exonérant le FPR des poursuites qui s'inscrivaient dans le mandat du TPIR/MTPI. Il ne faudrait pas en rajouter en lui remettant ses adversaires condamnés en guise de trophées.

⁷ Général Roméo Dallaire : *J'ai serré la main du diable*, page 279. Dans son témoignage sous serment devant le TPIR, Le Général Dallaire a confirmé cette révélation de Kagame faite quatre jours avant le 6 avril 1994.

⁸ Carla Del Ponte : voir le journal danois *Aktuel* du 17 avril 2000.



Excellence Monsieur le Président du Conseil de Sécurité de l'ONU,

Bu égard à tout ce qui précède, nous espérons que, sous votre autorité et votre sagesse, le Conseil de Sécurité tiendra compte de nos inquiétudes et nos suggestions pour ne pas retenir l'offre du gouvernement rwandais et nous permettre de continuer à exécuter nos peines dans des conditions humainement acceptables.

Nous vous prions d'agréer, Excellence Monsieur le Président du Conseil de Sécurité, l'expression de notre très haute considération.

Les signataires :

1. NIZEYIMANA Idéphonse
2. NCHADITHIGO Siméon
3. NDAHIMANA Grégoire
4. BIZIMUNGU Augustin
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- Aux Membres du Conseil de sécurité de l'ONU, New York, USA ;
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- Mesdames et Messieurs le Juges du MTPI ;
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- Messieurs les avocats de la Défense (Tous) ;
- CICR, Genève ;
- Les familles des signataires

ANNEX D

United Nations

A/60/316

**General Assembly**

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Item 73 (a) of the provisional agenda*

Human rights questions: implementation of human rights instruments**Torture and other cruel, inhuman or degrading treatment or punishment****Note by the Secretary-General**

The Secretary-General has the honour to transmit to the members of the General Assembly the interim report of the Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, submitted in accordance with Assembly resolution 59/182.

* A/60/150.

Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Summary

In the present report, submitted pursuant to General Assembly resolution 59/182 and Commission on Human Rights resolution 2005/39, the Special Rapporteur refers to the report of his predecessor, Theo van Boven, to the Commission at its sixty-first session (E/CN.4/2005/62 and Add.1-3) and to the activities he himself has been carrying out since he assumed the mandate on 1 December 2004. He also addresses issues of special concern to him, in particular overall trends and developments with respect to questions falling within his mandate.

The Special Rapporteur, as a follow-up to previous reports submitted to the Assembly and the Commission on the issue of corporal punishment, draws attention to continuing occurrences of the practice, surveys the jurisprudence of international and regional human rights mechanisms, and concludes that any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. In the section that follows, in the context of counter-terrorism measures and the absolute prohibition of torture, he examines the principle of non-refoulement and the use of diplomatic assurances in light of decisions of courts and international human rights mechanisms. In the opinion of the Special Rapporteur, diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment, and States cannot resort to them.

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I. Introduction

1. The present report is the seventh submitted to the General Assembly by the Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment. It is submitted pursuant to General Assembly resolution 59/182 (para. 28) and Commission resolution 2005/39 (para. 29). It is the first report submitted by the present mandate holder, Manfred Nowak, who assumed the mandate on 1 December 2004, succeeding Theo van Boven. This report includes issues of special concern to the Special Rapporteur, in particular overall trends and developments with respect to issues falling within his mandate.
2. The Special Rapporteur draws attention to document E/CN.4/2005/62 containing the final version of the "Study on the situation of trade in and production of equipment which is specifically designed to inflict torture or other cruel, inhuman or degrading treatment, its origin, destination and forms." The study concluded that the obligation to prevent torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment necessarily includes the enactment of measures to stop the trade in instruments that can easily be used to inflict torture and ill-treatment.
3. Document E/CN.4/2005/62/Add.1 covered the period 16 December 2003 to 30 November 2004 and contained allegations of individual cases of torture or general references to the phenomenon of torture, urgent appeals on behalf of individuals who might be at risk of torture or other forms of ill-treatment, as well as responses by Governments. The Special Rapporteur observes that from the period 1 December 2001 to 30 November 2004, out of 999 urgent appeals, the rate of response from Governments was merely 41 per cent. And 33 Governments have never responded to these appeals, including the Governments of the following States, which have received a significant number of urgent appeals: Equatorial Guinea, Honduras, Liberia, Tajikistan, Turkmenistan, Uganda and Yemen. Without any substantive reply (i.e. confirming or repudiating the allegations, and indicating what measures were taken), the Special Rapporteur is not in a position to assess the efficacy of his interventions. Moreover, the Special Rapporteur recalls that cooperation by States to clarify allegations constitutes an essential obligation without which he is not in a position to properly carry out his mandate.
4. Document E/CN.4/2005/62/Add.2 contained information on the state of follow-up to the recommendations resulting from previous country visits. While some Governments provided useful information, half of the countries visited by the Special Rapporteur did not respond to his request for information on implementation of his recommendations. The Governments of Cameroon, Kenya, Pakistan and Venezuela have never provided any follow-up information since the visits were carried out. The Special Rapporteur points out that a country visit is not only an important fact-finding tool; it is also an opportunity for a State to begin a long-term process of cooperation with the international community to combat and prevent torture.
5. During the period from 1 December 2004 to 31 July 2005, the Special Rapporteur sent 41 letters of allegations of torture to 30 Governments, and 133 urgent appeals on behalf of persons who might be at risk of torture or other forms of ill-treatment to 47 Governments.

6. With respect to fact-finding missions, the Special Rapporteur undertook a visit to Georgia, including the territories of Abkhazia and South Ossetia, from 19 to 25 February 2005 (a preliminary note on the visit was contained in document E/CN.4/2005/62/Add.3, and the final report will be presented to the Commission on Human Rights at its sixty-second session). The Special Rapporteur expressed his appreciation to the Government for the full cooperation it extended to him. He concluded, among other things, that torture and ill-treatment by law enforcement officials still exists in Georgia, and that conditions of detention are, in general, poor. Accordingly, a number of recommendations were addressed to the Government and the de facto authorities of Abkhazia and South Ossetia.

7. From 6 to 9 June 2005, the Special Rapporteur undertook a visit to Mongolia. The Special Rapporteur expressed his appreciation to the Government for the cooperation extended to him. He concluded that torture persists, particularly in police stations and pre-trial detention facilities. Concern was expressed at the secrecy surrounding the application of the death penalty, especially the absence of any official data. The deplorable conditions on death row and the lack of notification of families, among other things, amount to torture, in the view of the Special Rapporteur. In this regard, the Special Rapporteur, having received serious and credible allegations that persons on death row are detained in isolation and are kept handcuffed and shackled throughout their detention, regrets that prison authorities denied him access to these individuals despite the Government's authorization of unimpeded access to detention facilities. The Special Rapporteur subsequently learned that one individual, Seded Bataa, had died in custody and he requested the Government to undertake a prompt and effective investigation into the circumstances surrounding the death. During the visit, he also found that the treatment of prisoners serving 30-year terms in isolation to be inhuman. The report on the visit will be submitted to the Commission at the sixty-second session.

8. On the question of pending visits, for the remainder of 2005, visits to Nepal and China are expected to take place in September and November 2005, respectively. An invitation to participate in a workshop on the implementation of the Optional Protocol to the Convention against Torture in October 2005 was received from the Government of Mexico.

9. The Special Rapporteur continued to actively consider previous invitations for fact-finding visits extended by the Governments of Paraguay and Bolivia. Moreover, positive indications for future visits were received from the Governments of Côte d'Ivoire (first requested in 2005) and the Russian Federation with respect to the Republic of Chechnya (2000).

10. He regrets that despite long-standing requests, invitations have not been received from the Governments of Algeria (1997), Egypt (1996), India (1993), Indonesia (1993), Israel (2002), Tunisia (1998), and Turkmenistan (2003). The Special Rapporteur regrets that no invitation has yet been received from the Government of the United States of America with respect to the joint request made with the Special Rapporteur on the independence of judges and lawyers, the Chairperson-Rapporteur of the Working Group on Arbitrary Detention and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health to visit persons detained on grounds of alleged terrorism or other violations in Iraq, Afghanistan and the Guantánamo Bay military base (see E/CN.4/5/5, annex I). However, he is confident

that an invitation will soon be forthcoming. In 2005, the Special Rapporteur also requested invitations from the Governments of Belarus, Equatorial Guinea, Eritrea, Ethiopia, the Islamic Republic of Iran, Nigeria, Sri Lanka, the Syrian Arab Republic, Togo and Zimbabwe.

11. The Special Rapporteur issued press statements jointly with other special procedures mandate holders concerning: the situation of Guantánamo Bay detainees following the fourth anniversary of the existence of the detention centres (4 February 2005); the situation following the state of emergency in Nepal (8 February 2005); allegations of human rights violations by the authorities of Uzbekistan in connection with the violent events in Andijan (23 June 2005); the lack of an invitation by the Government of the United States of America to visit Guantánamo Bay on the first anniversary of the request by the independent experts of the Commission on Human Rights (23 June 2005); the campaign by Zimbabwe of forced evictions of informal traders and persons living in informal settlements (24 June 2005); and the reported denial of medical treatment to an imprisoned journalist in the Islamic Republic of Iran (18 July 2005).

12. On 28 January 2005, the Special Rapporteur held an informal one-day meeting with representatives of the following international non-governmental organizations (NGOs) involved in torture issues: Amnesty International, Association for the Prevention of Torture, International Federation of ACAT (Action of Christians for the Abolition of Torture), International Federation of Human Rights Leagues, Human Rights Watch, International Commission of Jurists, International Rehabilitation Council for Torture Victims, International Service for Human Rights, and World Organization against Torture. The meeting was an opportunity for the NGO representatives to meet with the newly appointed Special Rapporteur, introduce their respective organizations and brief him on their activities. It was also an occasion for the representatives to discuss substantive issues, as well as cooperation.

13. On 4 February 2005, with a view to strengthening the collaboration among United Nations mechanisms dealing with the question of torture and ill-treatment, the Special Rapporteur met with members of the Committee on the Rights of the Child. On that occasion, issues of common interest were discussed, including the mutual follow-up to the recommendations of the respective mechanisms concerning specific countries, cooperation in terms of preparation of country visits by the Special Rapporteur, and the United Nations study on violence against children.

14. On 7 April 2005, he participated in a meeting of the European Network of Treatment and Rehabilitation Centres for Victims of Torture and Human Rights Violations in Cartigny, Switzerland. The Special Rapporteur presented an overview of the mandate and discussed the important role treatment centres played in the activities of the mandate, including preparation for and follow-up to country visits.

15. Also on 7 April 2005, during the sixty-first session of the Commission on Human Rights, the Special Rapporteur participated in a commemorative event to mark the 20 years since the establishment of the mandate, organized by the Government of Austria and the Office of the High Commissioner for Human Rights. The current mandate holder's three predecessors Pieter Kooijmans, Sir Nigel Rodley and Theo van Boven, also participated. The Special Rapporteurs highlighted the achievements and challenges during their tenures and discussed the future of the mandate.

16. On 26 June 2005, on the occasion of the United Nations International Day in Support of Victims of Torture, the Special Rapporteur, together with the Committee against Torture, the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture and the High Commissioner for Human Rights, issued a joint statement.

17. On 14 July 2005, the Special Rapporteur delivered the keynote address of the Supplementary Human Dimension Meeting on Human Rights and the Fight against Terrorism convened by the Organization for Security and Cooperation in Europe in Vienna. In his statement he emphasized that attempts to circumvent the absolute and non-derogable nature of the prohibition against torture, especially in the context of counter-terrorism strategies, undermined the consensus on the primacy of human rights and signified to terrorists that they had attained their goal of upsetting rules established by States.

II. Corporal punishment

18. An issue that is of particular concern to the Special Rapporteur which he would like to draw attention to is corporal punishment.¹ Since assuming the mandate, the Special Rapporteur has intervened by transmitting communications in response to allegations in a number of countries involving corporal punishment, such as amputation, stoning, strangulation, eye-gouging, flogging, and beating. In view of such continuing practices — often grounded in justifications of domestic law, including religious law (e.g. sharia), and argued that pain and suffering incidental to lawfully sanctioned punishments fall outside the prohibition against torture² — the Special Rapporteur considers it necessary to review the relevant jurisprudence of international and regional human rights mechanisms.

A. United Nations human rights treaty bodies

19. Both the Human Rights Committee and the Committee against Torture have called for the abolition of judicial corporal punishment.³ Indeed, in paragraph 5 of general comment No. 20 (1992), the Human Rights Committee stated that the prohibition of torture and ill-treatment under article 7 of the International Covenant on Civil and Political Rights must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.

20. The Human Rights Committee has developed this view through relevant case law. In March 2000, in *Osbourne v. Jamaica*, in which the applicant had been sentenced to receive 10 strokes of the tamarind switch, the Committee held, “Irrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant.”⁴ This case-law was later confirmed in *Sooklal v. Trinidad and Tobago*,⁵ *Higginson v. Jamaica*⁶ and in 2004 in *Errol Pryce v. Jamaica*.⁷

21. The Human Rights Committee, in its concluding observations on Iraq, held that the imposition of cruel, inhuman and degrading punishments such as amputation and branding were incompatible with article 7 of the Covenant, that the

imposition of such punishments should cease immediately, and that all laws and decrees providing for their imposition should be revoked without delay.⁸ In its concluding observations on the Sudan it stated that flogging, amputation and stoning, which are recognized as penalties for criminal offences, are not compatible with the Covenant.⁹ Concerning the Libyan Arab Jamahiriya, the Human Rights Committee stated that flogging, which is recognized as a penalty for criminal offences, is incompatible with article 7 of the Covenant; that the imposition of such punishment should cease immediately; that all laws and regulations providing for its imposition should be repealed without delay; and that amputation should be formally abolished.¹⁰

22. In 1995, the Committee against Torture expressed the view that corporal punishment in Jordan could constitute a violation of the Convention.¹¹ In 1997, after considering the State party report of Namibia, the Committee against Torture recommended that the Government bring about “the prompt abolition of corporal punishment insofar as it is legally still possible under the Prisons Act of 1959 and the Criminal Procedure Act of 1977”.¹² In 2001, in relation to Zambia, a member of the Committee stated that corporal punishment, regardless of whether the cane was three feet or four feet long was a clear violation of article 16 of the Convention.¹³ In 2002, the Committee noted in its conclusions and recommendations on Saudi Arabia, that while sharia expressly prohibits torture and other cruel and inhuman treatment, domestic law itself does not explicitly reflect this prohibition, nor does it impose criminal sanctions.¹⁴ The Committee considered that the express incorporation in the State party’s domestic law of the crime of torture, as defined in article 1 of the Convention, was necessary to signal the cardinal importance of this prohibition, and that the sentencing to, and imposition of, corporal punishments by judicial and administrative authorities, including, in particular, flogging and amputation of limbs, are not in conformity with the Convention.¹⁵ Concerning the report of Yemen, the Committee expressed the view that criminal sanctions, in particular flogging and amputation of limbs, may be in breach of the Convention.¹⁶

23. In considering the report of Saudi Arabia, the Committee on the Rights of the Child expressed concern that persons under 18 may be subject to flogging under article 28 of the 1977 Detention and Imprisonment Regulations, as well as sentenced under criminal law to flogging, stoning, and amputations for crimes committed when they were under 18.¹⁷ Similarly, the Committee noted that under article 49 of the Penal Law of the Islamic Republic of Iran, persons who committed crimes when they were under 18 could be subjected to amputation, flogging and stoning, which are systematically imposed by the judicial authorities.¹⁸ In both cases, the Committee found such measures were incompatible with the Convention. That in Yemen corporal punishment, including flogging, is still lawful as a sentence was of deep concern to the Committee, which recommended that the State explicitly prohibit all forms of corporal punishment.¹⁹

B. Regional human rights mechanisms

24. In *Tyrer v. the United Kingdom*, involving the birching of a juvenile as a traditional punishment, the European Court of Human Rights held that this amounted to degrading punishment within the meaning of article 3 of the European Convention on Human Rights, and therefore was prohibited.²⁰ The Court, in *A v. the*

United Kingdom, held that corporal punishment in the home also constitutes degrading punishment contrary to article 3 of the European Convention.²¹

25. In March 2005, the Inter-American Court of Human Rights, in *Winston Caesar v. Trinidad and Tobago*, condemned, for the first time, judicially sanctioned corporal punishment.²² Unanimously, the Court held that “punishment by lashes of the ‘cat of nine tails’ is, in its very nature, intention and consequence, incompatible with the standards of human treatment as established in articles 5.1 and 5.2 of the American Convention on Human Rights”. The Court considered that the very nature of this punishment reflects an institutionalization of violence, which, although permitted by the law, ordered by the State’s judges and carried out by its prison authorities, is a sanction incompatible with the Convention. As such, corporal punishment by flogging was deemed to constitute a form of torture and, therefore, is a violation per se of the right of any person submitted to such punishment to have his physical, mental and moral integrity respected.

C. Conclusion

26. The Special Rapporteur recalls that the Commission on Human Rights has stated on numerous occasions that “corporal punishment, including of children, can amount to cruel, inhuman or degrading punishment or even to torture”.²³ In this regard, the Special Rapporteur endorses the view taken by his predecessor, Sir Nigel Rodley, that corporal punishment is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment enshrined, inter alia, in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²⁴ With respect to international humanitarian law, he notes that the infliction of corporal punishment on prisoners of war or on protected civilians would involve a clear breach of State responsibility under the Geneva Conventions, of 12 August 1949, and Additional Protocol I thereto.²⁵ Article 4 of Additional Protocol II contains fundamental guarantees of humane treatment and specifies as prohibited acts any form of corporal punishment. Moreover, rule 31 of the Standard Minimum Rules for the Treatment of Prisoners provides that “corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.”

27. The Special Rapporteur points out that the term “lawful sanctions” in article 1, paragraph 1, of the Convention against Torture must be interpreted as referring both to domestic and international law. Furthermore, the savings clause in article 1, paragraph 2, explicitly provides that article 1, paragraph 1, is without prejudice to any international instrument which contains provisions of wider application. It follows from the international and regional case law cited above that corporal punishment is in violation of international law (International Covenant on Civil and Political Rights, art. 7; European Convention on Human Rights, art. 3; American Convention on Human Rights, art. 5). It therefore cannot be considered a “lawful sanction” in accordance with article 1, paragraph 1, of the Convention against Torture.

28. On the basis of the review of jurisprudence of international and regional human rights mechanisms, the Special Rapporteur concludes that any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Moreover, States cannot invoke provisions of domestic law to justify the violation of their human rights obligations under international law, including the prohibition of corporal punishment. He therefore calls upon States to abolish all forms of judicial and administrative corporal punishment without delay.

III. Principle of non-refoulement and diplomatic assurances

29. The Special Rapporteur continues to receive a large number of allegations involving persons in circumstances where the absolute principle of non-refoulement has not been respected. Several Governments, in the fight against terrorism, have transferred or proposed to return alleged terrorist suspects to countries where they may be at risk of torture or ill-treatment. In this section, the Special Rapporteur addresses the principle of non-refoulement and the use of diplomatic assurances, or formal guarantees, between Governments that a person to be returned will not be subjected to torture, ill-treatment or the death penalty and will be afforded the right to a fair trial.

A. The non-refoulement principle in the jurisprudence of international human rights mechanisms

30. One of the bedrock principles of international law is the express prohibition against refoulement of persons to where there are substantial grounds to believe that there is a risk of torture. This principle has already been dealt with by the Special Rapporteur's predecessors in previous reports to the General Assembly.²⁶ However, in the present report the Special Rapporteur would like to place emphasis on recent decisions reached by international human rights mechanisms on this matter.

31. Article 3 of the Convention against Torture states clearly and unequivocally that "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".

32. In general comment No. 20 (1992), the Human Rights Committee also interpreted article 7 of the International Covenant on Civil and Political Rights to cover the principle of non-refoulement by stipulating that "... States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement" (para. 9). The non-refoulement principle is also firmly anchored in article 33 of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

33. In May 2005, the Committee against Torture, in its concluding observations on the report of Canada, expressed its concern at "the failure of the Supreme Court of Canada, in *Suresh v. Minister of Citizenship and Immigration*, to recognize at the level of domestic law the absolute nature of the protection of article 3 of the Convention, which is not subject to any exception whatsoever."²⁷ Furthermore,

concern was expressed at “the alleged roles of the State party’s authorities in the expulsion of Canadian national Mr. Maher Arar, expelled from the United States to the Syrian Arab Republic where torture was reported to be practised.”²⁸ The Committee also recommended that Canada “... unconditionally undertake to respect the absolute nature of article 3 in all circumstances and fully to incorporate the provision of article 3 into the State party’s domestic law ... Given the absolute nature of the prohibition against refoulement contained in article 3 of the Convention, the State party should provide the Committee with details on how many cases of extradition or removal subject to receipt of ‘diplomatic assurances’ or guarantees have occurred since 11 September 2001, what the State party’s minimum requirements are for such assurances or guarantees, what measures of subsequent monitoring it has undertaken in such cases and the legal enforceability of the assurances or guarantees given.”²⁹

34. On 17 May 2005, in *Maifhoud Brada v. France*, the Committee against Torture, “... acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, considers that the deportation of the complainant to Algeria constituted a breach of articles 3 and 22 of the Convention.”³⁰

35. In March 2004, the Human Rights Committee adopted general comment No. 31 on article 2 of the Covenant in which it states that “the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed” (para. 12).

36. In *Ahani v. Canada*, where the complainant was deported from Canada on the grounds of national security, the Human Rights Committee stated that

“... the failure of the State party to provide him ... with the procedural protections afforded to the plaintiff in *Suresh* on the basis that he had not made out a risk of harm did not satisfy the obligation in article 13 to allow the author to submit reasons against his removal in the light of the administrative authorities’ case against him and to have such complete submissions reviewed by a competent authority, entailing a possibility to comment on the material presented to that authority. The Committee thus finds a violation of article 13 of the Covenant, in conjunction with article 7.”³¹

37. On 22 June 2005, the United Nations High Commissioners for Refugees and Human Rights released a press statement in which they both urged the Government of Kyrgyzstan to refrain from any action aimed at ensuring the forcible return of Uzbek asylum-seekers to their country as there were well-founded reasons to believe that asylum-seekers in Kyrgyzstan may face an imminent risk of grave human rights violations, including torture and extrajudicial and summary executions, if returned to Uzbekistan. The Secretary-General, on the United Nations International Day in Support of Victims of Torture, also reminded Governments that the prohibition of torture is non-negotiable, and that torture cannot be justified by any circumstances whatsoever. This includes an absolute ban, in accordance with

article 3 of the Convention, on transferring any person to another jurisdiction where there are reasonable grounds to believe that the person is at risk of torture.³²

B. Jurisprudence of regional human rights mechanisms

38. The Special Rapporteur would like to recall the decision of the European Court of Human Rights in the *Soering* case in which it was established that the general principle of non-refoulement falls under the general and absolute prohibition against torture as outlined in article 3 of the European Convention on Human Rights.³³

39. In the case of *Chahal v. the United Kingdom*,³⁴ not only did the Court reaffirm the obligation of non-refoulement in European human rights law, but it also established the standard that diplomatic assurances are an inadequate guarantee for returns to countries where torture is “endemic”, or a “recalcitrant and enduring problem”. The Court ruled that the return to India of a Sikh activist suspected of involvement in terrorism would violate the United Kingdom’s obligations under article 3 of the European Convention, despite the diplomatic assurances given by the Government of India.

C. Diplomatic assurances

40. In November 2004, the Committee against Torture expressed its concern at the United Kingdom’s reported use of diplomatic assurances in the refoulement context in circumstances where its minimum standards for such assurances, including effective post-return monitoring arrangements and appropriate due process guarantees, were not wholly clear.³⁵ The Committee requested that within one year, the United Kingdom provide it with details on how many cases of extradition or removal subject to receipt of diplomatic assurances or guarantees had occurred since 11 September 2001, what the State party’s minimum contents are for such assurances or guarantees and what measures of subsequent monitoring it has undertaken in such cases.³⁶

41. In *Tapia Paez v. Sweden*, the Committee against Torture stated that the test of article 3 is absolute: “Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned [is] engaged cannot be a material consideration when making a determination under article 3 of the Convention.”³⁷

42. In May 2005, the Committee against Torture considered the case of *Agiza v. Sweden*³⁸ involving the expulsion in December 2001 of Ahmed Agiza and Mohammed al-Zari, on the grounds of suspected terrorist activities, from Sweden to Egypt aboard an aircraft operated by the United States.

43. The Swedish authorities relied on diplomatic assurances proffered by the Government of Egypt that neither of the suspects would be subjected to the death penalty, torture or ill-treatment and that they would be afforded the right to a fair trial. The two Governments also implemented a post-return monitoring mechanism

in the form of visits to Egypt by the Swedish authorities. However, despite these assurances, Mr. Agiza

“allegedly told his mother that after the January visit further electric shocks had been applied, and that for the last ten days he had been held in solitary confinement. His hands and legs had been tied, and he had not been allowed to visit a toilet. At a following visit, he told his parents that he was still in solitary confinement but no longer bound. He was allowed to visit a toilet once a day, and the cell was cold and dark. With reference to a security officer, he was said to have asked his mother, ‘Do you know what he does to me during the nights?’ He had also been told that his wife would soon be returned to Egypt and that she and his mother would be sexually assaulted in his presence. Thereafter, the complainant’s parents visited him once a month until July 2002 and then every fortnight. According to counsel, the information available is that he is held in a two-square-metre cell, which is artificially cooled, dark and without a mattress to sleep on. His toilet visits are said to be restricted.”³⁹

Although the Swedish authorities made 25 visits to the men, no such visit was carried out during the first five weeks, during which time they were held incommunicado.

44. The Committee held in this landmark decision that “... the State party’s expulsion of the complainant was in breach of article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.”⁴⁰

45. The *Agiza* case is the first case of extraordinary rendition to provide us with a statement of law at the international level. In this case the diplomatic assurances procured were insufficient to protect against the manifest risk of torture and were therefore unenforceable.

46. It is the opinion of the Special Rapporteur that post-return monitoring mechanisms do little to mitigate the risk of torture and have proven ineffective in both safeguarding against torture and as a mechanism of accountability.

47. In July 2004, the Council of Europe Commissioner for Human Rights, Alvaro Gil-Robles, stated:

“The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment. Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains.”⁴¹

48. The Special Rapporteur would also like to recall the case of Maher Arar, on whose behalf the Special Rapporteur’s predecessor sent a communication on 12 August 2003.⁴² This case illustrates very clearly the consequences of violating the principle of non-refoulement and the inoperability of diplomatic assurances in the protection against torture and other forms of ill-treatment.

49. In September 2002, United States authorities apprehended Maher Arar, a dual Canadian-Syrian national, in transit from Tunisia through New York to Canada, where he resided. He was held for almost two weeks and then flown by United States immigration authorities to Jordan, where he was driven across the border and handed over to Syrian authorities. The transfer was carried out despite Mr. Arar’s

repeated statements to United States officials that he would be tortured in the Syrian Arab Republic and his repeated requests to be sent home to Canada. The Government of the United States has claimed that prior to Mr. Arar's transfer, it had obtained assurances from the Government of the Syrian Arab Republic that he would not be subjected to torture upon return. Mr. Arar was released from Syrian custody 10 months later without charge and alleged that he had been beaten by security officers in Jordan and tortured repeatedly, often with cables and electrical cords, during his confinement in a Syrian prison. Mr. Arar filed suit in United States Federal Court on 22 January 2004, alleging that United States officials and agents involved in his transfer had violated the Fifth Amendment to the United States Constitution, the Government's treaty obligations under the Convention against Torture and the Torture Victim Protection Act of 1991. In seeking to dismiss the lawsuit, the United States Department of Justice employed the rarely invoked "State secrets privilege" (section 102 (a) of the National Security Act of 1947) and filed a motion in January 2005 stating that the release of any official information concerning Mr. Arar's transfer to Syria could jeopardize the intelligence, foreign policy and national security interests of the United States.

50. The Government of the United States has not explained why it sent Mr. Arar to Syria rather than to Canada, where he resides, or why it believed the assurances of the Government of the Syrian Arab Republic to be credible in the light of serious and credible allegations of torture emanating from that country. Furthermore the Government of the United States has also refused to release any information regarding the assurances against torture it claims it received from Syria in the case of Maher Arar.

D. Conclusion

51. It is the view of the Special Rapporteur that diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are sought usually from States where the practice of torture is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated. The Special Rapporteur is therefore of the opinion that States cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.

52. The Special Rapporteur calls on Governments to observe the principle of non-refoulement scrupulously and not expel any person to frontiers or territories where they might run the risk of human rights violations, regardless of whether they have officially been recognized as refugees.

Notes

¹ See also E/CN.4/1996/35, E/CN.4/1997/7, A/54/426, A/55/290 and A/57/173.

² E/CN.4/1997/7, paras. 7 and 10, and E/CN.4/1997/7/Add.1, para. 435.

- ³ See *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, para. 467, and *ibid.*, *Fifty-second Session, Supplement No. 44 (A/52/44)*, para. 250, respectively.
- ⁴ *Ibid.*, *Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. II, annex IX, sect. L, communication No. 759/1997, *Osbourne v. Jamaica*, para. 9.1.
- ⁵ *Ibid.*, *Fifty-seventh Session, Supplement No. 40 (A/57/40)*, vol. II, annex IX, sect. FF, communication No. 928/2000, *Boodlal Sooklal v. Trinidad and Tobago*.
- ⁶ *Ibid.*, vol. II, annex IX, sect. Q, communication No. 792/1998, *Higginson v. Jamaica*.
- ⁷ *Ibid.*, *Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. II, annex IX, sect. B, communication No. 793/1998, *Pryce v. Jamaica*.
- ⁸ CCPR/C/79/Add.84, para. 12.
- ⁹ CCPR/C/79/Add.85, para. 9.
- ¹⁰ See CCPR/C/79/Add.101.
- ¹¹ *Official Records of the General Assembly, Fiftieth Session, Supplement No. 44 (A/50/44)*, para. 169.
- ¹² *Ibid.*, *Fifty-second Session, Supplement No. 44 (A/52/44)*, para. 250.
- ¹³ See CAT/C/SR.494, para. 34.
- ¹⁴ CAT/C/CR/28/5, para. 4.
- ¹⁵ *Ibid.*
- ¹⁶ CAT/C/CR/31/4, para. 6.
- ¹⁷ CRC/C/15/Add.148, paras. 33 and 34.
- ¹⁸ CRC/C/15/Add.123, paras. 37 and 38, and CRC/C/15/Add.254, paras. 45 and 46.
- ¹⁹ CRC/C/15/Add.266, paras. 41 and 42.
- ²⁰ *Tyrer v. The United Kingdom*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 26, judgment of 25 April 1978, para. 35.
- ²¹ *A. v. The United Kingdom*, European Court of Human Rights, *Reports 1998-VI*, judgment of 23 September 1998, para. 21.
- ²² *Caesar v. Trinidad and Tobago*, Inter-American Court of Human Rights, *Series C*, No. 123, judgment of 11 March 2005.
- ²³ Commission on Human Rights resolutions 2002/38, para. 5; 2003/32, para. 5; 2004/41, para. 6 and 2005/39, para. 7.
- ²⁴ See E/CN.4/1997/7, para. 6.
- ²⁵ Article 87 of the Third Geneva Convention, article 32 of the Fourth Geneva Convention and article 75 (2) of Additional Protocol I: N. S. Rodley, *The Treatment of Prisoners Under International Law* (Oxford: Oxford University Press, 1999), pp. 314-316.
- ²⁶ See A/54/426, A/57/173 and A/59/324.
- ²⁷ CAT/C/CR/34/CAN, para. 4 (a).
- ²⁸ *Ibid.*, para. 4 (b).
- ²⁹ *Ibid.*, para. 5.
- ³⁰ CAT/C/34/D/195/2002, para. 14.
- ³¹ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. II, annex IV, sect. BB, para. 10.8.

³² www.un.org/News/Press/docs/2005/sgsm9959.doc.htm.

³³ *Soering v. The United Kingdom*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 161, judgment of 17 July 1989.

³⁴ *Chahal v. The United Kingdom*, European Court of Human Rights, *Reports 1996-V*, judgment of 15 November 1996.

³⁵ CAT/C/CR/33/3, para. 4.

³⁶ *Ibid.*, para. 5.

³⁷ *Official Records of the General Assembly, Fifty-second Session, Supplement No. 44 (A/52/44)*, annex V, sect. B.4, communication No. 39/1996, *Gorki Ernesto Tapia Paez v. Sweden*, para. 14.5.

³⁸ CAT/C/34/D/233/2003. See also the communications transmitted by the Special Rapporteur on behalf of Mr. Agiza (E/CN.4/2003/68/Add.1, paras. 461 and 462, and E/CN.4/2005/62/Add.1, paras. 645 and 646).

³⁹ *Ibid.*, annex, para. 2.8.

⁴⁰ *Ibid.*, para. 13.4.

⁴¹ Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to Sweden, 21-23 April 2004, Council of Europe, document CommDH(2004)13, 8 July 2004, para. 9.

⁴² E/CN.4/2004/56/Add.1, para. 1665.

ANNEX E

Article 3

Principle of Non-Refoulement

1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

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1. Introduction

1 The prohibition of refoulement in Article 3 CAT codifies an important principle of general international law and a norm of customary international law. According to this principle a State violates the absolute prohibition of torture not only if its own authorities subject a person to torture, but also if its authorities send a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture. The Committee's task is to determine whether the expulsion, return, or extradition would violate the returning State party's obligation under Article 3¹—and not whether the applicant's rights under CAT have been violated by the receiving State. The CAT Committee has dedicated a General Comment to the principle of non-refoulement: General Comment No 4 (2017).²

2 The vast majority of individual complaints decided by the CAT Committee concerns Article 3.³ Until 31 March 2017, out of 318 Article 3-related complaints, 61 were admissibility decisions.⁴ Out of the 257 decisions on the merits, in 79 cases the Committee found a violation, in 178 cases a non-violation of Article 3.⁵ Most cases in which the Committee found a violation of Article 3 concerned applicants whose asylum applications were rejected and who were being or had been returned to the receiving State.⁶ This practice has led to criticism that the Committee acted as a kind of fourth instance in asylum proceedings, particularly in the Global North, rather than concentrating its efforts on denouncing torture in the States where it is perpetrated. The fact that countries of the Global North, such as Switzerland and Sweden, are those where the Committee has found the highest number of violations of Article 3⁷ can be explained by the high level of awareness of international complaints procedures among the legal profession, and the availability of legal aid, as well as by the fact that the optional individual complaints procedure under Article 22 has been less readily accepted by States with a record of systematic practice of torture. These cases also show that, in times of increasingly restrictive asylum and immigration laws in Europe and other States of the Global North, the authorities are put under a heavy political pressure which can lead to a substantial number of violations

¹ See eg *Mutombo v Switzerland*, No 13/1993, UN Doc CAT/C/12/D/13/1993, 27 April 1994; *Khan v Canada*, No 15/1994, UN Doc CAT/C/13/D/15/1994, 15 November 1994; *Alan v Switzerland*, No 21/1995, UN Doc CAT/C/16/D/21/1995, 8 May 1996; *Aemei v Switzerland*, No 34/1995, UN Doc CAT/C/18/D/34/1995, 9 May 1997.

² CAT, 'General Comment No 4 on the Implementation of Article 3 of the Convention in the context of article 22' (2018) UN Doc CAT/C/GC/4 replacing General Comment No 1 (1998) on the principle of non-refoulement.

³ As of 31 March 2017, approximately 83% of all individual complaints decided by the CAT Committee related to Article 3 CAT. See Appendix A.7B, Figure 1. See also CAT/C/GC/4 (n 2) para 7.

⁴ Fifty-eight complaints were regarded as inadmissible, three as admissible.

⁵ For the details on the share of admissibility decisions and decisions finding a violation/non-violation of Article 3 CAT see below Appendix A.7C, Figure 2.

⁶ Main receiving States in relation to violations of Article 3 are Iran, Turkey, and Democratic Republic of the Congo (former Zaire). See below Appendix A.7D, Figure 3.

⁷ See below Appendix A.7A, Table 1, Article 3 decisions broken down by State party (Host Country).

of the non-refoulement principle. Torture is one of the most serious human rights violations, and complicity or participation in torture, which includes sending a person to a country despite a risk of torture there, constitutes a severe violation of the Convention.

3 The principle of non-refoulement is absolute and affords protection to every person regardless of the threat he or she may pose to the national security of the sending country and regardless of whether he or she has committed serious crimes. No balancing of interests is permitted. In contrast to the Refugee Convention of 1951, Article 3 CAT guarantees an absolute right which is not subject to any exclusion or limitation clause. Thus persons who might, for instance, for national security reasons not be eligible for asylum are equally protected.

4 In contrast to the principle of non-refoulement as developed by the European Court of Human Rights (ECtHR) and the UN Human Rights Committee (HRC) on the basis of Article 3 ECHR and Article 7 CCPR, Article 3 CAT only applies to torture in the sense of Article 1 CAT, but, owing to the insistence of the US during the drafting, not to other forms of cruel, inhuman or degrading treatment. However, other ill-treatment, not amounting to torture, is not irrelevant in the context of Article 3: the infliction of other ill-treatment is an indication of a torture risk⁸ and States parties should in their assessment of torture risk consider whether the risk of other ill-treatment 'could likely change so as to constitute torture'.⁹ Apart from that, the Committee has in its State reporting procedure urged States parties not to return persons to situations where they might run the risk of torture *or* cruel, inhuman or degrading treatment or punishment.¹⁰

5 States parties must not send persons to States where the risk of torture emanates from non-State actors who enjoy impunity either because the State fails to exert due diligence or because the State is not or only partially in control of its territory.

6 When methods of corporal punishment or the methods of implementing a death penalty as per national laws in the receiving State reach a threshold where they amount to torture, States parties are prohibited from returning persons to States where they might receive sentences imposing such treatment.

7 Although the text of Article 3 only speaks of expulsion, refoulement, and extradition, this provision covers all forms of obligatory departure of a human being (aliens as well as citizens) from one jurisdiction to another, including forms of ordinary or extraordinary 'rendition', as practised in the fight against global terrorism. Even the transfer of a suspected terrorist from the US detention centre of Abu Ghraib to another detention centre in Iraq under the jurisdiction of the Iraqi Government must be assessed in relation to the non-refoulement principle. Similarly, the Committee cautions against requesting and accepting diplomatic assurances from States with a known record of torture. Diplomatic assurances do not absolve a sending State party from its obligations under Article 3, and from carrying out the risk assessment mandated by the non-refoulement principle.

8 In order to guarantee the principle of non-refoulement, Article 3 also demands preventive measures, in particular legislative, administrative, and judicial measures against possible violations.¹¹ Such measures include inter alia procedural rights of the person

⁸ CAT/C/GC/4 (n 2) para 28. ⁹ *ibid*, para 16.

¹⁰ See eg CAT, 'Concluding Observations: Jordan' (25 May 2010) UN Doc CAT/C/JOR/CO/2, para 23; CAT, 'Concluding Observations: Guinea' (2014) UN Doc CAT/C/GIN/CO/1, para 24.

¹¹ See CAT/C/GC/4 (n 2) para 18.

concerned,¹² referral of the person alleging previous torture to an independent medical examination free of charge, in accordance with the Istanbul Protocol; or training of relevant personnel.¹³

9 Article 3(1) contains an explicit prohibition of refoulement. It demands ‘substantial grounds’ for believing that a torture risk for the person facing deportation exists. Article 3(2) stipulates that the ‘competent authorities’ of States parties must thereby take ‘all relevant considerations’ into account. In the following, this article analyses the following distinct elements:

1. Forms of prohibited conduct (‘expel, return (“refouler”) or extradite’) if substantial grounds exist that a torture risk exists upon return (see below, 3.2).
2. The meaning of ‘a person’ (see below, 3.3).
3. The meaning of ‘to another State’ (see below, 3.4).
4. The question of the particular treatment that the person would be subjected to in the case of expulsion, return or extradition to another State: Is the scope of Article 3 CAT limited to torture alone as defined in Article 1 CAT, or does the prohibition extend to cruel, inhuman or degrading treatment in accordance with Article 16 CAT? How does the Committee deal with cases in which the applicant risks being subjected to torture which is defined as a ‘lawful sanction’ by the receiving State? What about a risk of torture posed by non-governmental actors in the receiving State? (see below, 3.5).
5. The question as to the probability of the torture risk: what is the time of the risk assessment? How does the Committee interpret the phrase ‘would be in danger of being subjected to torture’? What are the relevant factors for the risk assessment? What role does the human rights situation in the receiving State play? Are ‘internal flight alternatives’ or diplomatic assurances of relevance under Article 3? (see below, 3.6).
6. The standard of proof/evidence applied in assessing the risk of danger of torture: what is the standard of proof that can be reasonably applied? Who bears the burden of proof and when does the burden of proof shift? What is the procedure by domestic authorities and by the Committee? (see below, 3.7)

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

10 *IAPL Draft (15 January 1978)*¹⁴

Article IV

The Contracting Parties undertake to adopt legislative, judicial, administrative and other measures necessary to give effect to this convention to prevent and suppress torture, and in particular to ensure that:

¹² eg the right to an individual assessment of a case, to be informed of the reasons why being subject of a deportation procedure and of the rights to appeal such decision; access to a lawyer, to free legal aid when necessary; procedure in a language the person understands, or with the assistance of interpreters and translators; right of appeal against a deportation order to an independent administrative and/or judicial body within a reasonable period of time and with suspensive effect. See CAT/C/GC/4 (n 2) para 18.

¹³ eg effective training of officials dealing with persons under deportation procedures about Article 3; effective training of medical and other personnel in identifying and documenting signs of torture, taking into account the Istanbul Protocol. See CAT/C/GC/4 (n 2) para 18.

¹⁴ Draft Convention for the Prevention and Suppression of Torture Submitted by the International Association of Penal Law (1978) UN Doc E/CN.4/NGO/213.

The Committee also criticized States parties for introducing concepts such as ‘internal asylum’ and ‘safe countries of origin’ in national law, which do not guarantee absolute protection against refoulement.⁶⁶

78 In contrast to Article 3 CAT, the refoulement prohibition of the *Refugee Convention* in Article 33 (limited to refugees within the meaning of the Refugee Convention) is *not absolute*: The refoulement protection may ‘not ... be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country’.⁶⁷ Apart from that, the Refugee Convention contains provisions which allow the exclusion from refugee status. Article 1(F) Refugee Convention excludes groups of persons which ‘are to be considered undeserving of international protection as refugees’ per se from its personal scope of application.⁶⁸ The Committee stressed in cases in which authorities had refused asylum applications by invoking the exclusion clause of Article 1(F) Refugee Convention that ‘the non-refoulement principle in article 3 of the Convention is absolute even if, after an evaluation under the 1951 Convention relating to the Status of Refugees, a refugee is excluded under article 1 F (c) of the latter Convention’.⁶⁹

3.2 Forms of Prohibited Conduct

79 Article 3(1) stipulates that ‘[n]o State Party shall expel, return (‘refouler’) or extradite a person to another State ...’ if a torture risk exists. This provision covers any form of obligatory departure to another State. It ‘is intended to cover all measures by which a person is physically transferred to another State’.⁷⁰ In General Comment No 4 (2017) the Committee deals with the question whether also measures not physically transferring but indirectly forcing a person to go to another State are covered by Article 3. It states that

States parties should not adopt dissuasive measures or policies ... which would compel persons in need of protection under Article 3 ... to return to their country of origin in spite of their personal risk of being subjected there to torture and other cruel, inhuman or degrading treatment or punishment.⁷¹

80 Other international human rights treaties use similar terminology: Article 33(1) Refugee Convention uses the terms ‘expel or return (‘*refouler*’)’. Article 13 CCPR, which protects aliens against arbitrary expulsion, only refers to ‘expulsion’. The HRC interprets the latter provision as encompassing every form of ‘obligatory departure’ of aliens,

⁶⁶ CAT/C/FRA/CO/4-6 (n 49).

⁶⁷ Geneva Refugee Convention, art 33(2).

⁶⁸ Andreas Zimmermann and Philipp Wennholz, ‘Article 1F’ in A Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011) para 1.

⁶⁹ See eg *Mumin Nasirov v Kazakhstan*, No 475/2011 (n 53); *Toirjon Abdussamatov et al v Kazakhstan*, No 444/2010 (n 59). Similar: *Tapia Paez v Sweden*, No 39/1996 (n 49); *MBB v Sweden*, No 104/1998 (n 49) para 6.4.

⁷⁰ Burgers and Danelius (n 21) 126.

⁷¹ CAT/C/GC/4 (n 2) para 14. It mentions as examples of dissuasive measures ‘detention in poor conditions for indefinite periods, refusing to process claims for asylum or unduly prolong them, or cutting funds for assistance programs to asylum seekers’.

ANNEX F



Photo: GettyImages

5 December 2024

Also available in Español, Français

Rwanda: Authorities must immediately release detained journalist and members of political opposition

The Rwandan authorities must immediately and unconditionally release eight political opposition members on trial for taking part in a training on non-violent action and campaign planning, as well as a journalist facing prosecution for planning to cover one of their events, Amnesty International said ahead of their trial hearing scheduled today.

The eight politicians — members of Development and Liberty for All (DALFA-Umurinzi), a political opposition party — and journalist Théoneste Nsengimana, arrested in October and December 2021, have spent three years in detention awaiting the start of their trial. Meanwhile, a ninth DALFA-Umurinzi member is being prosecuted in absentia.

“This trial is a travesty of justice. It underscores the extent to which any form of peaceful dissent is criminalized in Rwanda. No one should face prosecution for the peaceful expression of their views,” said Tigere Chagutah, Amnesty International’s Regional Director for East and Southern Africa.

“

8/8/26, 10:50 AM

Rwanda: Authorities must immediately release detained journalist and members of political opposition - Amnesty International

This trial is a travesty of justice. It underscores the extent to which any form of peaceful dissent is criminalized in Rwanda. No one should face prosecution for the peaceful expression of their views

Tigere Chagutah, Amnesty International's Regional Director for East and Southern Africa

“Spending three years in pre-trial detention is a blatant miscarriage of justice — the nine defendants must be immediately and unconditionally released, as they are detained solely for the peaceful exercise of their human rights.”

‘Trumped-up charges’

The prosecution is seeking prison sentences ranging from 20 years to life imprisonment. The opposition members stand accused of having planned and attended a training session on non-violent action, based on *Blueprint for Revolution: How to Use Rice Pudding, Lego Men, and Other Nonviolent Techniques to Galvanize Communities, Overthrow Dictators, or Simply Change the World* — a book by Srđa Popović, a leader of the student movement that helped topple former Serbian president Slobodan Milošević.

The group is also accused of planning actions aimed at mobilising the population and encouraging non-cooperation, such as the non-payment of taxes. According to the prosecution, the accused planned to start the activities around 14 October 2021, a day recognized by supporters of opposition leader Victoire Ingabire as “Ingabire Day”.



Instead of resorting to trumped-up charges to instill fear, the Rwandan authorities should uphold everyone's rights to freedom of expression and association, as guaranteed under the Rwandan Constitution

Tigere Chagutah

The opposition members are facing serious charges, including forming or joining a criminal association, conspiracy to commit an offence against the ruling power of the President of the Republic, conspiracy to cause uprisings and unrest among the population, conspiracy to attack the force of the law, and conspiracy to organize unlawful demonstrations or public meetings. One DALFA-Umurinzi member has also been charged with spreading false information or harmful propaganda aimed at provoking hostile international opinion against the Rwandan Government, as well as publishing rumors.

8/8/26, 10:50 AM

Rwanda: Authorities must immediately release detained journalist and members of political opposition - Amnesty International

Journalist Théoneste Nsengimana is also standing trial alongside the DALFA-Umurinzi members. He faces charges of forming or joining a criminal association and publishing rumours. He had announced on his online TV channel that he was planning to cover the Ingabire Day events.

“Instead of resorting to trumped-up charges to instill fear, the Rwandan authorities should uphold everyone’s rights to freedom of expression and association, as guaranteed under the Rwandan Constitution and human rights treaties including the African Charter on Human and Peoples’ Rights and the International Covenant on Civil and Political Rights to which the country is a state party,” said Tigere Chagutah.

Background

Rwanda’s political opposition continues to face severe restrictions on their rights to freedom of expression and association, alongside threats, arbitrary detention, prosecution on trumped-up charges, killings, and enforced disappearances. Independent civil society and the media also face attacks, intimidation, harassment and reprisals for their work. These acts of repression have a chilling effect, stifling debate and shrinking space for the enjoyment of other human rights in the country.

ANNEX G



HUMAN
RIGHTS
WATCH

“We Will Force You to Confess”

Torture and Unlawful Military Detention in Rwanda



“We Will Force You to Confess”

Torture and Unlawful Military Detention in Rwanda

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“We Will Force You to Confess”

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Map of Military Detention Sites in Rwanda



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Glossary and Explanation of Terms

African Charter	African Charter of Human and Peoples’ Rights. Ratified by Rwanda in 1983.
CAT	Committee Against Torture. United Nations body which monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by state parties. The CAT reviewed Rwanda in 2012 and will review it again in 2017.
CNDP	National Congress for the Defence of the People (Congrès national pour la défense du peuple). A former rebel group in eastern Democratic Republic of Congo.
DDRRR	Disarmament, demobilization, repatriation, reintegration, and resettlement of foreign armed groups. In the context of this report, DDRRR is used to describe the process through which FDLR combatants (see below) are demobilized in Congo, transferred to Rwanda, and reintegrated into civilian life there. The DDRRR program in Congo is coordinated by the UN peacekeeping mission, MONUSCO.
DMI	Rwanda’s Department of Military Intelligence, officially known as “J2,” responsible for matters concerning military intelligence and security.
EACJ	East African Court of Justice. Organ of the East African Community, located in Arusha, Tanzania.
FAR	Rwandan Armed Forces (Forces armées rwandaïses), the Rwandan army before and during the 1994 genocide. “Ex-FAR” refers to its former members.
FARDC	Armed Forces of the Democratic Republic of Congo (Forces armées de la République démocratique du Congo), the Congolese national army.
FDLR	Democratic Forces for the Liberation of Rwanda (Forces démocratiques pour la libération du Rwanda). A predominantly Rwandan Hutu armed rebel group, based in eastern Congo, some of whose members and

leaders participated in the 1994 genocide in Rwanda. The FDLR has also been responsible for serious human rights abuses in Congo.

FDU-Inkingi	United Democratic Forces-Inkingi (Forces démocratiques unifiées-Inkingi). A Rwandan opposition party which has been unable to register as a political party.
HRC	Human Rights Committee. UN body which monitors implementation of the International Covenant on Civil and Political Rights by state parties. The HRC reviewed Rwanda in March 2016.
ICC	International Criminal Court. Rwanda is not a signatory to the Rome Statute, the treaty which established the ICC.
ICCPR	International Covenant on Civil and Political Rights. Ratified by Rwanda in 1975.
ICRC	International Committee of the Red Cross. One of its objectives is to secure humane treatment and conditions of detention for all detainees.
MINADEF	Rwanda's Ministry of Defence. The term is also used in this report to describe the Ministry of Defence's premises in Kimihurura, in the capital, Kigali.
MONUC	United Nations Organization Mission in the Democratic Republic of Congo. UN peacekeeping mission in Congo, renamed "MONUSCO" in July 2010.
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of Congo, known as "MONUC" until July 2010.
NCHR	National Commission for Human Rights of Rwanda.
NISS	National Intelligence and Security Service, the civilian intelligence agency of Rwanda.
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Ratified by Rwanda on June 30, 2015.

RCS	Rwandan Correctional Services. Responsible for the management of Rwanda's official prisons. Overseen by the Ministry of Justice.
RDF	Rwanda Defence Force, the national army of Rwanda.
RDRC	Rwanda Demobilization and Reintegration Commission. A government body responsible for the demobilization and reintegration of former members of armed groups.
RNC	Rwanda National Congress. An opposition group in exile, composed mainly of former members or supporters of the RPF (see below).
RPA	Rwandan Patriotic Army. The Rwandan army formed by the RPF (see below) in July 1994. In May 2002, it was renamed "RDF."
RPF	Rwandan Patriotic Front. Rebel group that ended the genocide in 1994 and has been Rwanda's ruling party ever since.
SNR	National Intelligence Service of Burundi (Service national de renseignement).
SPT	Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, a UN body established pursuant to the provisions of the OPCAT.
UNHCR	United Nations High Commissioner for Refugees. UN agency responsible for the protection of refugees worldwide.
UPR	Universal Periodic Review. A periodic review of the human rights record of UN member states at the UN Human Rights Council. Rwanda's last UPR took place in November 2015.

Summary

They came into my cell, took my handcuffs off and covered my eyes. Then they walked me out and into the bush on a path I did not know. They put me on my knees, tied a shirt around my arms and said: “Now it is too late for you.” They took out a plastic bag and put it over my head so I could not breathe. As I was running out of air, they said: “Do you have something else to say?” I accepted [everything they told me to accept] because I was going to die. Then they stopped. I signed a document they put in front of me.

—Former detainee at Kami, January 29, 2014.

I ended up believing I was guilty. At this point, I was being beaten so badly I couldn’t feel anything. It was as if they were beating a tree.

—Former detainee at Mukamira, February 28, 2013

Between 2010 and 2016, scores of people suspected of collaborating with “enemies” of the Rwandan government were detained unlawfully and tortured in military detention centers by Rwandan army soldiers and intelligence officers. Some of these people were held in unknown locations, including incommunicado, for prolonged periods and in inhuman conditions.

These illegal detention methods are designed to extract information from real or suspected members or sympathizers of the Democratic Forces for the Liberation of Rwanda (FDLR)—an armed group based in eastern Democratic Republic of Congo, some of whose members took part in the 1994 genocide in Rwanda—and, to a lesser extent, the Rwanda National Congress (RNC), an opposition group in exile. Rwandan authorities have accused the FDLR of launching attacks on Rwanda from the Democratic Republic of Congo, as recently as 2016, and have accused both the FDLR and the RNC of carrying out grenade attacks in Rwanda between 2008 and 2014.

This report describes systematic patterns of torture, enforced disappearances, illegal and arbitrary detention, unfair trials, and other serious human rights violations in military detention centers in Rwanda, from 2010 to 2016, in clear violation of Rwandan and international law. Human Rights Watch’s findings are based on interviews with more than 230 people, including 61 current and former detainees. Human Rights Watch also observed the trials of seven groups of people and reviewed court statements regarding 21 illegal

detention cases and statements given in court by 22 individuals. Human Rights Watch conducted research for this report in Rwanda, Congo, Uganda, Burundi, and Kenya between 2010 and 2017.

Human Rights Watch has confirmed 104 cases of people who were illegally detained and in many cases tortured or ill-treated in military detention centers in Rwanda during this seven-year period. Yet the actual number of cases is likely much higher. Due to the secret nature of torture, enforced disappearances, and illegal and arbitrary detention, and the fear of many former detainees that speaking out may lead to reprisals by authorities, it is extremely difficult to confirm the total number of people unlawfully detained by the military during the period covered by this report.

While most cases documented by Human Rights Watch occurred between 2010 and 2014, Human Rights Watch interviewed five people detained and tortured in military custody in 2016 and heard credible accounts about several other more recent cases, including in early 2017, indicating that these violations continued.

Many of the detainees, including FDLR combatants and civilians, were arrested in Rwanda by military officials, sometimes assisted by police, intelligence, or local government officials. Others were arrested and ill-treated in neighboring Burundi or Congo, some while being processed through the demobilization and repatriation program supported by the United Nations peacekeeping mission in Congo. They were then illegally transferred to Rwanda, where they were subjected to abuse.

Most of the detainees were held near the capital, Kigali, or in northwestern Rwanda. Many were held at multiple locations during their detention. In the cases documented by Human Rights Watch, detainees were held at unofficial military detention centers, including at the premises of the Ministry of Defence (known as MINADEF), at Kami military camp, at Mukamira military camp, at a military base known as the “Gendarmerie,” at detention centers in Bigogwe, Mudende, and Tumba, and at private homes used as detention centers. Human Rights Watch is not aware of any Rwandan laws or statutes allowing for the military or other authorities to detain people at these locations.

To force them to confess, or to incriminate others, officials severely tortured or ill-treated most of the detainees interviewed by Human Rights Watch. Several former detainees gave accounts of severe beatings, electric shocks, asphyxiation, and mock executions. Former detainees were held for up to nine months in extremely harsh and inhuman conditions,

with insufficient food and water to meet their basic needs. Human Rights Watch received allegations it was unable to verify that some detainees were killed.

At the time of arrest, family members or friends often witnessed state agents taking people away, with authorities rarely revealing their whereabouts or any other information. Most of these arrests could therefore be described as enforced disappearances, and almost all were incommunicado detention. Most families only saw their loved ones after they were released or transferred to an official detention facility, several months later. Some families believed the detained family members had died. Human Rights Watch documented cases in which people believed to be held in military custody have never returned, and appear to have been forcibly disappeared.

Kami military camp has a reputation as the most notorious torture and interrogation center. Human Rights Watch interviewed 39 people detained there between 2010 and 2016, and received information about many other cases. Many former detainees described beatings, asphyxiation, the use of acid to burn skin, and mock executions, as interrogators sought to extract information about their alleged links with the FDLR or opposition groups. Many were held in isolation, sometimes in a constantly dark or brightly lit cell.

Human Rights Watch interviewed 11 people who were detained and severely beaten at MINADEF in 2010 before they were transferred to Kami.

Human Rights Watch interviewed 25 former detainees of Mukamira military camp, located between Musanze and Rubavu, in northwestern Rwanda, some who were detained as recently as May 2016. Beatings were commonplace in Mukamira, and some former detainees told Human Rights Watch that military or intelligence officials tortured them or threatened to kill them, if they would not confess.

In numerous cases, Rwandan officials first took detainees who were arrested near the Congolese border or in Congo to a military base known as the “Gendarmerie,” in Rubavu district. Seventeen former detainees told Human Rights Watch how military officials hit detainees at the “Gendarmerie” or beat them with sticks and detained them in holes in the ground.

In many cases, after several months of illegal detention—and often only after detainees had signed a statement under torture—the Rwandan authorities transferred them to official detention centers, including civilian prisons, and they were then charged and put on trial. The period of their detention in military centers was erased from the public record. Police

statements seen by Human Rights Watch claimed the detainees had been arrested just before their transfer to the regular justice system.

Despite being told not to reveal the abuses they faced in detention, many of the defendants told judges they had been illegally detained or tortured in military detention centers. Human Rights Watch is not aware of any judges ordering an investigation into such allegations or dismissing evidence obtained under torture, despite clear legal obligations under international human rights law to do so.

In many cases, the defendants did not receive a fair trial. Many were sentenced to lengthy prison terms, including life imprisonment, sometimes partly or entirely based on confessions or witness testimonies obtained under torture. Many are still in prison. Others were acquitted and released after lengthy pretrial detention.

Since around 2005, conditions in Rwanda's official civilian prisons have improved considerably. In the years following the 1994 genocide, severe overcrowding and other prison conditions amounting to cruel, inhuman, and degrading treatment led to the death of many prisoners. Since then, the authorities have released several thousand prisoners, thereby significantly reducing the overcrowding. Allegations of torture and ill-treatment in official civilian prisons have become rare since the mid-2000s. As this report shows, however, this progress stands in contrast with a parallel circuit of unofficial military detention centers, in which detainees, including civilians, have been subjected to serious violations over many years.

Most of the violations described in this report were committed by members of the Rwandan military, including military intelligence operatives, who have benefited from a system of impunity. Human Rights Watch is not aware of any disciplinary or judicial action against military or intelligence officials for illegal detention or torture in military centers during the period covered by this report.

The FDLR have carried out killings, rapes, and other serious abuses against civilians in eastern Congo. Many of the abuses faced by detainees and documented in this report are a result of attempts by the Rwandan government to punish the FDLR and its sympathizers for the group's incursions into Rwanda and to extract information regarding potential future attacks. While the Rwandan government has a responsibility to protect its borders and ensure security for all its citizens, this should be done in full respect of the law. International and Rwandan law prohibit torture, illegal and arbitrary detention, enforced disappearances, and other human rights violations described in this report.

In June 2015, in a promising move, Rwanda ratified the Optional Protocol to the Convention against Torture (OPCAT), which requires ratifying states to set up a national preventive mechanism for the prevention of torture at the domestic level. The Rwandan government has yet to create this mechanism, despite a deadline in the OPCAT to do so one year after ratification. However, a process to establish the mechanism has commenced and consultations are ongoing. There are indications that this mechanism may be managed through the National Commission for Human Rights.

At the end of 2017, Rwanda will be reviewed by the UN Committee Against Torture (CAT), a body of 10 independent experts that monitors the implementation of the Convention against Torture.

The UN Subcommittee on the Prevention of Torture, a monitoring body of the OPCAT comprised of international experts, will conduct a state visit to Rwanda in October 2017.

Human Rights Watch shared the findings presented in this report with the government of Rwanda in December 2016, but despite repeated requests, and a second letter in August 2017, the government did not respond. Justice Minister Johnston Busingye told Human Rights Watch in 2014 that there should be zero tolerance for torture and that perpetrators should be brought to account. In 2016, in a submission for the CAT, the government stated that, “There is no unofficial detention in Rwanda.”

Human Rights Watch calls on the Rwandan authorities to immediately stop all unlawful detention and torture in military custody, to investigate all allegations of violations, including those contained in this report, and to bring the perpetrators to justice, in fair and prompt trials. The government should also disclose the whereabouts of all those subjected to enforced disappearance.

International donors to Rwanda’s justice and security sectors should press Rwandan authorities to immediately halt the practices of torture and other serious human rights violations documented in this report. Financial and other support to these sectors should be re-evaluated and only continue if concrete steps are taken to end these violations and hold the perpetrators to account. While international donors are quick to praise Rwanda’s remarkable economic progress since the 1994 genocide and have repeatedly rewarded the government with substantial aid packages, the darker underside of torture, enforced disappearances, and unlawful detention should not be ignored.

Recommendations

To Rwandan Government, Military, and Judicial Authorities

- Immediately cease arbitrary and unlawful detention and torture in military detention centers and ensure that no one is held in unofficial detention centers.
- Promptly release detainees who are held in unlawful military detention centers, or where there is sufficient and credible evidence of having committed a recognizable offence, charge them, transfer them to official detention centers, and ensure they receive a prompt trial that fully respects international fair trial standards.
- Ensure that all detainees are promptly brought before a prosecutor and a judge within the legally defined periods, and that arrests are not arbitrary and take place in accordance with the procedures and safeguards established by law.
- Investigate all allegations of torture, enforced disappearances, unlawful and arbitrary detention and arrests, even without an official complaint by victims or their families, and ensure that the perpetrators are brought to justice.
- Suspend members of the Rwanda Defence Force (RDF), regardless of rank, against whom there are credible allegations of involvement in serious human rights violations, pending investigations, and ensure that all personnel implicated in violations, as well as their commanders, are appropriately disciplined and prosecuted.
- Publicly and unequivocally condemn the practices of torture, enforced disappearances, ill-treatment, and unlawful and arbitrary detention, and make clear to the RDF, at all levels, that these practices will not be tolerated.
- Compensate victims of torture, ill-treatment, enforced disappearances, and unlawful and arbitrary detention adequately and speedily.
- Ensure that judges exclude from evidence any statements, confessions, and other information allegedly obtained through torture or ill-treatment. In cases in which detainees have been tortured, it may be that all alleged evidence is tainted by the torture and should not be used in any prosecution. In such cases, where it is not possible to guarantee a fair trial, detainees should be promptly released.
- Promptly provide information about detainees to their families, including their whereabouts, charges against them, if any, and allow detainees to receive visitors.
- Provide detainees with access to food, water, and medical care.

- Pending closure of unlawful military detention centers, ensure conditions of detention in all detention centers, including those mentioned in this report, are subject to independent monitoring by human rights monitors who can visit without prior notification and communicate privately with detainees.
- Ensure that all law enforcement personnel are appropriately trained on the absolute prohibition of torture and other inhuman and degrading treatment, and how to interrogate detainees in conformity with international human rights standards.
- Ratify the International Convention for the Protection of All Persons from Enforced Disappearance.
- Implement the Optional Protocol to the Convention against Torture (OPCAT) by establishing an independent national mechanism for the prevention of torture.
- Invite relevant human rights mechanisms to visit Rwanda, including the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the UN Working Group on Arbitrary Detention, and the African Commission on Human and Peoples' Rights.

To Rwanda's National Commission for Human Rights, Ombudsman, and Parliament

- Investigate allegations of enforced disappearances, unlawful and arbitrary detention, and torture in military detention centers, report publicly on these investigations, and organize hearings with senior government officials.
- Publicly and unequivocally condemn torture, ill-treatment, enforced disappearances, and unlawful and arbitrary detention.

To International Donors to Rwanda's Justice and Security Sectors and Other Foreign Governments

- Call on the Rwandan authorities to immediately implement the recommendations in this report, including by directing security personnel to desist from torturing detainees, investigating all allegations of torture and unlawful detention in military custody, and bringing those responsible to justice.
- Integrate compliance with human rights standards in programs to support the Rwandan military, security and justice sectors, and in political dialogue with the

Rwandan government, and monitor compliance with these standards at regular intervals.

- In the context of assistance to the justice sector, monitor judicial procedures to help ensure that trials are conducted in accordance with international fair trial standards.
- Re-evaluate financial and other support, including training and capacity-building, to institutions directly involved in human rights violations documented in this report and communicate clearly to the Rwandan government that such support will only continue if concrete steps are taken to end these violations and hold the perpetrators to account.
- Request permission to visit the military detention sites mentioned in this report and communicate privately with detainees.
- Under the principle of universal jurisdiction and in accordance with national laws, investigate and prosecute Rwandan officials suspected of committing the serious violations described in this report who may be visiting the relevant country.

To the UN, the World Bank, and Donors Supporting the DDRRR Program

- Closely and systematically monitor the situation of former combatants returned from Congo to Rwanda through the disarmament, demobilization, repatriation, reintegration, and resettlement (DDRRR) program and take measures to prevent illegal transfers from Congo to Rwanda and human rights abuses such as arbitrary and unlawful detention and torture.
- Establish, together with the Rwandan authorities, clear procedures for monitoring the situation of former combatants returned to Rwanda via the DDRRR program.
- Intervene with the Congolese and/or Rwandan authorities when MONUSCO, the peacekeeping mission in Congo, has credible information that a former combatant processed through the MONUSCO DDRRR program is illegally arrested, detained, and/or tortured in Congo or Rwanda.

To the African Commission on Human and Peoples' Rights

- In accordance with the African Charter on Human and Peoples' Rights, conduct an immediate investigation into the cases outlined in this report and others.

- Urge the government of Rwanda to attend the forthcoming 61st ordinary session of the African Commission to ensure consideration of its combined 11th, 12th and 13th periodic report as well as to consider the cases outlined in this report.

To the UN Subcommittee on the Prevention of Torture

- Inspect locations mentioned in this report during its upcoming state visit to Rwanda scheduled for October 2017 and publish the findings of this visit.
- Urge the government to establish an independent national preventive mechanism as soon as possible.

To the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Working Group on Arbitrary Detention

- Request an invitation from the Rwandan government to investigate torture and arbitrary detention in military custody, including through visits to the locations mentioned in this report, and publish the findings of such a visit.

Methodology

This report is based on research conducted by Human Rights Watch between 2010 and 2017. Human Rights Watch interviewed more than 230 people, including 61 current and former detainees who had been held in military detention centers in Rwanda between 2010 and 2016; over 160 family members and friends of detainees; and 10 government and military officials, some of whom requested anonymity. Human Rights Watch also observed the trials of seven groups of people who said they were tortured while being held unlawfully at military detention centers and reviewed court statements regarding 21 illegal detention cases and statements given in court by 22 individuals.

Human Rights Watch conducted most of the interviews for this report in Rwanda; others were conducted in Burundi, Congo, Kenya, and Uganda. Five interviews were conducted over the phone. Human Rights Watch staff explained to each interviewee the purpose of the interview, its voluntary and confidential nature, the way in which the information would be used, and that no compensation would be provided.

Names and other identifying information of detainees and other sources have been withheld to protect interviewees from possible reprisals. However, in some cases, former detainees insisted that their identity should be revealed. Some detainees were too afraid or traumatized to describe what had happened to them.

Human Rights Watch faced numerous challenges conducting research for this report. The Rwandan government has restricted access to the country to several Human Rights Watch researchers and other staff between 2008 and 2017, making it difficult to access potential interviewees.

Between 2011 and 2016, Human Rights Watch repeatedly sought authorization, in person and in writing, from the Rwandan Correctional Services (RCS) to visit detainees transferred from military custody to regular prisons, as well as other prisoners. The RCS granted the authorization in 2012, which enabled a Human Rights Watch researcher to visit Kigali Central Prison twice. Human Rights Watch visited Rubavu Central Prison several times between 2012 and 2014. However, in December 2014, the RCS informed Human Rights Watch that its prison authorization was no longer valid, without providing a reason. Two

years later, Human Rights Watch asked the Ministry of Justice to facilitate access to civilian prisons, but did not receive a response.

On December 14, 2016, Human Rights Watch sent a detailed letter outlining the findings presented in this report to the Rwandan minister of justice, requesting the government's response to the findings, but received no response, despite a dozen reminders. A senior Human Rights Watch staff visited Kigali in February 2017 to discuss the research findings, but no government official was willing to hold a meeting. In addition, Human Rights Watch sent a second letter to the minister of justice in August 2017 (see Appendix II), but there was no response.

Human Rights Watch also wrote to the National Commission for Human Rights (NCHR) on January 30, 2017. The NCHR invited Human Rights Watch to a meeting in Kigali, but Human Rights Watch's researcher was unable to secure a Rwanda entry visa to attend the meeting. Human Rights Watch proposed a telephone meeting with the NCHR, but the commission members did not respond. The NCHR did not provide a written response to the January 2017 letter. Human Rights Watch wrote a second time to the NCHR, in August 2017, but received no response (see Appendix III).

Human Rights Watch also wrote to MONUSCO on February 27, 2017. MONUSCO's April 14 response is reflected in this report.

I. Background

Between April and July 1994, more than half a million people were killed in Rwanda in a genocide on an unprecedented scale, perpetrated by Hutu political and military extremists against the Tutsi minority.¹ The genocide ended in July 1994, when the Rwandan Patriotic Front (RPF), a predominantly Tutsi rebel group, defeated the Rwandan army and government and took over the country. The RPF established a new government, and has since been the ruling party in Rwanda.

Since the genocide, Rwanda has made great strides in rebuilding the country's institutions and infrastructure, which were almost completely destroyed in 1994. The Rwandan government has developed the economy, delivered public services, and made progress in reducing poverty. It has set itself ambitious priorities for the country's development, which it has pursued with determination over the last 23 years.

However, there is a dark side to Rwanda's post-genocide economic and infrastructural development. From the outset, the RPF did not tolerate any criticism, dealing ruthlessly with real or suspected opponents, through extrajudicial killings, enforced disappearances, torture, and unlawful detention, as well as threats, intimidation, harassment, and intense physical surveillance.

The military has been and remains at the heart of the RPF's system of repression. Officials of the Rwandan Patriotic Army (RPA), renamed the "Rwanda Defence Force" (RDF) in 2002, have been responsible for serious human rights violations since the RPF took power after the genocide. Few have been brought to justice for these crimes.

¹ The Rwandan Patriotic Front (RPF), a politico-military movement made up largely of ethnic Tutsi, invaded Rwanda in 1990 from its base in southern Uganda with the declared aim of assuring the right to return of refugees, many of whom had been living in exile for a generation, and of ending the rule of President Juvenal Habyarimana, who was, like most government officials at the time, an ethnic Hutu. After nearly three years of alternating between combat and negotiations, an airplane carrying Habyarimana was shot down in April 1994. Combat resumed and the Rwandan government, assisted by tens of thousands of soldiers, militia fighters and ordinary citizens, carried out a genocide against Tutsi civilians, whom they treated as enemy combatants. For a detailed account of the genocide in Rwanda, see Human Rights Watch/Fédération Internationale des Ligues des Droits de l'Homme, *Leave None to Tell the Story: Genocide in Rwanda* (New York: Human Rights Watch/Fédération Internationale des Ligues des Droits de l'Homme, 1999), <https://www.hrw.org/reports/pdfs/r/rwanda/rwanda993.pdf>.

As the RPF took over the country in the final days of the genocide, hundreds of thousands of people, mostly Hutus, fled Rwanda and sought refuge in neighboring countries. They included members of the Interahamwe militia² and the former Rwandan army (Forces armées rwandaïses, FAR), known as “ex-FAR.” Hutu armed groups, with a base in Congo, commonly referred to in Rwanda as “infiltrators,”³ launched deadly attacks in Rwanda, primarily against Tutsi, in the late 1990s.

The RPA countered these attacks with vast counterinsurgency operations, in which many civilians were killed, particularly those who lived in northwestern Rwanda, which is the birthplace of many of the former Hutu leaders and is often regarded as a Hutu stronghold.

The presence of these Hutu armed groups in eastern Congo served as the justification for the RPA to invade the country in 1996 and 1998, with devastating consequences, and to support a succession of murderous Congolese armed groups in the following years.⁴

The FDLR

After using different names over a period of years, the main Rwandan Hutu armed group in Congo eventually called itself the “Democratic Forces for the Liberation of Rwanda” (Forces démocratiques pour la libération du Rwanda, FDLR). The FDLR still operates in eastern Congo today. Many of the armed group’s members in 2017 are too young to have participated in the genocide; however, some of its current leaders and combatants did participate in the genocide.

² The Interahamwe (meaning “those who stand or attack together” in Kinyarwanda) were the youth wing of the former ruling party in Rwanda, the Mouvement républicain national démocratique (MRND). The term “Interahamwe” is often used more widely to refer to militia and other armed groups and individuals who participated in the genocide.

³ “Infiltrator,” or “*abacengezi*” in Kinyarwanda, is a term often used to describe those who wish to destabilize Rwanda, particularly those with links to the FDLR and former Interahamwe who have infiltrated Rwanda from Congo and other neighboring countries.

⁴ Thousands of Rwandan and Congolese civilians were killed by the RPA and their Congolese allies, as documented in a 2010 mapping report by the Office of the UN High Commissioner for Human Rights. For details, see “DR Congo: Q & A on the United Nations Human Rights Mapping Report,” Human Rights Watch Q & A, October 1, 2010, <https://www.hrw.org/news/2010/10/01/dr-congo-q-united-nations-human-rights-mapping-report>. The Rwandan army continued to support Congolese rebel groups who committed serious human rights abuses, at least until 2013. See, for example, “DR Congo: M23 Rebels Kill, Rape Civilians,” Human Rights Watch news release, July 22, 2013, <https://www.hrw.org/news/2013/07/22/dr-congo-m23-rebels-kill-rape-civilians>.

The FDLR has committed, and continues to commit, horrific abuses against Congolese civilians in eastern Congo, sometimes in alliance with Congolese armed groups.⁵ In July 2012, the International Criminal Court (ICC) issued an arrest warrant for Sylvestre Mudacumura, the military commander of the FDLR, on nine counts of war crimes in eastern Congo, including attacking civilians, murder, mutilation, cruel treatment, rape, torture, destruction of property, pillaging, and outrages against personal dignity. Mudacumura is still at large. Human Rights Watch has documented serious atrocities committed by forces under Mudacumura's command and repeatedly called for his arrest.⁶

On September 28, 2015, a court in Germany convicted Ignace Murwanashyaka and Straton Musoni, the president and vice president of the FDLR, and sentenced them to 13 and 8 years in prison respectively. Murwanashyaka was found guilty of war crimes in respect of five FDLR attacks in eastern Congo and of leading a terrorist organization. Musoni was found guilty of leading a terrorist organization, but acquitted of war crimes and crimes against humanity.⁷ This was the first time that FDLR leaders have been held to account.

Estimates of the FDLR's troop strength in 2016 ranged from 1,400 to 1,600 men. The Rwandan government cited a figure of 2,905.⁸ Near the end of 2016, UN experts said that the rebel group had been significantly weakened, because of arrests, military operations and defections, in particular to a breakaway armed group, the National Council for Renewal and Democracy (CNRD).⁹ Despite losing some of their military strength in recent years, the FDLR continued to conduct sporadic attacks into Rwanda. In April 2016, at least one attack took place in northwestern Rwanda, which the Rwandan Ministry of Defence attributed to "suspected FDLR terrorist elements."¹⁰ Soon after the attack, 24 people were arrested for

⁵ See Human Rights Watch, *"You Will be Punished": Attacks on Civilians in Eastern Congo*, December 13, 2009, <http://www.hrw.org/reports/2009/12/13/you-will-be-punished>.

⁶ See "DR Congo: Arrest Rebel Leader Wanted by ICC," Human Rights Watch news release, July 13, 2015, <https://www.hrw.org/news/2015/07/13/dr-congo-arrest-rebel-leader-wanted-icc>; and "Arrest DR Congo Warlord," Human Rights Watch dispatch, July 13, 2017, <https://www.hrw.org/news/2017/07/13/arrest-dr-congo-warlord>.

⁷ See "DR Congo: German Court Convicts Two Rwandan Rebel Leaders," Human Rights Watch news release, September 28, 2015, <https://www.hrw.org/news/2015/09/28/dr-congo-german-court-convicts-two-rwandan-rebel-leaders>.

⁸ UN Group of Experts on the Democratic Republic of Congo, "Final Report," S/2016/466, May 23, 2016, http://www.un.org/ga/search/view_doc.asp?symbol=S/2016/466 (accessed October 5, 2017), para. 7.

⁹ UN Group of Experts on the Democratic Republic of Congo, "Midterm Report," S/2016/1102, December 23, 2016, http://www.un.org/ga/search/view_doc.asp?symbol=S/2016/1102 (accessed October 5, 2017), pp. 5-9.

¹⁰ Ministry of Defence press release, April 16, 2016, http://mod.gov.rw/news-detail/?tx_ttnews%5Btt_news%5D=3016&cHash=b75b07dbb3d68208617173766845cf19 (accessed September 26, 2017).

illegally entering the country from Congo¹¹ and three village leaders were arrested for alleged collaboration with the FDLR, according to Rwandan media reports.¹² In August 2017, UN experts said that, “while weakened,” the FDLR “still showed resilience.”¹³

Between 2002 and June 2014, 12,427 combatants and 12,518 dependents returned from Congo to Rwanda through an official process of disarmament, demobilization, repatriation, reintegration, and resettlement (DDRRR).¹⁴ Between January and October 2016, 141 non-Congolese FDLR combatants were processed via DDRRR.¹⁵ By the end of 2016, 37,201 foreign combatants had been processed by MONUSCO and repatriated, predominantly to Rwanda, since the start of the DDRRR program. This includes some fighters from other foreign armed groups active in eastern Congo.¹⁶

Former FDLR combatants who go through the DDRRR process transit through camps in eastern Congo administered by the UN mission in Congo, MONUSCO. MONUSCO oversees the DDRRR process on the Congolese side, and then arranges the transfer of demobilized FDLR members to the Rwanda Demobilization and Reintegration Commission (RDRC), a Rwandan government body. The RDRC then takes them to designated centers in Rwanda and assists them in reintegrating into social and economic life.

Many former FDLR members, including several of their commanders, appear to have successfully reintegrated into civilian life in Rwanda; some have even been given posts in government agencies. Others have been arrested on their return and prosecuted in Rwanda for security-related offenses, as illustrated in this report. A third category have resisted return and remain in Congo.

¹¹ Théophile Niyitegeka, “Rubavu residents arrest 24 suspected FDLR collaborators,” *Igihe*, June 20, 2016, <http://en.igihe.com/news/rubavu-residents-arrest-24-suspected-fdlr.html> (accessed September 26, 2017).

¹² “Trois dirigeants couvrent les Fdlr dans leur attaque dans le secteur Bugeshi/Rubavu,” *Igihe*, April 28, 2016, <http://fr.igihe.com/arts/securite/trois-dirigeants-couvrent-les-fdlr-dans-leur.html> (accessed September 26, 2017).

¹³ UN Group of Experts on the Democratic Republic of Congo, “Final Report,” S/2017/672/Rev.1, http://www.un.org/ga/search/view_doc.asp?symbol=S/2017/672/Rev.1 (accessed October 5, 2017), August 8, 2017, p. 7.

¹⁴ MONUSCO, statistics of ex-combatants of foreign armed groups, <http://monusco.unmissions.org/en/statistics-ex-combatants-foreign-armed-groups> (accessed September 26, 2017).

¹⁵ UN Group of Experts on the Democratic Republic of Congo, “Midterm Report,” December 23, 2016, S/2016/1102, annex 7.

¹⁶ Letter from MONUSCO to Human Rights Watch, April 14, 2017, copy on file with Human Rights Watch.

The Rwanda National Congress

In 2010, Gen. Kayumba Nyamwasa, a senior Rwandan military official who had held several top positions in the RPF and in the security forces, including army chief-of-staff, fled Rwanda to South Africa, where he sought asylum and became an outspoken critic of Rwandan President Paul Kagame. Together with other former senior RPF officials, he founded the Rwanda National Congress (RNC), an opposition group in exile.

The Rwandan government has repeatedly accused the RNC of collaborating with the FDLR, and of supporting and conducting terrorist activities in Rwanda.¹⁷

In January 2011, Nyamwasa and three RNC co-founders—all former senior government and army officials—were tried in absentia by a military court in Kigali and found guilty of endangering state security, destabilizing public order, “divisionism,” defamation, and forming a criminal enterprise. Nyamwasa and Théogène Rudasingwa, former secretary general of the RPF, were each sentenced to 24 years in prison, and Patrick Karegeya, former head of external intelligence, and Gerald Gahima, former Prosecutor General, to 20 years each.

Several RNC members or suspected members have been attacked, in Rwanda and abroad.¹⁸ Among the most prominent are Nyamwasa himself, who narrowly escaped an assassination attempt in South Africa in June 2010, and Karegeya, who was found strangled in a hotel room in Johannesburg in January 2014. Other RNC members, or people suspected of links with the RNC, have been arrested, prosecuted, and convicted in Rwanda.¹⁹

Grenade attacks

From 2008 to 2014, dozens of grenade explosions took place in Rwanda, mostly in the capital, Kigali, killing at least a dozen people and injuring many others.

¹⁷ “Kayumba plans to re-energize the FDLR – Col. Bisengimana,” *The New Times*, February 21, 2011, <http://www.newtimes.co.rw/section/read/28651/> (accessed September 26, 2017); Bosco R. Asiimwe, “Terror suspects implicate Kayumba,” *The New Times*, June 23, 2011, <http://www.newtimes.co.rw/section/read/32365/> (accessed September 26, 2017); and Edwin Musoni, “Kayumba terror network busted,” *The New Times*, June 29, 2011, <http://www.newtimes.co.rw/section/read/32538/> (accessed September 26, 2017).

¹⁸ “Rwanda: Repression Across Borders,” Human Rights Watch news release, January 28, 2014, <https://www.hrw.org/news/2014/01/28/rwanda-repression-across-borders>.

¹⁹ See, for example, “Ex-Military Officers Convicted Over Comments,” Human Rights Watch news release, April 1, 2016, <https://www.hrw.org/news/2016/04/01/rwanda-ex-military-officers-convicted-over-comments>.

Several grenade attacks took place in the period leading up to the presidential elections of 2010 and the legislative elections of 2013.²⁰ The 2010 attacks were particularly worrying, as they took place in a context of heightened political tensions, with reports of deepening divisions in the military. They coincided with Nyamwasa fleeing Rwanda in February 2010, the arrest, house arrest or demotion of several senior military officials, and, in December 2010, the official creation of the RNC.

Many people attributed these grenade attacks to the FDLR or the RNC, but the identity of the perpetrators was not conclusively established in each case. According to the Rwandan government, 18 grenade attacks were carried out by the FDLR in Rwanda between December 2009 and March 2011, killing 14 people and injuring 219.²¹

The grenade attacks triggered a series of arrests and prosecutions of people accused of collaborating with the RNC or the FDLR, several of which are documented in this report.

History of Violations in Rwandan Military Detention

Human Rights Watch, Amnesty International, and other organizations have documented a longstanding pattern of unlawful detention and torture in military custody in Rwanda for most of the past 23 years. Some detainees were so badly tortured that they died of their injuries. Others were killed in detention. Many were held incommunicado, in extremely harsh conditions.²²

The nature of some of these violations has barely changed, with striking similarities between former detainees' description of their treatment in military custody today and those of former detainees 15 or 20 years ago. Some of the same senior military or intelligence officials are still in charge, and some of the same locations, such as Kami and Mukamira camps, are still being used for these purposes.

²⁰ President Kagame and the ruling RPF won both elections with a large majority, in a context of tight restrictions on freedom of expression and political space. See "Attacks on Freedom of Expression, Freedom of Association and Freedom of Assembly in the Run-up to Presidential Elections, January to July 2010," Human Rights Watch chronology, August 2, 2010, <https://www.hrw.org/news/2010/08/02/rwanda-silencing-dissent-ahead-elections>.

²¹ Rwandan government statistics on grenade attacks carried out in Rwanda between December 2009 and March 2011, in UN Group of Experts on the Democratic Republic of Congo, "Final Report," S/2011/738, December 2, 2011, http://www.un.org/ga/search/view_doc.asp?symbol=S/2011/738 (accessed September 26, 2017), Annex 20, p. 195.

²² Carina Tertsakian, *Le Château: The Lives of Prisoners in Rwanda* (London: Arves Books, 2008), pp. 218-235.

In 1997, 300 men were reportedly detained in Mukamira after search and cordon operations in northwestern Rwanda.²³ In September 1999, Amnesty International reported that the RPA detained six men accused of theft in Mukamira and tortured several of them; one died as a result of torture.²⁴ In 2003, military authorities told the National Commission for Human Rights (NCHR) that a military officer was imprisoned in Kami and “that it is the Department of Military Investigation which was in charge of that jail.” Members of the NCHR subsequently visited the detainee and concluded that he was detained illegally.²⁵ In 2006, a United States District Court rejected the confessions of three Rwandans accused of murdering US citizens in Bwindi, Uganda, in 1999. The judge held that the confessions had been coerced by Rwandan police and intelligence agents through “unconscionable conditions and abuse at Kami military camp.”²⁶ In 2007, 10 members of a Rwandan dissident political organization arrested in Uganda were held in Kami, according to a leaked US diplomatic cable.²⁷

In the years following the 1994 genocide, victims of unlawful detention and torture in military custody included armed opponents—notably members of the FDLR and ex-FAR—but also civilians accused of collaborating with these groups. Some were eventually transferred to civilian prisons and tried for genocide-related crimes or security offenses in the post-genocide years. Some have since been released.

²³ Human Rights Watch, *World Report 1997* (New York: Human Rights Watch, 1997), Rwanda chapter, <https://www.hrw.org/reports/1997/WR97/AFRICA-07.htm>.

²⁴ Amnesty International, “Rwanda: no business of the military: Illegal detention and beatings of civilian tea workers in Mukamira army camp result in death,” February 1, 2000, <https://www.amnesty.org/en/documents/afr47/002/2000/en/> (accessed September 26, 2017).

²⁵ National Commission for Human Rights, “Annual Report 2003,” July 2004, http://www.cndp.org.rw/fileadmin/user_upload/reports/Annual%20report%202003.pdf (accessed September 26, 2017), p. 18.

²⁶ *United States of America v. François Karake et al.*, United States District Court for the District of Columbia, Criminal Action No. 02-0256(ESH), August 17, 2006, p. 2.

²⁷ Wikileaks, “Uganda Hands Rwanda 10 Members of Dissident Group,” March 21, 2007, https://wikileaks.org/plusd/cables/07KIGALL291_a.html (accessed September 26, 2017).

II. Torture and Unlawful Detention in Military Centers

Human Rights Watch has documented 104 cases of people who were illegally detained and in many cases tortured or ill-treated in military detention centers in Rwanda between 2010 and 2016. Former detainees described how military officials interrogated them, mostly about their alleged links to the FDLR and involvement in grenade attacks or other threats to Rwanda's security. To force them to confess, or provide information about other suspects, military officials subjected detainees to various forms of torture and ill-treatment. Some detainees were subjected to these violations in several locations as they were transferred from one detention center to another.

Kami

Camp Kami, run by the RDF, lies just outside Kigali, in the hills of Gasabo district. The military camp is situated in a small forest in Gashura cell, northeast of the antennae of the former Deutsche Welle radio station at Kinyinya hill, a well-known landmark that several former detainees recognized during their detention. The camp was renovated in 2013 to house approximately 1,600 soldiers.²⁸

Human Rights Watch interviewed 39 people who said they were detained in Kami between 2010 and 2016 and spent between two weeks and nine months there. Most were men, but Human Rights Watch also interviewed three women, one of whom was detained in Kami for eight months. Interviewees mentioned dozens of other former detainees whom they saw in Kami; Human Rights Watch confirmed, through multiple sources, the presence of at least nine of them.

²⁸ "RDF rehabilitates Kami Barracks," Ministry of Defence press release, date unknown, http://mod.gov.rw/news-detail/?tx_ttnews%5Btt_news%5D=687&cHash=a6450bodd34e8a3f76905aa951d22a07 (accessed September 26, 2017).



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During trials observed by Human Rights Watch, at least 13 defendants mentioned in court that they had been detained in Kami.²⁹ On one occasion, the prosecution also mentioned that an accused had been interrogated in Kami.³⁰

Beatings and Forced Confessions

Twenty-seven former detainees told Human Rights Watch that they were tortured in Kami. RDF officials interrogated and beat them upon arrival. They used metal bars, wooden sticks, hammers, and other objects to hit detainees, often on their back and feet, sometimes forcing them into various positions to facilitate the beatings. Often, detainees were handcuffed or blindfolded.

One former detainee, arrested in September 2010, told Human Rights Watch:

²⁹ Human Rights Watch trial observation, Kigali, March 28, 2011 and November 28, 2011; Kanombe, October 3, 2014; and Musanze, May 27, 2015. *Prosecutor v. Mukeshimana Jean Berchmans et al.*, Kigali High Court, Case No. RP0027/11/HC/KIG-RP 0036/11/HC/KIG, January 13, 2012. *Prosecutor v. Mukeshimana Jean Berchmans et al.*, Supreme Court, Case No. RPA 0090/12/CS, March 4, 2016.

³⁰ *Prosecutor v. Mukeshimana Jean Berchmans et al.*, Supreme Court, Case No. RPA 0090/12/CS, March 4, 2016, para. 101.

[When we arrived] at Kami I got out of the truck.... I was still blindfolded and they switched the handcuffs to put my arms behind my back. They told me to lie on the ground. Two soldiers came and stood on me, one on my head and one on my feet. They stood on me and beat me. Then they changed my position. They made me curl up into a ball and tied me up and then they pulled my legs and arms. They did this for hours and kept telling me to confess. I said: "I cannot confess to what I do not know." They were furious with me.... Then another man put his fingers in my eyes and said, "We will force you to confess." Since then I have had pain in my eyes, even now. It felt like they were doing that for several minutes. After that, I said, "Bring me a paper and I will confess to whatever you want. I will sign."³¹

Another former detainee, held at Kami in 2013, told Human Rights Watch: "They slammed my hand with an iron rod. All they wanted to hear was, "Yes. Yes. Yes, I am FDLR." I was beaten every day for two months. Most of the time they beat me on my hands and my feet."³²

For others, the beatings and interrogations started a few days after they arrived. A man arrested in April 2014 told Human Rights Watch:

They [intelligence officials] took my blindfold off and a man in civilian clothes was sitting at a table. He said, "Ok, you will tell the truth." His first question was, "Tell us how many times you met the FDLR." I was surprised and I said, "God help me, I know nothing about that." He said, "Ok, sit on the ground then." Then another man started to beat me on my feet, while two others held me down. I was handcuffed. While they were beating me, they yelled, "Tell us how many people you recruited for the FDLR!" I said, "I know nothing about the things you are asking!" The man yelled, "Tell us how many people you sent to Congo!" I started to explain [why I sometimes went to Congo for business]. But they kept on with their questions: "Tell us who you met there! Tell us the names of the FDLR who went there!" With each question the other men would continue to beat me.... I begged them

³¹ Human Rights Watch interview with former detainee, Cyanguu, June 13, 2012.

³² Human Rights Watch interview with former detainee, Rubavu, May 5, 2014.

to stop.... They said, “No, you will tell us which FDLR leaders you saw there. Tell us how many soldiers you met.” I said I never worked for the FDLR. It went on like that for one hour. After each question, they beat me. After that, they gave me a piece of paper and said, “Sign this.” I only had a moment to look at it, then I signed it.³³

Another former detainee, arrested in April 2014, told Human Rights Watch that despite severe beatings, he had continued denying being an FDLR member:

After they beat me, a man said to me, “Ok, we asked you calmly. Now we will show you.” They took out a special rope and tied it across my chest. Then a big man pulled it ... it hurt very badly. They asked me more questions, but I still denied [being an FDLR member]. The man in charge said to the others, “No, that is not sufficient.” They tied my feet and turned me upside down. Another man entered and they started to beat me with metal clubs. I continued saying I didn’t know anything about the FDLR. It lasted over an hour until I lost consciousness.... When I woke up, I was in a cell. I spent three days without food or water. On the third day, I was given corn and a small bottle of water. It hurt when I ate. I only drank a small amount of water. I couldn’t move, I didn’t have any strength, I couldn’t speak. I was hurting all over. They had beaten me all over my body.³⁴

During interrogations, military officials often threatened to kill detainees if they would not give them the answers they demanded. A former detainee, who was in Kami in 2016, told Human Rights Watch that when he insisted he had no links with the FDLR, his interrogator pulled out a pistol and pointed it at him. He was threatened with death, but not killed.³⁵

Electric Shocks, Asphyxiations, Acid Burns and Mock Executions

Former detainees from Kami told Human Rights Watch how military and intelligence officials used electric shocks, asphyxiations, acid to burn skin, and mock executions to

³³ Human Rights Watch interview with former detainee, Rubavu, October 28, 2014.

³⁴ Human Rights Watch interview with former detainee, Rubavu, October 29, 2014.

³⁵ Human Rights Watch interview with former detainee, Musanze, October 12, 2016.



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force them to confess or to incriminate others.³⁶ A former detainee, arrested in March 2014, told Human Rights Watch about some of the torture methods:

I can start with my own case. When they put you in the torture chamber, they take off the blindfold. They put a black plastic bag over your head until you can't breathe. When I was about to suffocate, they took it off and asked me questions about political parties.... Another way they torture people is: they take a poncho and tie it around your neck. They lift the bottom over your head and fill it with water. Another method is: they take your fingers and wrap electrical wire around them and make you put your finger in a socket. They did this to me once. They put your finger in and out to make you talk. If they left your finger in the socket, it could kill you; but they put it in and out. Another way they torture you is: they take a sack and put stones in it, and then they attach it to your testicles with an elastic cord.³⁷

³⁶ Amnesty International also reported on the use of electric shocks at Kami. See Amnesty International, "Rwanda: Shrouded in Secrecy: Illegal detention and torture by military intelligence," October 8, 2012, <https://www.amnesty.org/en/documents/AFR47/004/2012/en/> (accessed September 27, 2017), p. 17.

³⁷ Human Rights Watch interview with former detainee, Goma, DR Congo, October 28, 2014.



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When some detainees refused to confess, RDF officials resorted to asphyxiation or mock executions. A former detainee, arrested in August 2010, described his ordeal:

He [an RDF official] took me into the bush. It was still in the camp. He made me lie on my stomach. He was accompanied by three other soldiers. He showed me a pistol and told me to touch it. He said, “Do you understand what this is? Will you accept [that you are FDLR] or not?” I said that I could not accept. He said, “Do you want to die by the bullet or by the hoe? You can choose.” I said, “I can’t confess to what I have not done.” They started to dig [a hole] right next to me. They brought a plastic bag and put it over my head and started to ask questions. After a few minutes, when they saw that I was suffocating, they stopped. They said, “Now will you accept?” I said, “I cannot confess to what I do not know.” They put the bag over my head maybe four times. When I defecated in my pants, they stopped. I thought I was going to die.³⁸

³⁸ Human Rights Watch interview with former detainee, Huye, June 27, 2012.

Other detainees (see also Boxes 1, 3, 4, and 6) described to Human Rights Watch the use of asphyxiation, electric shocks, mock executions and the tying of objects to men's genitals. They said they ended up signing false statements because they could not stand the torture or believed they would die.

A man detained in Kami in 2010 told Human Rights Watch that military beat him, put a bag over his head, and poured acid over him, causing serious burns on his skin.³⁹ Two other former detainees also mentioned the use of acid in their appeal hearings in court.⁴⁰

Box 1 – Kami and Victoire Ingabire's Trial

On October 30, 2012, Victoire Ingabire, president of the FDU-Inkingi opposition party, was convicted of conspiracy to undermine the government and genocide denial, and sentenced to eight years in prison. In December 2013, the Supreme Court increased her sentence to 15 years. Human Rights Watch observed her trial which was flawed in several respects. Among other things, it included politically motivated charges, such as “genocide ideology,” divisionism, and spreading rumors intended to incite the public to rise up against the state, and there were doubts about the reliability of some of the evidence.⁴¹

During the trial, it emerged that three of Ingabire's four co-defendants—Vital Uwumuremyi, Tharcisse Nditurande, and Noel Habiyaemye, all members of the FDLR—had been detained in Kami for several months in 2009 and 2010. Nditurande and Habiyaemye said in court that they were held there incommunicado. A defense witness, Michel Habimana—a former FDLR spokesperson also known as Edmond Ngarambe—, said in court that he was detained in Kami at the same time as Uwumuremyi in 2009. He said that intelligence agents asked him and Uwumuremyi to incriminate Ingabire. Uwumuremyi agreed to do so, despite admitting to Habimana privately that he did not even know Ingabire. Despite this statement in court, the judges did not discount Uwumuremyi's statement against Ingabire.⁴²

³⁹ Human Rights Watch phone interview with former detainee, September 12, 2016.

⁴⁰ Appeal hearing documents on file with Human Rights Watch, February 2012 and October 2015.

⁴¹ “Rwanda: Eight-Year Sentence for Opposition Leader,” Human Rights Watch news release, October 30, 2012, <https://www.hrw.org/news/2012/10/30/rwanda-eight-year-sentence-opposition-leader>. See also Amnesty International, “Rwanda: Justice in Jeopardy: The First Instance Trial of Victoire Ingabire,” March 23, 2013, <https://www.amnesty.org/en/documents/AFR47/001/2013/en/> (accessed September 30, 2016).

⁴² Human Rights Watch trial observation, Kigali High Court, November 11, 14, and 21, 2011; and April 11, 2012.

Separately from Ingabire's trial, Human Rights Watch spoke to three former detainees who Rwandan soldiers had interrogated about their links with Ingabire: two in Kami in 2010, the other in a private house used as a detention center in Rubavu, in 2014.⁴³ One of the former detainees from Kami told Human Rights Watch, "They asked me to accuse her [Ingabire] of complicity with the FDLR and to say she was involved in the grenade attacks."⁴⁴ Another man, who was in Kami around the same time, told Human Rights Watch, "I saw men who had their testicles squeezed to get them to admit that they collaborated with Victoire [Ingabire] and Nyamwasa."⁴⁵

Another former detainee told Human Rights Watch that in November 2010, military officers had asked him and several other detainees in Kami to accuse Ingabire, but he refused.⁴⁶ This was confirmed by one of his co-detainees.⁴⁷

MINADEF (Headquarters of the Ministry of Defence)

In 2010, RDF officials took several people suspected of having links with the FDLR to the Ministry of Defence headquarters (known by its acronym, MINADEF) in Kigali, before transferring them to Kami. Most were held at MINADEF for just one or two days. The ministry is in a multi-story building in Kimihurura, in central Kigali. Former detainees told Human Rights Watch that they were first taken to a large meeting room, where other detainees were often present, and were then singled out and taken to a smaller office where most of the interrogations and torture took place.

Human Rights Watch spoke to 11 people who said that they had transited through MINADEF. Two others mentioned in court that they had been detained at MINADEF.⁴⁸

Beatings and Forced Confessions

Ten former detainees interviewed by Human Rights Watch described how RDF officials beat them at MINADEF to force them to confess to involvement in grenade attacks.

⁴³ Human Rights Watch interviews with former detainees, Cyangugu, June 13, 2012; and July 17, 2014, Rubavu, January 29, 2014.

⁴⁴ Human Rights Watch interview with former detainee, Cyangugu, June 13, 2012.

⁴⁵ Human Rights Watch interview with former detainee, Rubavu, January 30, 2014.

⁴⁶ Human Rights Watch interview with former detainee, Uganda, July 10, 2012.

⁴⁷ Human Rights Watch interview with former detainee, Burundi, April 29, 2012.

⁴⁸ Human Rights Watch trial observation, Kigali High Court, March 28, 2011.

One man, arrested in June 2010, told Human Rights Watch:

Lieutenant-Colonel [Faustin] Tinka⁴⁹ asked me, “There have been explosions in Kigali. Do you know who is throwing the grenades?” I said no. He said, “If you don’t want to tell us easily, you will tell us by force.” [Then] they put me in an isolated room [and] hit me with metal rods, slapped me and punched me. I was bleeding from the mouth. One of them put a plastic wrapper—the type used to wrap water bottles—into my mouth and kicked it into my mouth with his foot. I was bleeding. Captain Murenzi⁵⁰ was beating me.⁵¹

Another man, arrested in August 2010, was briefly detained at MINADEF, and then transferred to Kami for six months. He told Human Rights Watch:

At MINADEF I was taken to a large room. There were many men in civilian clothes. They asked me about [other men accused of throwing grenades]. They started to hit me on the head with their hands. They asked, “Are you part of the group that threw grenades?” I said, “I do not know who threw the grenades.” They beat me and took me to the office of a high-ranking military official. He asked me the same question and I gave the same answer. He said to the others, “Go, make him understand that he needs to say certain things.” They took me away and started beating me again. They ripped my shirt off and tied it around my face and hit me and kicked me. When they were hitting me in the face, my lip started to hurt and I started to bleed a lot, so they stopped when they saw all the blood.⁵²

⁴⁹ Seven former detainees mentioned in 2010 Lt.-Col. Faustin Tinka’s involvement in interrogations at MINADEF and Kami. Several former detainees told Human Rights Watch that Tinka worked for the military intelligence services.

⁵⁰ Eight former detainees told Human Rights Watch that an official known as Captain Murenzi oversaw interrogations, forced confessions and torture in Kami and MINADEF in 2010. Human Rights Watch was unable to confirm his first name or his function.

⁵¹ Human Rights Watch interview with former detainee, Kampala, Uganda, July 10, 2012.

⁵² Human Rights Watch interview with former detainee, Kigali, June 22, 2012.



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Electric Shocks and Threats

A former detainee, arrested in June 2010, told Human Rights Watch how a man, who he overheard being called an army captain, subjected him to electric shocks at MINADEF:⁵³

[The army captain]⁵⁴ put an electric gadget on my back. It was small and long, and looked like a pen. It was plugged into the wall with a wire. [When he used it] I fell on the ground and passed out. When I woke up, they gave me a paper and pen, and asked me to write down the names of the people who had carried out grenade attacks. I took the pen and just wrote the date. I said I couldn't write the names as I didn't know them. They tortured me again. I was on the ground. They kicked me and punched me and slapped me, mostly on my back, my chest, and my head. My throat hurt. I couldn't speak properly for about five months. They were trying to force me to give them the names of people involved in the grenade attacks. The torture lasted about two or three hours. They tortured my genitals. [A soldier] did this by squeezing my

⁵³ In 2012, Amnesty International also reported that two former detainees had mentioned the use of electronic devices during interrogations in MINADEF. See Amnesty International, "Rwanda: Shrouded in Secrecy," p. 17.

⁵⁴ Many former detainees mentioned names of military and other officials involved in torture and other abuses. This report only mentions the names of those whose presence was confirmed by multiple sources.

testicles. Others hit me at the same time. They did this to other detainees too. I was handcuffed with my hands behind my back.⁵⁵

After interrogating them at MINADEF, RDF officials took many of those accused of launching grenade attacks to Kami, individually or in small groups. Former detainees told Human Rights Watch they were terrified of being transferred to Kami. One man told Human Rights Watch that a soldier told him, “If you don’t tell us now, you will tell us later ... you will answer our questions.”⁵⁶ Another said, “At about five in the morning they came in and put our shirts over our faces. We were taken out and put into a pick-up truck.... I thought I was going to be killed. We were taken to a military camp. I later learned we were at Kami.”⁵⁷

Mukamira

Mukamira is a military base in northwestern Rwanda, between the towns of Musanze and Rubavu, in Nyabihu district.

Human Rights Watch interviewed 25 people detained in Mukamira between 2010 and 2016. They spent between one day and three months there, on average about a month. Human Rights Watch received information about several other former detainees in Mukamira, at least six of whose cases were confirmed by multiple sources.

Some were taken straight to Mukamira after their arrest, but most had first passed through other military detention centers, such as the “Gendarmerie,” Bigogwe, or Mudende (see below).

Eleven of those interviewed by Human Rights Watch and detained between 2010 and 2012 were eventually tried and convicted, or released. Eight others, detained in Mukamira in 2014, were transferred to Kami, before being sent to trial or released. Human Rights Watch spoke to several former detainees who were held in Mukamira in 2016 on accusations of collaboration with the FDLR. They were interrogated and detained in Mukamira for a short time, before being transferred to Kami or the “Gendarmerie,” where most beatings took place.

⁵⁵ Human Rights Watch interview with former detainee, Kampala, Uganda, July 10, 2012.

⁵⁶ Human Rights Watch interview with former detainee, Bujumbura, Burundi, April 29, 2012.

⁵⁷ Human Rights Watch interview with former detainee, Kigali, May 24, 2012.

In trials observed by Human Rights Watch, at least 19 defendants stated in court that they had been illegally detained in Mukamira.

Beatings and Forced Confessions

Most of the former detainees from Mukamira interviewed by Human Rights Watch were beaten by soldiers, usually with iron rods or wooden sticks. Some were beaten as part of a daily routine, others only during interrogations. The beatings were intended to force them to confess to collaboration with the FDLR or accuse others of doing so.

A demobilized FDLR fighter, who said he left the rebel group in 2005, was arrested in July 2011 and taken to Mukamira. He told Human Rights Watch:

They beat me and said I had to confess that I was FDLR and that I was here [in Rwanda] to destabilize the regime. I refused to confess. I said that I had been a member of the FDLR but that I left, so I could not respond to [these accusations] because I did not collaborate with them.... Some other demobilized FDLR were also detained at Mukamira.... They would beat us every morning and every night. They would make a selection. Sometimes I was selected, sometimes not. They would beat people who did not accept that they were FDLR. Whoever did not confess was beaten. They would beat us with sticks and sometimes with a bike chain. I was beaten on my back, on my buttocks and on my feet. Sometimes they would beat us all night long. It was always to make us confess. When they beat us, they would write things down.⁵⁸

Another former detainee, who was acquitted of all charges in a trial in 2012, told Human Rights Watch:

They would beat me for around two hours. They said, “Tell us where we can find the Interahamwe with whom you collaborate.” I was beaten by a group of four soldiers. One of them would hit me, then I was passed on to another one who would hit me too. They were always saying the same thing: “You

⁵⁸ Human Rights Watch interview with former detainee, Rubavu, January 23, 2013.

are an Interahamwe.” I said, “No, I went to Congo legally, I showed you my papers that prove this.” But they kept telling me to confess.... I was beaten so seriously that I finally confessed. I said, “Yes, I was with the FDLR ... we were in the forest.” They liked hearing this and they left me. [But] the next morning I was taken out to be beaten again. They said, “You, do you still admit or have you changed your mind?” I said, “No, I still admit.” But they still beat me.... The next day, it was the same thing. They beat me just for the sake of beating me.⁵⁹

A former detainee who was arrested in September 2011 was detained in Mudende (see below) before being taken to Mukamira:

When I left Mudende, I thought life would be better, but arriving at Mukamira, I found it was the opposite. Life there was worse.... As soon as I arrived, I was beaten. It has completely changed me. There I was a different person. The “daily ration” was beating.... When they beat me, they would ask how they could find other combatants.... I confessed and by the end, I even believed I was guilty because I was beaten so badly. At this point I was beaten so badly I felt nothing. It was as if they were beating a tree.⁶⁰

Human Rights Watch spoke to several other people who were ill-treated in Mukamira in 2016. One of them said:

I was beaten there by a soldier. He wanted me to confess.... He said, “You were on your way to join the Interahamwe by going through Uganda.” I said no. I could not accept that. He wanted us to confess this and he beat us with cables on our bodies. We were lying down. They beat us the whole time.⁶¹

In the trials Human Rights Watch monitored, at least eight defendants stated in court that they were tortured or forced to confess in Mukamira. One said in 2012:

⁵⁹ Human Rights Watch interview with former detainee, Rubavu, March 6, 2013.

⁶⁰ Human Rights Watch interview with former detainee, Musanze, February 28, 2013.

⁶¹ Human Rights Watch interview with former detainee, Musanze, October 11, 2016.

I didn't confess of my own free will. I was forced to confess to accusations that were formulated against me. Since my arrest, they never stopped persecuting me, beating me day and night. I was afraid of being killed, so I confessed all that they wanted me to confess in front of the official from the prosecutor's office.⁶²

A serving RDF member confirmed to Human Rights Watch that the military beat people in Mukamira: "When they interrogate people there they beat them. If you are accused of being part of a negative force,⁶³ you will be seriously beaten to make you confess. We all know this."⁶⁴

Electric Shocks and Death Threats

Several sources confirmed the use of electric shocks (see Box 2) and death threats in Mukamira, to force detainees to confess. The same serving RDF member told Human Rights Watch, "At Mukamira there is a special room. It has water in it and they use electricity there. I have heard the screams of men coming from this house."⁶⁵

The wife of a former detainee, whose detention in Mukamira for two months in 2012 was confirmed by several of his former co-detainees, visited her husband in Rubavu prison after his transfer from Mukamira. She told Human Rights Watch:

I went to see my husband. He had scars on his arms and legs. He said he had been beaten and mistreated there. He said they deprived him of food to force him to admit that he worked with men from outside [Rwanda]. He said he was forced to dig his own grave at Mukamira and he was told he would be killed and buried in it. Then they forced him to stay in that hole.⁶⁶

Human Rights Watch received credible information from several former detainees about killings of co-detainees at Mukamira, but was unable to verify these allegations.

⁶² Human Rights Watch trial observation, Musanze High Court, December 13, 2012.

⁶³ The expression "negative force" is used to refer to armed groups such as the FDLR who oppose the Rwandan government.

⁶⁴ Human Rights Watch interview with RDF member, Rubavu, January 31, 2013.

⁶⁵ Ibid.

⁶⁶ Human Rights Watch interview with wife of former detainee, Musanze, December 7, 2012.

Box 2 – “Robert”: Tortured in Mukamira

In June 2011, military officials arrested “Robert,” a former soldier, at a bus station in Rubavu and told him they wanted to question him about his alleged links with the FDLR.

They took him to the “Gendarmerie,” where they interrogated him and beat him. He denied that he was an FDLR combatant.

More than a month later, they took him to Mukamira, where he was put in a dark cell by himself. The cell was too small for him to lie down. He told Human Rights Watch:

I was beaten many times there, very hard. They beat me with a rifle. My knee is still hurting. They also hit me in the chest with the rifle. They came every night to ask me if I had changed my mind or if I had something to add. If I said no, I was beaten.

He had very limited access to food, and once had to go without food for five days.

Then things got worse. One day, military officials decided to use electric shocks to force him to confess to working with “enemies” of the Rwandan government:

They called me a traitor.... I was in a cell in a separate house. There was water on the floor, about ankle-high. There was a cable plugged in and I was standing in the water. At the end of the cable there was something that looked like a fork. It had two prongs. They put it on my arm and asked me questions. When the fork touched me, my body went numb and it felt like my blood boiled. It was very painful. They asked me if I was with the FDLR and who threw the grenades in Kigali. They asked me many questions about who collaborated with Nyamwasa. They asked me for the name of a captain who worked with Nyamwasa. They asked me who gave grenades to Nyamwasa and this captain. They said, “Do you know what happened to the others who came here with you? They are dead. You will soon meet the same fate.” I could hear the military come at night to take people away; we never saw them again. I confessed after they [tortured me with electronic equipment] for the third time. I accepted that I had thrown grenades in 2010.⁶⁷

⁶⁷ Human Rights Watch interview with former detainee, Rubavu, January 24, 2013.

In late October, after “Robert” had spent three months in Mukamira, police officers came to question him there. He told them he had been tortured.

In early December, a soldier took him to a police station. There, a police officer asked him to sign a statement, which said he had been arrested in October 2011, almost five months after the real date of his arrest. He told Human Rights Watch:

I refused and said that I could not sign something that was not true. The soldier who escorted me said, “If you refuse, we will take you to Mukamira.” The policeman I was with ... said, “Yes, you will go back to Mukamira.” So, I signed.

“Robert” was then sent to a regular prison, tried in a civilian court, and acquitted. He was released in January 2013.

Rubavu’s “Gendarmerie”

Human Rights Watch interviewed 17 men who said they were detained in the military barracks commonly known as the “Gendarmerie,”⁶⁸ in Rubavu district, near a border crossing with Congo known as “*la Petite Barrière*.” They had spent up to two months there—on average a month—between 2010 and 2016. Almost all of them were tortured and accused of collaborating with the FDLR. Some were arrested in Congo, others in Rwanda, near the border.

During trials observed by Human Rights Watch, at least four other defendants stated in court that they had been detained in the “Gendarmerie.”⁶⁹

Torture and Forced Confessions

Most of the former detainees interviewed by Human Rights Watch said that military officials at the “Gendarmerie” beat them, often with bayonets, sticks, and other objects. Most ended up confessing to their alleged crimes.

A former detainee, who spent one month in the “Gendarmerie” in 2016, told Human Rights Watch:

⁶⁸ The “Gendarmerie” was a law enforcement institution in Rwanda until 2000, when the Rwanda National Police was created. Many people continue to refer today to former gendarmerie premises as the “Gendarmerie.”

⁶⁹ Human Rights Watch trial observation, Musanze High Court, October 15, 2011 and December 13, 2012.

When we arrived, we were told, “If you don’t confess, we will beat you to death.” I was beaten every night and every morning. They beat us with cables but sometimes they would make those who were accused of being FDLR run around and do exercises. They beat us as we ran.... They would say, “You are FDLR, you must confess.” I said, “I don’t associate with the FDLR.” The cables were the worst, but they also beat us with wooden clubs.⁷⁰

Another former detainee, arrested in May 2016 for allegedly crossing the border from Congo illegally, was detained for two months in the “Gendarmerie”:

When I first arrived at the “Gendarmerie,” two soldiers started to hit me across my body with metal clubs and cables. One said, “You are FDLR! Admit and tell us you are FDLR and we can free you.”⁷¹

Another former detainee told Human Rights Watch that the military detained him at the “Gendarmerie” for three days because his brother was a member of the FDLR:

At the “Gendarmerie” they asked me about my brother. They asked me where he was. I said he was [in jail]. They asked me why. I said I didn’t know. Then they beat me. They put a rope around my neck and hung me from the ceiling to get me to talk. I was beaten three times a day. I was not given anything to eat.”⁷²

Another former detainee was taken to the “Gendarmerie” after being arrested in Congo in late 2010. He was detained there for 56 days:

I was seriously beaten there. I was beaten and stabbed with a bayonet from a rifle. I was kicked in my testicles. They beat me because I refused to sign a piece of paper that had been prepared for me. I wasn’t able to read it. I

⁷⁰ Interview with former detainee, Musanze, October 11, 2016.

⁷¹ Human Rights Watch interview with former detainee, Musanze, October 11, 2016.

⁷² Human Rights Watch interview with former detainee, Rubavu, January 29, 2014.

was beaten so badly that I ended up signing it because of the suffering. I signed by force.⁷³

A man who was later sentenced to 10 years in prison told the judges in his trial that he had been pressured to confess at the “Gendarmerie”: “A soldier approached me and asked me if I knew one of the two other people who were [detained] with me. I said I did not know them.... That soldier told me I would never be released if I did not accept that I knew that person. I continued to say that I didn’t know him, because I had never known him.” He was later transferred to Mukamira, where he confessed to “everything they wanted us to confess to,” out of desperation.⁷⁴

A man detained at the “Gendarmerie” in late November 2010 and beaten every night told Human Rights Watch that eight detainees—five Rwandans and three Congolese—were killed in the “Gendarmerie” in late 2010 and that he was forced to help bury three of the bodies. He said:

One night they took three men out and killed them. I had to bury their bodies. Two of them were beaten to death with sticks and one was shot in the head. Two of us were pulled out of the cells to bury them.... The bodies were wrapped in plastic sheeting before being put in the ground.⁷⁵

Human Rights Watch was unable to independently verify these allegations of extrajudicial executions.

⁷³ Human Rights Watch interview with former detainee, Rubavu, April 30, 2013.

⁷⁴ Human Rights Watch trial observation, Musanze High Court, October 15, 2012.

⁷⁵ Human Rights Watch interview with former detainee, Rubavu, April 30, 2013.

Box 3 – “Jean Bosco”: Mukamira, the “Gendarmerie,” and Kami

“Jean Bosco” was arrested in May 2016, in western Rwanda, after authorities accused a member of his family of entering the country illegally from Congo. He was first held at a military position, then driven to Mukamira. He told Human Rights Watch his family was too scared to look for him because he had been arrested by soldiers.⁷⁶

After a week in Mukamira, he was driven to the “Gendarmerie”:

I was interrogated there [about the FDLR]. They beat us with metal cables and wooden clubs. Our hands were handcuffed and they would beat us all over, or they would sit us down and beat us on our feet. There were maybe 40 people in the cell. Everyone was beaten.

An army captain then took him back to Mukamira, where he spent one night. The day after, he was transferred to Kami. He told Human Rights Watch he saw red lights and antennae, presumably from the former Deutsche Welle radio station on a hill close to Kami.

“Jean Bosco” said there were many other detainees in Kami, each in their own cell. He heard men being beaten and crying. He himself was not beaten in Kami, but he was detained in harsh conditions and forced to provide information:

I was handcuffed the entire time. They shackled my legs and my hands. I had no mattress, no cover, only a military uniform [which most detainees got upon arrival in Kami]. I never washed or changed clothes.... I was interrogated five times. I was threatened. The man [who interrogated me] said, “You continue to lie.... If you don’t accept [that you have links with the FDLR], we will kill you.” When he said that, he pulled out a pistol and pointed it at me.

After three months, in August 2016, “Jean Bosco” was taken back to his home area, released, and told not to talk about what happened to him.

⁷⁶ Human Rights Watch interview with former detainee, Musanze, October 12, 2016.

Other Detention Centers

Authorities also detained and tortured suspects in military camps in Bigogwe, Mudende, and Tumba and in houses in Kigali and Rubavu, which detainees were unable to identify. In most cases, detainees were transferred from these locations to either Mukamira or Kami.

Bigogwe

Bigogwe military camp is located between Musanze and Rubavu, in northwestern Rwanda.

One former detainee told Human Rights Watch that military officials arrested him in April 2011 and took him to Bigogwe, where they beat him in order to force him to confess to working with the FDLR and the RNC.

They took me to a cell that had a special area you walked down into. It was like a cage.... When you're in there, they can beat you.... When I went down into the cell, they said, "You refuse to give us information you got in Congo. We know ... you were given a mission to come here [to Rwanda]. If you keep refusing [to tell us], you will see." ... They took me in and out of this cell over two days. Each time I was in there for around 30 minutes, then they would take me out and interrogate me and beat me with sticks again. They were always asking what information I had collected in Congo.... They would say, "You must accept you are FDLR, you must give us information." They wanted me to give them names. They said, "It was that group of 30 who threw the grenades in Kigali and you work with them. We know you work with the FDLR and with Nyamwasa."⁷⁷

Like many others, this man finally relented and confessed to crimes he later said in court he did not commit. He told Human Rights Watch:

They only beat me for two days because I could not take this treatment. I started to say things that were not true to stop [it]. I started giving false information. I invented things. I said I was looking for information in Rwanda to give to the FDLR; I said I was investigating military zones. They

⁷⁷ Human Rights Watch interview with former detainee Rubavu, January 31, 2013.

accepted this. They wrote it all down and I had to sign the document.... Then I was put in a cell alone. It was a small space. I could not even lie down. I was given water to drink every day, but only a small amount of corn a few days a week.... I would go out of the cell once a day to use the toilet. Every day they would ask if I had something to add. I would add little things to my story in order not to be beaten.⁷⁸

After three months in Bigogwe, he was transferred to Mukamira, where he was detained for 10 days. Several other former detainees in Mukamira confirmed his presence there to Human Rights Watch. A civilian court later acquitted him of all charges and he was released.

Mudende

The RDF detained other suspected FDLR collaborators in Mudende military camp, in Rubavu district.

A former detainee who spent several days in Mudende in 2011 after being transferred there from the “Gendarmerie” and before his transfer to Mukamira told Human Rights Watch:

They [the military] told me I was an Interahamwe. I was taken to Mudende in a *panda-gali* [police pick-up truck]; I was hidden underneath benches in the back of the truck. I was put in a very small cell, with four [other detainees] who were already there. I was accused of transporting arms. I was detained there for two days and beaten before I moved to Mukamira.⁷⁹

Another man, who had been working near the Congolese border and was accused of being a member of the FDLR, was detained in Mudende in September 2011. He told Human Rights Watch:

We were beaten a lot ... they used wooden clubs to beat us every day. Sometimes we spent two or three days without food. When we were fed, it was corn and hot water. When they beat us, they asked us questions. They said,

⁷⁸ Ibid.

⁷⁹ Human Rights Watch interview with former detainee, Musanze, October 28, 2014.

“What were you doing in Congo if not planning attacks [against Rwanda]?” I was beaten so badly I did not know what I was saying. I was beaten every day there. Sometimes they saw that I was really suffering and they stopped asking questions. They just said, “Accept that you are an infiltrator.”⁸⁰

He confessed to crimes he later said in court he did not commit. He told Human Rights Watch this was to stop the torture:

The RDF forced us to admit that we went to Congo to wage war [against Rwanda]. When we were beaten, we would say anything. At Mudende, they wrote things down and made me sign a paper.⁸¹

After about one month in Mudende, the authorities transferred him to Mukamira, where he was tortured again.

Tumba

Several people accused of collaborating with the FDLR told Human Rights Watch that the military detained them at the Tumba military base, near Huye, in southern Rwanda.

One former detainee said military arrested him in Huye in June 2010:

We arrived at Tumba, the military camp in Butare [Huye]. As we were arriving [they said to me], “If you tell the truth, you will be saved.” I agreed [to tell the truth]. They took me to an office and said, “Tell us what you have done.” I said, “I don’t know anything; I can’t think of what to say.” They made a call to someone in Kigali and they said [on the phone], “He refuses to tell us anything; he needs to be transferred to Kigali.” They then said to me, “Because you refuse to talk here, you will talk in Kigali.”⁸²

Military officials then transferred him to MINADEF and later to Kami. In MINADEF, military officials beat him during his interrogation.

⁸⁰ Human Rights Watch interview with former detainee, Rubavu, February 28, 2013.

⁸¹ Ibid.

⁸² Human Rights Watch interview with former detainee, Cyangugu, June 14, 2012.

In another case, from February 2011, the RDF arrested a man in Huye and took him to Tumba, from where he was transferred to a house in Kigali and held for two months. He was eventually transferred to an official prison and acquitted in court on charges of participating in grenade attacks.⁸³

Another former detainee told Human Rights Watch that military officials arrested him in August 2010 and tortured him at Tumba:

They covered my eyes with a cloth. They handcuffed my hands behind my back. In the car [parked in Tumba military camp] they asked me if I knew [someone with links to the FDLR]. I said no. They asked several times. They asked if I was FDLR and asked me to give the names of people who threw grenades. My eyes were covered the entire time.... They tied a nylon cord in my mouth and pulled it. They said, “Finally you will accept that you know everything.” They wrapped the cord three times around my head and a man behind me pulled it.... [I did not confess so] I was then taken to a small house in the camp.... In the house, I was beaten. Just before they beat me they said, “Now, you will admit.” I was beaten all night.⁸⁴

The next day, the military transferred him to Kami.

Houses Used as Detention Centers

Several former detainees described to Human Rights Watch ordinary, anonymous houses where the RDF detained, interrogated, and tortured them, after or before transferring them to other military centers. Four former detainees confirmed the existence of such houses in Rubavu, and seven said they were detained in a house in Kigali.⁸⁵

⁸³ Human Rights Watch interview with former detainee, Huye, May 16, 2012.

⁸⁴ Human Rights Watch interview with former detainee, Huye, June 27, 2012.

⁸⁵ A 2012 Amnesty International report also mentions “reports of a network of safe houses used to detain suspects in Kigali.” See Amnesty International, “Rwanda: Shrouded in Secrecy,” p. 17. Kizito Mihigo, a well-known singer, was also detained incommunicado in an anonymous house near Kigali, after his arrest on April 6, 2014, in Kigali. He was beaten by police officers, threatened and forced to confess. In his trial, Mihigo and his three co-accused were accused of collaborating with the RNC and the FDLR. Mihigo pled guilty. One of Mihigo’s co-accused was quoted in the media telling the court he had been detained incommunicado for a month in an unknown place and that he had confessed under torture to his involvement in grenade attacks. He retracted his confession in court. On February 27, 2015, Mihigo was sentenced to 10 years in prison. His three co-accused were respectively acquitted, sentenced to 25 years and 30 years in prison. See “Key suspect in Rwanda terror trial alleges torture,” *The East African*, November 29, 2014, <http://www.theeastafrican.co.ke/news/Key-suspect-in-Rwanda-terror-trial-alleges-torture-/2558-2539590-b99617/index.html> (accessed September 28, 2017); “Rwandan accused of

A man, who was previously detained in Kami, told Human Rights Watch:

In November [2010] I left Kami. I was blindfolded. They took me to a house in Kigali and they beat me again, with sticks. I was in a big room. I spent one night there. [Previously] they had asked me to write a letter to confess and apologize, but I had refused. I was afraid to write these things down. Until then, I had only agreed verbally. That night I agreed to write them a letter. I wrote that I knew about the grenade case ... and [made up] details of others involved with me. I wrote that I would implicate the men [whose names I wrote down]. This was the night I was beaten so badly. They threw me on the ground and broke my teeth. While they were beating me, they were saying, “Confess to save your life.” After I confessed, they left me alone. They next day they sent me back to Kami.⁸⁶

Another, who had come from the “Gendarmerie” and was later sent to Kami, told Human Rights Watch:

When they transferred me to Kigali, they put me in a safe house in Kicukiro. It was a well-furnished house. I was there with other detainees. One man was beaten so badly that he was almost dead. They left him on a mattress. There was also a room from which a lot blood came out. I don’t know what was in that room. They did not allow us to see it. I spent a terrible night there. Three men beat me very hard. They beat me on my head repeatedly.⁸⁷

Human Rights Watch documented the cases of three women who were held in houses in Kigali. Two said they believed the houses were in Nyarutarama, an upscale suburb of Kigali. One described how she was taken from her home in 2015 by men she suspected were military intelligence officials:

plotting against regime alleges torture,” Agence France-Presse, November 28, 2014, <http://www.dailymail.co.uk/wires/afp/article-2853028/Rwandan-accused-plotting-against-regime-alleges-torture.html> (accessed September 28, 2017).

⁸⁶ Human Rights Watch interview with former detainee, Cyangugu, June 13, 2012.

⁸⁷ Human Rights Watch phone interview with former detainee, November 25, 2016.

I was put into a green military pickup truck. I was forced to the floor in the back and they slapped me and told me to stay down. They put a shirt over my eyes, but I saw a soldier in the pickup truck with a gun. I was taken into a house and into a room. They handcuffed my arms behind a chair. They questioned me for four days. Every time I gave an answer, they slapped me. They wanted to know who I was working for. I said, “I don’t know what you want me to say. I don’t work for anyone.” But it was not good enough. They would say, “No, who do you work for? Tell us.” On the fourth day one of the men was losing his patience and he said, “If you don’t tell us the truth, we will silence you because we are tired of stupid people who don’t understand how hard we have worked [for this country].”⁸⁸

She was fed once a day and was handcuffed throughout her detention. She was released after five days and was told she would be killed if she spoke about her detention.

Another woman told Human Rights Watch she was detained in a house in Rubavu for two days in 2014, then transferred to a house in Kigali for five days. She was interrogated about her alleged connections to the FDLR, which she denied. She was handcuffed throughout her detention. When she was released she was told, “We have your phone. We will check to see if you are lying. If we find out you are lying, what do you think will happen?” The military also told her that if she talked about where she had been, she would have problems.⁸⁹

Detention Conditions

Former detainees described very harsh living conditions in military detention centers. Most were held incommunicado, alone in a cell, and were not allowed to go outside or speak to other detainees. Food and water were often very scarce, and quantities depended on detainees’ confessions. Apart from beatings and torture, lack of water and food was the most significant complaint by former detainees interviewed by Human Rights Watch.

⁸⁸ Human Rights Watch phone interview with former detainee, June 5, 2015.

⁸⁹ Human Rights Watch interview with former detainee, Rubavu, May 5, 2014.

One detainee who was held in Mukamira for one month said, “We once asked for water. We had peed in a bucket [in the cell] and the guard said, ‘Drink the urine.’”⁹⁰
A man arrested in June 2010, described the conditions in Kami:

In Kami, there are houses that were originally built as houses for officers. They have different rooms [and] we were put in separate rooms. I was alone in a room for eight days. It was about two meters by two meters. There were windows, but they were blocked with metal sheeting so it was always dark. I had to sleep on the concrete. I was handcuffed, with my hands behind my back at night and in front in the daytime. In the mornings, I was taken out to the toilet for about two minutes. At about 3 p.m., I was given corn mixed with beans and half a liter of water to drink. I was not given water to wash. At about 5 p.m., I was taken to the toilet again.... I was allowed to wash once a month. There were no visits, no radio, no information. Nothing. I didn’t know what was happening. I was waiting to die.⁹¹

The authorities in charge of the detention centers denied several detainees medical treatment for injuries sustained as a result of torture or bad detention conditions. When the detainee quoted above asked for medical treatment, the guards told him, “You are accused of endangering state security. You don’t have the right to be treated in hospital.”⁹²

Several detainees explained to Human Rights Watch how guards in Kami gave them “special treatment,” in Kami, or “specialization,”⁹³ a term used to refer to particularly harsh conditions. One of them said:

I was in a special cell.... My legs were chained together with four locks. I was naked and I was sitting on the floor. It was very painful. My hands were handcuffed behind my back. I spent six weeks in this situation. Twice a day the chains were taken off so I could use the toilet. To eat, they just threw

⁹⁰ Human Rights Watch interview with former detainee, Rubavu, March 6, 2013.

⁹¹ Human Rights Watch interview with former detainee, Bujumbura, Burundi, April 29, 2012.

⁹² Ibid.

⁹³ Amnesty International also reported on a system of “specialization” or “regime” in Kami, in which some detainees were held in especially severe conditions. See Amnesty International, “Rwanda: Shrouded in Secrecy,” p. 18.

some corn and beans at me. I would go three or four days without making a bowel movement. I drank half a liter of water every other day.⁹⁴

The military also used extreme and continuous light, darkness, and isolation to inflict further suffering on detainees. One former detainee, arrested in August 2010, described to Human Rights Watch how this was done in Kami:

In the cell there was an electric lamp. It was always on, it hurt my eyes. If I tried to unscrew it, I was beaten. I was always alone. I spent four or five months alone. I had no mattress there. I only started to see other prisoners after six months.⁹⁵

A former detainee told Human Rights Watch he was detained in a hole in the “Gendarmerie”:

At the “Gendarmerie,” every man had his own hole in the camp to sleep in.... The hole I stayed in was in the bush, with trees around. I could sit but there wasn’t enough space for me to lie down.... They gave us food at night: potatoes, beans, and maize, but we did not eat every night. We were not given much water. I did not wash in the two months I spent there.⁹⁶

Because of the torture, limited access to food, water and health care, and other inhuman detention conditions, most former detainees left military detention severely emaciated. A man who was detained in Kami for four months and was only given one cup of corn a day, said his family did not recognize him at first when he was released: “They thought I was a ghost.”⁹⁷

⁹⁴ Human Rights Watch interview with former detainee, Cyanguu, June 13, 2012.

⁹⁵ Human Rights Watch interview with former detainee, Huye, June 27, 2012.

⁹⁶ Human Rights Watch interview with former detainee, Rubavu, April 30, 2013.

⁹⁷ Human Rights Watch interview with former detainee, Rubavu, May 5, 2014.

III. Arrests and Enforced Disappearances

Profile of Former Detainees

Most of the former detainees interviewed by Human Rights Watch were civilians, but some said they had been FDLR combatants. The majority were arrested in Rwanda, but nine said they were arrested in Congo and six others in Burundi. Many former detainees who spoke to Human Rights Watch said they did not know why they had been arrested. Others tried to guess why they had been arrested, based on the questions asked during interrogations or, for those whose cases went to court, the charges against them.

In trials observed by Human Rights Watch, several defendants confessed that they were FDLR combatants or collaborators. Human Rights Watch also spoke to several former FDLR combatants, who had been demobilized in the years before their arrest and reintegrated into civilian life in Rwanda. Others had contacted authorities in Congo to enter the DDRRR process. However, the majority of people interviewed by Human Rights Watch said they were not associated with the FDLR and did not sympathize with the group.

Several former detainees told Human Rights Watch that some of their family members, friends, or business relations were accused of being FDLR or RNC members. Others had regularly traveled to Congo, to visit family or study in Goma, making them suspicious in the eyes of the Rwandan intelligence services.

One former detainee was demobilized from the RDF, while another was a former member of the National Congress for the Defence of the People (CNDP), a Rwandan-backed Congolese rebel group responsible for serious human rights abuses in Congo.⁹⁸

Arrests in Rwanda

Rwandan military and intelligence agents, some in civilian clothing, arrested most of the detainees interviewed by Human Rights Watch between 2010 and 2016 in Rwanda. They were sometimes assisted by local government officials or police. Officials usually arrested

⁹⁸ See “Killings in Kiwanja,” Human Rights Watch news release, December 11, 2008, <https://www.hrw.org/report/2008/12/11/killings-kiwanja/uns-inability-protect-civilians>.

suspects near their homes or workplaces, and drove them away in civilian vehicles to a nearby military center.

Some were arrested under false pretenses. A former detainee from Mukamira told Human Rights Watch that he was arrested in May 2016 after a local government official asked him to come to his office to update his details in an administrative register.⁹⁹

Some were lured to the place of arrest with a promise of employment. One former detainee told Human Rights Watch how he was arrested in August 2010:

I was at home [and] I got a call. It was a man who said he was close by and had a job for me.... He asked me to go outside and meet him. I went out and I saw a man I didn't know in civilian clothes. He was the man who had called me. There were others in a car, all in civilian clothes.... I later learned [at Kami] that the man in civilian clothes was Major Prosper.¹⁰⁰ I got in the car and we drove off. The other men were in the back. I was sitting between two of them. When we arrived near the main road, Prosper asked if I knew [two people who were later his co-accused]. I said I knew them.... Prosper said, "We know they were throwing grenades and you are a part of that." I said, "I didn't throw grenades and I don't have any information about that. If they have information about that, it has nothing to do with me." ... Prosper brought out his military ID card and said, "I am military, from the DMI [Department of Military Intelligence]. We don't have a job for you. You are under arrest."¹⁰¹

A motorcycle taxi driver arrested in April 2014 told Human Rights Watch a client approached him:

I drove up to him and asked him where he wanted to go. He said, "Near the police at the 'Gendarmerie.'" When we arrived at the "Gendarmerie," I asked if I should enter. He said yes. I entered and stopped. Then he jumped

⁹⁹ Human Rights Watch interview with former detainee, Musanze, June 26, 2016.

¹⁰⁰ Six former detainees mentioned to Human Rights Watch the involvement of Major Prosper in interrogating and threatening detainees in MINADEF and Kami in 2010.

¹⁰¹ Human Rights Watch interview with former detainee, Kigali, June 22, 2012.

off the moto, handcuffed me, and took me to the military base. He said to some soldiers there, “If he runs, shoot him.”¹⁰²

A woman who was detained in a house in Kigali explained to Human Rights Watch how she was abducted in March 2014:

I was arriving at work. A man in civilian clothes saw me and called out my name. He said, “We have some questions to ask you.” He walked me to a car and asked me to get in. In the car, there was another man in civilian clothes, the driver, a soldier in uniform, and a woman. All of a sudden, the car started and we drove off. I said, “Where are you taking me?” The man said, “We are going to question you at the brigade [police station]. Don’t be scared, you are with a soldier. We are all Rwandans.” They took my phone and handcuffed me. The man said, “You won’t be able to see where we are going,” and they covered my eyes with a T-shirt that was in my bag. I knew we were going to Gisenyi [Rubavu], because we were heading in that direction.¹⁰³

The men then used her to arrest one of her colleagues. They forced her to go to her colleague’s place of work, call her from the vehicle, and tell her, “I have a message for you. Come to the end of the road so that I can give it to you.” Military officials abducted her colleague as she approached the vehicle.¹⁰⁴

Some arrests were done in groups. One former detainee was among a group of men arrested by military in Kigali in April 2013 and taken to Kami after a grenade went off nearby. Another told Human Rights Watch, “During my time at Kami, grenades were being thrown everywhere. They were bringing men into Kami regularly in groups of up to 30 at a time.”¹⁰⁵

Most of the arrests documented in this report amount to enforced disappearances, at least until the detainees were released or transferred to an official prison or detention center, where their detention was acknowledged and they could receive visits. State agents

¹⁰² Human Rights Watch interview with former detainee, Rubavu, October 29, 2014.

¹⁰³ Human Rights Watch interview with former detainee, Rubavu, May 5, 2014.

¹⁰⁴ Ibid.

¹⁰⁵ Human Rights Watch interview with former detainee, Rubavu, March 5, 2014.

deprived individuals of their liberty, but did not divulge information as to their whereabouts. Family members often inquired in vain about the fate of their disappeared relatives with local officials, police, or even at the military camps, as it is well-known that people are regularly detained there. Some also sent letters to the authorities. However, others were too scared to look for their relatives.

In most cases, the authorities refused to acknowledge the detention of the disappeared person. Some people were harassed by the authorities or other individuals, because they inquired about their disappeared family member, or simply because they had family ties to someone accused of security-related offences.

Arrests in Burundi

Human Rights Watch interviewed six Rwandan nationals who were arrested in Burundi and illegally transferred to Rwanda in 2010.¹⁰⁶ The arrests were carried out by Burundian police and intelligence officials, almost always accompanied by Rwandan men in civilian clothing, whom some former detainees identified as military intelligence agents. In Rwanda, these men were detained in unofficial military detention centers and later tried for their alleged involvement in grenade attacks.

In Burundi, the suspects were taken first to the office of the Service National de Renseignement (SNR), the Burundian intelligence services, also known as *la Documentation*.¹⁰⁷ They were detained at the SNR office for a period of between a few hours and four days. One man said he was beaten there, by Burundian police and men in civilian clothes who he later found out were Rwandan military intelligence agents.¹⁰⁸ From there, they transferred them to Rwanda, where they were detained first at MINADEF, then in Kami, before being taken to court.

¹⁰⁶ Between 2010 and 2013 (when most of these transfers took place), Rwanda and Burundi maintained good relations. The relationship between the two countries began to deteriorate with Burundi's political crisis from April 2015 onwards. In 2015 some Burundian armed opposition members were trained in Rwanda. See "Burundi: Abductions, Killings Spread Fear," Human Rights Watch news release, February 25, 2016, <https://www.hrw.org/news/2016/02/25/burundi-abductions-killings-spread-fear>.

¹⁰⁷ Human Rights Watch has documented numerous abuses by the SNR. See "Burundi: Intelligence Services Torture Suspected Opponents," Human Rights Watch news release, July 7, 2016, <https://www.hrw.org/news/2016/07/07/burundi-intelligence-services-torture-suspected-opponents>; and "Burundi: Spate of Arbitrary Arrests, Torture," Human Rights Watch news release, August 6, 2015, <https://www.hrw.org/news/2015/08/06/burundi-spate-arbitrary-arrests-torture>.

¹⁰⁸ Human Rights Watch interview with former detainee, Bujumbura, Burundi, April 29, 2012.

A former detainee described to Human Rights Watch how a car pulled up outside his place of work in the Burundian capital, Bujumbura, in September 2010:

In the car there were two Burundian police officers, a driver, and a Rwandan in civilian clothes. The two Burundian police put me in handcuffs and took me to *la Documentation*.... The Rwandan spoke with a general there [and] said, “These men we are taking are disturbing the security in Rwanda.” The general said, “Take them, there is no problem.”¹⁰⁹

Rwandan security officials took him across the border and detained him in Kami, where they beat him and forced him to confess to working with the RNC.¹¹⁰

A former detainee, also arrested in Bujumbura in September 2010, explained:

Two Burundian police got out [of a car] with Kalashnikovs. Three Rwandans also got out. They were in civilian clothes and were speaking Kinyarwanda.... One of the Rwandans put a pistol to my head and said, “Don’t move.” He forced me into the jeep with a Burundian policeman on each side of me. The Rwandan was behind me with a pistol. The driver and another man in the front were Rwandan.... I was taken to the SNR office for one night, then taken to the border with [another detainee]. In Rwanda, the military were waiting for us in an RDF truck. They put us in and asked us our names. Then we drove to Kigali.¹¹¹

The former detainee was taken to MINADEF and Kami and beaten in both places.

Arrests in the Democratic Republic of Congo

Human Rights Watch interviewed 10 former detainees who said that they had been arrested in Congo and illegally transferred to Rwanda. Rwandan officials then detained them in military custody and tortured them.

¹⁰⁹ Human Rights Watch interview with former detainee, Kigali, June 12, 2012.

¹¹⁰ Ibid.

¹¹¹ Human Rights Watch interview with former detainee, Cyangugu, June 13, 2012.

Most of these arrests took place in North Kivu province, in eastern Congo, near the Rwandan border. They were carried out by the Congolese security services, sometimes assisted by Kinyarwanda-speaking individuals, whom several people described as Rwandan or Congolese military intelligence agents.¹¹²

Some individuals arrested in Congo were first taken to the military intelligence prison in Goma, known as the “T2.” A detainee at the “T2” told Human Rights Watch he saw many Rwandans detained there and that Congolese soldiers were paid to transfer alleged former FDLR fighters to Rwanda:

Two [Rwandans] were arrested because they were caught in a field wearing gum boots like those the FDLR wear. Others were caught with Rwandan ID cards. They were just small traders; they were not FDLR. The FARDC were arresting people because the Rwandans were paying them US\$100 per person [to do this].¹¹³

Former detainees told Human Rights Watch they were beaten and tortured by Congolese military or intelligence officials at the “T2.” One former detainee told Human Rights Watch:

I was arrested in Goma ... and [taken to] the “T2.” I was interrogated there. They beat me and asked me if I was an FDLR soldier. I said, “No, [I have a job in Goma]” and I identified the place [where I worked]. I was beaten by someone speaking Kinyarwanda; he wanted me to admit I was FDLR. He beat me all over with a stick. I was injured on my left arm and on my nose.... One day they tied me up and took me across the border at 1 a.m.... Other Rwandans were taken across the border with me. We were maybe 17 in total. Eight of those men were killed at the “Gendarmerie” and at Mukamira.¹¹⁴

¹¹² Relations between Rwanda and Congo have often been tense, and sometimes extremely hostile, over the past 20 years, with Rwanda backing a succession of Congolese armed opposition groups. However, in January 2009 the two governments launched a joint offensive against the FDLR, known as “*Umoja Wetu*” (“our unity” in Swahili), marking an important collaboration between the two countries, at least in terms of tackling the FDLR. Relations turned sour again in 2012 when Rwanda backed a new Congolese rebel group, the M23. See, “DR Congo: M23 Rebels Committing War Crimes,” Human Rights Watch news release, September 11, 2012, <https://www.hrw.org/news/2012/09/11/dr-congo-m23-rebels-committing-war-crimes>. More recently, there seems to be some renewed collaboration between the two countries.

¹¹³ Human Rights Watch interview with former detainee, Rubavu, January 24, 2013.

¹¹⁴ Human Rights Watch interview with former detainee, Rubavu, April 30, 2013.

Some people arrested by the Congolese military and transferred to Rwanda claimed they were Congolese nationals. One of them told Human Rights Watch how he was arrested by Congolese military in March 2011:

I was going to Bunagana [a Congolese town near the Ugandan border] to look for a job. I came across [the FARDC] in Rutshuru. They asked me for my ID card. I showed it to them and they tore it up. They took me and tied my arms with a rope. They said I was FDLR.... They took me to the [military base] on the hill ... and started beating me right away, to get me to admit I was FDLR. They beat me all over with a wooden stick and kicked me. I spent three days detained in Bunagana, in a hole in the ground with branches on top.... I was not questioned there, just told to confess.... Three days later, I was taken to the “T2” in Goma, and then to Rwanda the following night.¹¹⁵

Many of those arrested in Congo and transferred to Rwanda were later tried in Rwanda. In trials observed by Human Rights Watch (see Section IV), 29 defendants told judges that they had been arrested in Congo, and several said they had been detained at the “T2” or other military camps in Congo.¹¹⁶ In one trial, the court confirmed that the accused were arrested in Congo by Congolese military and transferred to Rwanda. No details about the transfer procedures were provided in these trials.¹¹⁷

A beer trader, who had always lived in Congo with his Congolese mother, told the judges: “One day, after the FDLR forced me to carry drinks for them,¹¹⁸ I was arrested by the FARDC. They were accompanied by the Rwanda Defence Force. They transferred me to Goma and to the “T2” prison, where to my surprise, they accused me of collaborating with the FDLR in

¹¹⁵ Human Rights Watch interview with former detainee, Goma, DR Congo, March 6, 2013.

¹¹⁶ Human Rights Watch trial observation, Kigali High Court, March 3 and November 28, 2011, and Musanze High Court, October 15, December 13, 2012, and May 27, 2015; *Prosecutor v. Mukeshimana Jean Berchmans et al.*, Kigali High Court, Case No. RP0027/11/HC/KIG-RP 0036/11/HC/KIG, January 13, 2012; *Prosecutor v. Janvier Ndagijimana et al.*, High Court of Musanze, Specialized Chamber, case No. RP 0108/11/HC/MUS, December 31, 2012; *Prosecutor v. Jérôme Nsanzimana et al.*, High Court of Musanze, case No. RP 004611/HC/MUS, March 21, 2013; and *Prosecutor v. Aboubacar Nsabiyeze et al.*, Musanze High Court, Case No. RP0052/13/HC/MUS, May 22, 2014.

¹¹⁷ *Prosecutor v. Aboubacar Nsabiyeze et al.*, Musanze High Court, Case No. RP0052/13/HC/MUS, May 22, 2014, para 1.

¹¹⁸ The FDLR often force Congolese civilians to carry goods for them and assist them in other ways, sometimes under threat of death or ill-treatment.

trying to overthrow the government in Rwanda.” The next day, he told the court, he was transferred to Rwanda and detained for three months in Mukamira.¹¹⁹

Box 4 – Norbert Manirafasha: Abducted in Congo, Tortured in Rwanda¹²⁰

Norbert Manirafasha, a political opposition activist in his thirties and a registered Rwandan refugee, was arrested by Rwandan intelligence agents in April 2014 in Goma, eastern Congo, and transferred to Rwanda the same day:

I was on the bus near the Virunga market [in Goma]. Suddenly a small jeep came and stopped the bus. It was a [Toyota] Rav-4 with Congolese plates. Men from the jeep got into the bus, looked at me and told me to get off. They were speaking Swahili.... They pushed me off the bus and into the car. I screamed, “I am being arrested!” When I entered the car, they covered my eyes and they started speaking Kinyarwanda. They said, “We have been looking for you.”

The men turned out to be Rwandan intelligence agents. They handcuffed and blindfolded him and took him to a house in Goma. After five hours, they told him he would be sent back to Rwanda.

I said, “It is my right not to go. I have been living here [in Congo] for many years.” Then [my guard] hit me twice in the side and said, “You know, if we kill you now, who will know about it? Your only chance now is to go to Rwanda. You can’t fight us. We decide your fate.” They blindfolded me again and told me to get up. They put me in a small car. There were men on either side of me in the car. I thought I was going to be killed. I didn’t know where we were going.

The intelligence agents took him to a house in Rubavu, Rwanda, where they interrogated him about his links with the opposition and asked him why he was living in Congo. They kicked him and threatened to kill him.

Then they drove him to Kami:

They put me in a room with a toilet. There was no bed. They locked a chain around my legs and locked my hands to the chain. They said, “Stay here. Someone will

¹¹⁹ Human Rights Watch trial observation, Musanze High Court, December 13, 2012.

¹²⁰ Human Rights Watch interview with former detainee, Rubavu, July 17, 2014.

come for you.” A woman in civilian clothes came the same day. She asked some questions about who I was and said, “You need to pray because you may be killed.”

Over the next two days, men in military uniform repeatedly tortured Manirafasha, questioning him about his alleged links with opposition groups and the FDLR.

[An army captain] kicked me and told one of the guards to bring a bag. They brought a black plastic bag. They handcuffed my arms behind my back, put the bag over my head and started to choke me. [The captain] said, “You see? You are very close to death.” He threw me on the ground. I couldn’t breathe. They put their feet on my back. I was sweating and gasping. Then they took the bag off. [The captain] said, “You are going to tell us how the FDLR works.”

The next day, the military repeated the same torture method and put a bag over his head again:

This time, when I could not breathe, I began urinating. So, they took the bag off. I was coughing and I said, “Ok, just kill me.” One of them said, “No, the hour of death is not here yet, but you will die in the end.”

A few days later, guards presented him with a statement that he said contained false information about his links with opposition groups and the FDLR. They forced him to read the statement on camera. He told Human Rights Watch, “They took off the handcuffs, but my legs were still chained. They put the camera on, but it was difficult for me to repeat everything [in the statement]. They slapped me and said, ‘If you do not do it correctly, we will kill you.’” They put a rifle on the chair next to him and forced him to sign a piece of paper. When he asked to read it, they slapped him again, so he ended up signing it.

Two weeks later, after renewed death threats, he signed another document, this time apparently prepared by the police. The following day, the military transferred him to a regular police detention center and presented him with official charges of threatening state security and working with criminals. They gave him the police document he had signed the previous day. It said he had been arrested in Rwanda, almost a month after his actual arrest date in Congo.

At Musanze High Court, where he was tried in 2015, Manirafasha told judges he had been abducted in Goma, tortured, and forced to confess. The judges did not dismiss his earlier confession, even though he stated it was extracted under torture; nor did they order an investigation into his allegations.¹²¹ On July 27, 2015, the court convicted Manirafasha and sentenced him to 20 years in prison. He is currently serving his sentence.

¹²¹ Human Rights Watch trial observation, Musanze High Court, May 27, 2015.

At the time of his abduction in Congo, Manirafasha was a refugee registered with the United Nations High Commissioner for Refugees (UNHCR).¹²² This status should normally provide refugees protection under international law.

Arrests and Transfers during Demobilization and Repatriation from Congo

Human Rights Watch documented the cases of seven individuals who were transferred from Congo to illegal military detention in Rwanda in 2010 and 2011 at various stages of the Disarmament, Demobilization, Repatriation, Reintegration and Resettlement of foreign armed groups (DDRRR) process. The process of DDRRR is supported in Congo by the UN mission in Congo, MONUSCO, and in Rwanda by the Rwanda Demobilization and Reintegration Commission (RDRC).¹²³

Human Rights Watch interviewed five of these seven individuals and received credible information about the two other cases from trial observation and interviews with other detainees. Human Rights Watch also interviewed family members, lawyers, and UN staff about these cases and observed several trials in Rwanda in which similar statements were made about transfers from Congo to illegal military detention in Rwanda during the DDRRR process.

In one case MONUSCO agents were allegedly directly involved in the illegal transfer of a Congolese citizen from Congo to military detention in Rwanda (see Box 5).

Three former FDLR combatants stated during their trial in Rwanda and in interviews with Human Rights Watch that they had been arrested in Congo and handed over to Rwandan military after they had started the DDRRR program and were already in contact with MONUSCO staff:

Case one: A former detainee told Human Right Watch and the judges during his trial in 2012 and 2013 that he had left the FDLR, contacted MONUSCO, and was registered in the

¹²² UNHCR registration number 01412H00058.

¹²³ The RDRC is co-funded by the Rwandan government and the World Bank, which also operates a trust fund with contributions from the governments of Sweden, the Netherlands, Germany, and Japan, as well as UNICEF. See Rwanda Demobilization and Reintegration Commission, "International partners," no date, <http://demobrwanda.gov.rw/partners/international.html> (accessed October 4, 2017).

DDRRR program and scheduled for repatriation for Rwanda.¹²⁴ But on the designated day of his repatriation to Rwanda, in February 2011, he was instead arrested by the Congolese police. He told Human Rights Watch:

I heard someone knock on the door of the place where I lived. I opened the door and they said they were from the police.... They handcuffed me and my wife and brought us in their vehicle to their office [at the “T2”].... Another man took me out [of the “T2”]. My wife stayed [in Congo]. They put me in a car, handcuffed me, and we crossed the border [to Rwanda].... They took me to Mukamira, and I stayed there for a month and a half.¹²⁵

He said that the Rwanda Demobilization and Reintegration Commission (RDRC) looked for him and found him after one month in illegal detention in Rwanda.¹²⁶ His arrest in Congo and transfer to Rwanda was confirmed to Human Rights Watch by a UN staff member and another former detainee.¹²⁷ He told Human Rights Watch he was seriously beaten in Mukamira military camp.¹²⁸

Case two: A former combatant told Human Rights Watch that Rwandan and Congolese military arrested him in January 2011 in Goma, after he had left the FDLR, spent seven months in a MONUSCO DDRRR camp and had requested asylum in Congo (he did not want to go back to Rwanda). He was then transferred to Rwanda where he was tortured and illegally detained for more than five months, first in the military barracks of the “Gendarmerie,” then in a private house, and later in the Kami military camp.¹²⁹ Another former detainee confirmed that he saw him in Kami.¹³⁰ After his transfer to a regular police station in Kigali, a MONUSCO staff member visited him in Rwanda after being contacted by

¹²⁴ Human Rights Watch trial observation, Musanze High Court, December 13, 2012 and March 21, 2013; *Prosecutor v. Jérôme Nsanzimana et al.*, High Court of Musanze, case No. RP 004611/HC/MUS, March 21, 2013; and Human Rights Watch interview with former detainee, Rubavu, May 3, 2014.

¹²⁵ Signed trial statement of former detainee, on file with Human Rights Watch.

¹²⁶ *Ibid.*

¹²⁷ Human Rights Watch interview with former detainee, Rubavu, January 24, 2013; Human Rights Watch interview with UN staff member, Goma, DR Congo, May 18, 2013.

¹²⁸ Human Rights Watch interview with former detainee, Rubavu, May 3, 2014.

¹²⁹ Human Rights Watch phone interview with former detainee, November 25, 2016.

¹³⁰ Human Rights Watch interview with former detainee, Rubavu, August 26, 2011.

the detainee's wife.¹³¹ He was released soon after. His arrest in Congo, the transfer to Rwanda, and the visit by a MONUSCO staff member were confirmed by a UN official.¹³²

Case three: A former FDLR combatant stated during his trial in Rwanda in 2013 that he had been arrested in Congo by the Congolese military who then handed him over to the Rwandan military after he was already in contact with MONUSCO staff to start the DDRRR process. Human Rights Watch spoke to two former co-detainees who confirmed his arrest in Congo and said he was later illegally detained in Kami military camp in Rwanda.¹³³

Three former FDLR combatants said they were arrested in Rwanda and ill-treated in military detention shortly after MONUSCO had facilitated their transfer from Congo to Rwanda as part of the DDRRR process:

Case four: A former FDLR combatant said during his trial in 2011 that, in September 2010, Rwandan military intelligence officials arrested him in the Mutobo demobilization center in Rwanda, took him to the premises of the Ministry of Defence in Kigali, and told him that, if he did not want to die, he had to sign a statement saying he had returned to Rwanda to launch attacks on behalf of the FDLR.¹³⁴ In the appeal proceedings, the Supreme Court confirmed that “the trial file shows that [name of the accused] was arrested in Congo, handed over to MONUSCO and brought to Mutobo camp where he was arrested by military intelligence.”¹³⁵

Case five: A former FDLR combatant told Human Rights Watch, “When I arrived in Rwanda [in 2010], MONUSCO handed me over to the leaders of Rubavu district, but while members of the [Rwandan] demobilization commission were questioning me, I saw Rwandan military intelligence officials arriving. They separated me from the others and took me to a military camp in Gisenyi [Rubavu].” Rwandan military intelligence arrested him and illegally

¹³¹ Human Rights Watch phone interview with former detainee, November 25, 2016.

¹³² Human Rights Watch interview with UN staff member, Goma, DR Congo, May 18, 2013.

¹³³ Human Rights Watch trial observation, *Prosecutor v. Jérôme Nsanzimana et al.*, High Court of Musanze, case No. RP 004611/HC/MUS, March 21, 2013. Human Rights Watch interview with former detainee, Rubavu, May 7, 2014; Human Rights Watch interview with former detainees, Rubavu, May 7, 2014.

¹³⁴ Human Rights Watch trial observation, Kigali High Court, March 28 and November 28, 2011; *Prosecutor v. Mukeshimana Jean Berchmans et al.*, Supreme Court, Case No. RPA 0090/12/CS, March 4, 2016, para. 129.

¹³⁵ *Prosecutor v. Mukeshimana Jean Berchmans et al.*, Supreme Court, Case No. RPA 0090/12/CS, March 4, 2016, para. 132.

detained him in various military detention facilities, including Kami military camp, for six months. He was regularly beaten.¹³⁶ A former co-detainee corroborated his story.¹³⁷

Case six: A former FDLR combatant told Human Rights Watch that, after MONUSCO had transferred him to Rwanda in September 2011, he was taken to Mukamira military camp, where he was detained for two months and regularly beaten.¹³⁸ He was held at Mukamira with another former detainee, who confirmed that the former combatant was seriously beaten in Mukamira.¹³⁹

Box 5 – Case seven: Arrested and Illegally Transferred to Rwanda by the UN

In 2011, a Congolese citizen, “Théophile,” was illegally transferred from Congo to military detention in Rwanda and subjected to serious abuses in both Congo and Rwanda. MONUSCO staff are alleged to have been directly involved in his illegal transfer. The former detainee told Human Rights Watch that Congolese military arrested him in April 2011, at the request of a member of MONUSCO’s DDRRR unit.¹⁴⁰ This was confirmed by two members of the DDRRR team.¹⁴¹ His arrest appeared to be at least partly linked to internal problems within the DDRRR unit.

“Théophile” spent around five months at the “T2” military intelligence prison in Goma, where he was severely tortured. He told Human Rights Watch:

[The FARDC] started beating me.... They put a stapler in my mouth and they tied my mouth shut with a shirt. They turned me over and continued beating me. They were saying, “You will accept you were a soldier!” At one point during the beating, the staples went down my throat [and] one got caught there. Later it hurt so much when I tried to eat. About two months later, the staple came out of my throat.¹⁴²

¹³⁶ Human Rights Watch interview with former detainee, Musanze, March 31, 2016.

¹³⁷ Human Rights Watch interview with former detainee, Kampala, July 10, 2012.

¹³⁸ Human Rights Watch phone interview with former detainee, October 26, 2016.

¹³⁹ Human Rights Watch interview with former detainee, Rubavu, January 24, 2013.

¹⁴⁰ Human Rights Watch interview with former detainee, Rubavu, January 24, 2013.

¹⁴¹ Human Rights Watch interview with MONUSCO staff member, Goma, DR Congo, February 28, 2013; Human Rights Watch interview with MONUSCO staff member, Goma, DR Congo, May 18, 2013.

¹⁴² Human Rights Watch interview with former detainee, Rubavu, January 24, 2013.

Members of MONUSCO's DDRRR unit visited him in detention, but said this was an issue for the Congolese military to handle.¹⁴³ Human Rights Watch spoke with two individuals who separately confirmed his detention at the "T2."¹⁴⁴

After five months at the "T2," "Théophile" was taken to the DDRRR camp in Goma, where he was processed as a combatant, even though he denied being one. He was then taken to Rwanda in a MONUSCO vehicle, and a MONUSCO staff member intervened at the border crossing to secure his transfer to Rwanda.¹⁴⁵

On the Rwandan side of the border, "Théophile" was first taken to the "Gendarmerie," together with a former FDLR combatant. They were both then transferred to Mukamira military camp, where they stayed for around a month.¹⁴⁶ Both men were then transferred to an official detention center and brought to trial, accused of endangering state security. "Théophile" was acquitted.¹⁴⁷

Human Rights Watch staff noted in 2013 that liquid came out of a hole in his throat after he drank, as a result of his 2011 ordeal at the "T2."

On April 14, 2017, MONUSCO responded to written questions submitted by Human Rights Watch. Regarding individuals detained in military custody after they were repatriated through the DDRRR process, MONUSCO said:

Whenever [we] received reports that a person repatriated through DDR/RR was in military custody in Rwanda, a member the DDR/RRR [sic] team would visit the person and organize his/her release. However, since MONUSCO does not have, and never did have, DDRR [sic] staff in Rwanda it is not always aware of such cases.

Since 2015, possibly before, but this cannot be confirmed, no ex-combatant has ever been arrested subsequent to entering the MONUSCO DDRRR process. If a legitimate candidate for DDR/RR is arrested and MONUSCO is

¹⁴³ Ibid.

¹⁴⁴ Human Rights Watch interview with family member of former detainee, Goma, DR Congo, January 30, 2013; Human Rights Watch interview with MONUSCO staff member, Goma, DR Congo, May 18, 2013.

¹⁴⁵ Human Rights Watch interview with former detainee, Rubavu, January 24, 2013.

¹⁴⁶ Human Rights Watch phone interview with former detainee, October 26, 2016.

¹⁴⁷ Human Rights Watch trial observation, Musanze, 2012.

made aware, MONUSCO intervenes if the person has expressly his/her wish [sic] to surrender to MONUSCO.¹⁴⁸

Regarding the case of “Théophile” (above), the peacekeeping mission wrote, “Unfortunately, MONUSCO cannot effectively trace the 2011 incident without [more information]. MONUSCO therefore cannot comment at this stage on the lawfulness of a transfer and detention.”¹⁴⁹

¹⁴⁸ Letter from MONUSCO to Human Rights Watch, April 14, 2017, copy on file with Human Rights Watch.

¹⁴⁹ Ibid.

IV. Leaving Military Detention

After detaining them unlawfully for several weeks or months, the Rwandan military or intelligence operatives either released detainees or transferred them to the regular justice system to stand trial. However, Human Rights Watch has documented several cases in which people believed to be detained by the Rwandan military or intelligence services never reappeared. Their fate remains unknown; they continue to be victims of enforced disappearances.

Many of the detainees whose cases went to trial told judges about their detention and torture in military centers, despite pressure not to reveal such information. However, in the trials that Human Rights Watch observed, judges did not dismiss confessions or evidence allegedly obtained under torture or order in-depth investigations into allegations of torture. Many detainees were too scared to file a formal complaint against those who had abused or tortured them, even though several of them knew the perpetrators' identity.

Release

The RDF released some detainees as suddenly and as arbitrarily as they had arrested them, often in groups, without any charges or judicial procedure. Two detainees told Human Rights Watch that after spending more than a month in Kami, they were driven in a convoy back to their home region and simply released.

Another former detainee described to Human Rights Watch how the authorities released him and a group of other detainees from Kami in 2011:

[After seven months of detention] they told me I was forgiven. They said, "We will forgive you as you won't accept your crime." They put us in a military bus ... and took us to the [bus] station at Nyabugogo. They gave us 5,000 francs (about US\$6) each and told us to go home.¹⁵⁰

¹⁵⁰ Human Rights Watch interview with former detainee, Cibitoke, Burundi, July 1, 2012.

A female former detainee told Human Rights Watch that, one day in March 2011, after she had spent eight months in Kami, she was told to wash to prepare to return home. “[The soldiers] said to me, ‘We forgive you ... go home and join your children. Do not talk about this place.... If someone asks where you have been, say you were in Kigali.’”¹⁵¹ The soldiers drove her back to her home province and gave her money for a motorcycle taxi to go home.

Into the Regular Justice System

Most of those who were not released were transferred to the regular civilian or military justice system. They were taken to an official detention center, such as a police station or a recognized prison, and a prosecutor questioned them. Most were then charged and, after a lengthy period of pre-trial detention, brought before a judge (see below). Six of the trials Human Rights Watch observed took place in a civilian court and one in a military court.¹⁵²

Before transferring them to official detention facilities, military, intelligence, or police officials made detainees sign documents stating they had been arrested on the date of their transfer, rather than their actual date of arrest, thereby erasing their military detention from the record. One former detainee told Human Rights Watch, “They brought me a piece of paper [and] told me to sign it. I asked to read it but they slapped me. So, I just signed it.”¹⁵³ The paper was his police statement and was dated 25 days after he was arrested and taken to Kami.

Officials at the military detention centers told detainees not to talk about their detention there. A former detainee told Human Rights Watch, “When we were at Kami, we were told not to say where we had been or what had happened. They said this to everyone.”¹⁵⁴ Another former detainee told Human Rights Watch in June 2012, “We were forbidden to talk

¹⁵¹ Human Rights Watch interview with former detainee, Bugesera, Rwanda, June 25, 2012.

¹⁵² Under Rwandan law, military courts have authority to try offenses by military personnel and their co-accused, even when the co-accused are civilians. See Organic law determining the organization, functioning and jurisdiction of Courts, N° 51/2008, arts. 137 and 148.

¹⁵³ Human Rights Watch interview with former detainee, Rubavu, July 17, 2014.

¹⁵⁴ Human Rights Watch interview with former detainee, Kigali, June 22, 2012.

about Kami. When we were preparing to leave, Karemera¹⁵⁵ and Murenzi¹⁵⁶ said that if we spoke about Kami, we would be sent back there.”¹⁵⁷

After detainees were transferred to official detention centers or prisons, prosecuting authorities warned several detainees again not to speak about what happened to them.

In their statements, some detainees mentioned their illegal detention and forced confessions, but hesitated to tell the prosecutor about the torture they had endured. One detainee who was held in Kami told Human Rights Watch:

We were taken to Nyamirambo [in Kigali]. I was alone in front of the prosecuting authorities. I think it was the assistant prosecutor. He had a copy of what I had signed and he started to ask me questions. He said, “You admitted to this, so admit to everything. How did you plan this [crime]?” I said, “I did not do that. I signed because I was in a bad situation.” He said, “Why didn’t you just refuse to confess?” I said, “There were military everywhere and I was scared, but before a public prosecuting official, I have to tell the truth.” I was still scared to say I was beaten. I said that I had spent nine months at Kami and he wrote that down.¹⁵⁸

A former detainee who was arrested in September 2011 and was badly beaten in Mukamira told Human Rights Watch:

When we were leaving to be transferred to Nyabihu district police office, [the soldiers at Mukamira] said, “If you don’t confess, we will bring you back here [to Mukamira].” They said to me, “Don’t say you were detained at Mukamira. Say you were at Nyabihu.” I agreed. I was taken to Nyabihu with four other detainees.... At Nyabihu, we were taken to the sector [local government] office and questioned by a judicial official. He asked me why I

¹⁵⁵ Nine former detainees mentioned the presence of Lt. Emmanuel Karemera in Kami in 2010. Several described him as a commanding officer who oversaw detention in Kami and said he was involved in threatening and torturing detainees.

¹⁵⁶ Eight former detainees told Human Rights Watch that an official known as “Captain Murenzi” oversaw interrogations, forced confessions and torture in Kami and MINADEF in 2010.

¹⁵⁷ Human Rights Watch interview with former detainee, Cyangugu, June 14, 2012

¹⁵⁸ Ibid.

was arrested. I told the story about coming from Congo and I said I had been in Mukamira for a month. He said, “How were you detained in a military camp?” I said, “I was driven there, I was beaten there, I was told to accept things and I accepted.” He said, “No, you are all FDLR in this group.” I denied it. He said, “Don’t lie.” He wrote down what he wanted and said, “Ok, you will spend 30 days in jail.” I just replied to his questions. I didn’t read the document.¹⁵⁹

Visits

Most family members only saw their disappeared relatives when the authorities released them, transferred them to a regular prison, or put them on trial—or, in some cases, only after their conviction. A man arrested in Burundi in September 2010 told Human Rights Watch that he only saw his family when the authorities transferred him to an official prison in March 2012, after his conviction. “My sister said they thought I was dead. She said they had looked everywhere. My father died of a heart attack when he learned I had been arrested.”¹⁶⁰

The lack of knowledge about the fate and whereabouts of their loved ones caused serious psychological harm for many family members of the disappeared. Some families organized mourning periods for relatives they assumed to be dead, only to discover many months later that they were alive.

Several former detainees from Kami and Mukamira told Human Rights Watch that staff from the International Committee for the Red Cross (ICRC) visited them in detention. A former detainee in Kami told Human Rights Watch that it was thanks to the ICRC, who visited him, that he survived his eight months in detention.¹⁶¹ Some detainees were punished for talking to ICRC staff. A detainee who was in Kami in April 2014 told Human Rights Watch:

After the ICRC staff left, soldiers came to ask us what we had told them. I said, “Nothing.” The soldiers said, “You are a traitor. You talked for a long

¹⁵⁹ Human Rights Watch interview with former detainee, Rubavu, March 6, 2013.

¹⁶⁰ Human Rights Watch interview with former detainee, Cyangugu, June 13, 2012.

¹⁶¹ Human Rights Watch interview with former detainee, Kigali, August 26, 2011.

time with the ICRC and, what's more, in a language we don't understand.”
After the ICRC left, they tortured me.¹⁶²

Two former detainees told Human Rights Watch that following their transfer to a regular prison in 2014, ICRC staff members visited them there. A prosecutor then came to see them, accompanied by men who said they were from the National Commission for Human Rights (NCHR) and from a nongovernmental organization. One of the detainees told Human Rights Watch:

There were four men, but we thought they were all soldiers. They looked like soldiers. [The prosecutor] said, “It is not good that you spoke with those white people. You don't need to speak to white people. It will make your problems worse.”¹⁶³

The other former detainee said that the people introduced to them as NCHR staff asked him questions about his arrests and detention conditions, and then said: “You don't have any more problems anymore, right?” The prosecutor told him, “The white people come to tell lies. They are lying to you. They are fooling you.”¹⁶⁴

A former detainee told Human Rights Watch that during his detention in Mukamira in May 2016, he was questioned by someone whom an army captain introduced as being from ‘human rights,’ probably referring to the NCHR:

He was there to question us. There were also two soldiers in the room when I was interviewed.... [The army captain] said, “You have the good fortune to be given the chance to confess. Tell the truth.” The man from ‘human rights’ said, “Yes, I am from human rights, you must tell the truth.”¹⁶⁵

Human Rights Watch saw six letters written to the NCHR by people close to individuals who disappeared in 2014, alerting the NCHR about the disappearances and providing

¹⁶² Human Rights Watch interview with former detainee, Goma, DR Congo, October 28, 2014.

¹⁶³ Human Rights Watch interview with former detainee, Rubavu, July 17, 2014.

¹⁶⁴ Human Rights Watch interview with former detainee, Rubavu, October 29, 2014.

¹⁶⁵ Human Rights Watch interview with former detainee, Musanze, October 12, 2016.

additional information. Human Rights Watch documented the illegal detention in Kami military camp of three of the cases described in these letters. Two of them were detained in Mukamira military camp before their transfer to Kami. Two were seriously beaten in illegal detention, to extract confessions.

The NCHR has the responsibility to visit all places of detention “with the purpose of inspecting whether the rights of detainees are respected and urge relevant authorities to address identified cases of violation of the rights of detainees.”¹⁶⁶ In its annual reports between 2010 and 2016, however, the commission has never reported on military detention.¹⁶⁷

In an April 2016 meeting with the NCHR, representatives told Human Rights Watch, “There is no torture in Rwanda.” One representative told Human Rights Watch that he had been to Kami multiple times, but that there were no detainees there.¹⁶⁸ In January and August 2017, Human Rights Watch wrote to the NCHR to request its response to the findings in this report and several questions, but received no response.

Trials

Human Rights Watch observed seven trials related to security offenses in Rwanda,¹⁶⁹ including the following:

¹⁶⁶ Law determining missions, organization and functioning of the National Commission for Human Rights, no. 19/2013 of 25/03/2013, art. 6.

¹⁶⁷ In its annual report of 2003, the NCHR reported that a military official had been illegally detained in Kami. Representatives discussed this issue with military authorities and visited the detainee. The NCHR also mentioned a complaint from an individual who had allegedly spent 21 days in Mukamira military camp. Following the complaint, the NCHR requested the military prosecution and the military authorities to investigate into this case and prosecute the individuals involved. National Commission for Human Rights, “Annual Report 2003,” July 2004, http://www.cndp.org.rw/fileadmin/user_upload/reports/Annual%20report%202003.pdf (accessed September 28, 2017), p. 18, 56, and 57.

¹⁶⁸ Human Rights Watch interview with members of the National Commission for Human Rights, Kigali, April 26, 2016.

¹⁶⁹ On May 14, 2014, the Ministry of Justice gave Human Rights Watch a table of trials related to crimes against state security. The table included most of the cases described in this chapter, and contained references to several other trials, including that of Jean de la Croix Tuyisenge and 19 other people accused of stealing television sets and other electronic goods. Human Rights Watch researched this case and observed several hearings. Many of the accused were detained unlawfully by the police for several weeks in two unofficial detention centers in Kigali, known as *Chez Kabuga* and *Chez Gacinya*. At least 13 of them stated in court that the police had tortured them, mostly in *Chez Gacinya*. The judges dismissed their claims on the basis that they lacked evidence and failed to order investigations into their alleged torture. Human Rights Watch interviews, Kigali and Rubavu, August 2012 to December 2013 and Human Rights Watch trial observation, Gasabo Intermediate Court, Kigali, July 23, August 16 and August 22, 2012. See also Tuyisenge Jean de la Croix et al., Gasabo Intermediate Court, case No. RDP0386/12/TGI/GSBO-006170/S2/12/DC/MJB, August 23, 2012. For details on *Chez Kabuga* and *Chez Gacinya*, see Human Rights Watch, “*Why Not Call This Place a Prison?*”: *Unlawful Detention and Ill-Treatment in Rwanda’s Gikondo Transit*

- **Trial of Jean Berchmans Mukeshimana and 29 co-accused, Kigali, January 2012**

Thirty people were tried by the Kigali High Court in relation to their alleged participation in a series of grenade attacks in Rwanda since 2008. Several defendants confessed to participating in the attacks and being members of the FDLR; others denied the charges. Twenty-five defendants made statements in court about their illegal detention in military custody; six said they had been detained in Kami, two in MINADEF. Six accused said they had been tortured with a view to extracting confessions. Only four defendants were assisted by a lawyer. On January 13, 2012, the court handed 22 defendants sentences ranging from five years to life imprisonment, for participation in terrorist activities, offenses against internal state security, murder, attempted murder, and forming a criminal gang. The court acquitted and subsequently released eight defendants.¹⁷⁰ On March 4, 2016, in appeal, the Supreme Court confirmed the sentences handed down during the first instance judgment.¹⁷¹

- **Trial of Jean-Baptiste Kanyamuhanda and 12 co-accused, Musanze, December 2012**

Thirteen people were tried by the High Court in Musanze on charges of endangering state security, in collaboration with the FDLR. Several confessed being FDLR combatants; others denied the charges. Eight defendants said they were detained in Mukamira, one after transiting through the “Gendarmerie.” Four said they had been tortured. Only four defendants were assisted by a lawyer during the trial. On December 6, 2012, the court convicted nine defendants to life imprisonment for endangering state security. Two others were sentenced to eight and ten years in prison, and one was acquitted. Their appeal at the Supreme Court has been set for October 16, 2017.¹⁷²

- **Trial of Janvier Ndayambaje and 15 co-accused, Musanze, January 2013**

Sixteen people were tried by a specialized chamber of Musanze High Court on charges of creating an armed group, as FDLR combatants, spies, or recruiters. One said he had been detained in Mukamira, and two others said they had been tortured. None of the

Center, September 24, 2015, <https://www.hrw.org/report/2015/09/24/why-not-call-place-prison/unlawful-detention-and-ill-treatment-rwandas-gikondo#517e6a>.

¹⁷⁰ Human Rights Watch trial observation, *Prosecutor v. Jean Berchmans Mukeshimana et al.*, Kigali High Court, Case No. RP0027/11/HC/KIG-RP 0036/11/HC/KIG, January 13, 2012.

¹⁷¹ *Prosecutor v. Jean Berchmans Mukeshimana et al.*, Supreme Court, Case No. RPA 0090/12/CS, March 4, 2016.

¹⁷² Human Rights Watch trial observation, *Prosecutor v. Jean Kanyamuhanda*, Musanze High Court, Case No. RP 0054/11/HC/MUS, December 6, 2012.

defendants were assisted by a lawyer. On January 8, 2013, the court sentenced seven defendants to seven years in prison and one defendant to twenty years, for conspiring against the government by organizing the recruitment of FDLR fighters. One defendant who confessed to collaborating with the FDLR saw his sentence reduced to three years. The court acquitted seven others because of lack of evidence.¹⁷³ In appeal, the sentences of those who interjected appeal were reduced, from seven to six years and from twenty to ten years.

- **Trial of Jérôme Nsanzimana and 17 co-accused, Musanze, March 2013**

Eighteen people were tried by the Musanze High Court on charges of membership of an unrecognized armed force (the FDLR). The prosecution accused them of planning attacks in Rwanda and spying. Four defendants confessed in court that they were former members of the FDLR. Eleven defendants mentioned their illegal detention, of which ten told the judges that they had been detained in Mukamira. Three said they had transited through the “Gendarmerie.” Four said they had been tortured. Only one defendant was assisted by a lawyer. On March 21, 2013, the court sentenced seven defendants to three and a half to eight years in prison, and acquitted eight others, who were subsequently released. The case of three others was dissociated from the trial and treated separately.¹⁷⁴ In appeal, the sentences of four convicted who interjected appeal was upheld and one was freed.

- **Trial of Aboubacar Nsabiyeze and seven co-accused, Musanze, May 2014**

Eight people were tried by the Musanze High Court on charges of endangering state security by collaborating with the FDLR, including by spying or otherwise providing support to the FDLR. Several accused retracted earlier confessions in court. Some confessed that they had been with the FDLR in the past, but denied the accusations against them. On May 22, the Court convicted one defendant to fifteen years in prison, six others to ten years, and acquitted the last one.¹⁷⁵

¹⁷³ Human Rights Watch trial observation, *Prosecutor v. Janvier Ndayambaje et al.*, High Court of Musanze, Specialized Chamber, case No. RP 0108/11/HC/MUS, January 8, 2013.

¹⁷⁴ Human Rights Watch trial observation, *Prosecutor v. Jérôme Nsanzimana et al.*, High Court of Musanze, case No. RP 004611/HC/MUS, March 21, 2013.

¹⁷⁵ *Prosecutor v. Aboubacar Nsabiyeze et al.*, Musanze High Court, Case No. RP0052/13/HC/MUS, May 22, 2014,

- **Trial of Xaverina Mukashyaka and 12 co-accused, Musanze, July 2015**

Thirteen people were tried by Musanze High Court on charges of complicity in offenses against the government and in terrorist acts. The prosecution accused them of inciting the population to collaborate with the FDLR. Five defendants stated they had been detained in Kami. Five told the judges they had been tortured, to extract confessions and to incriminate others. Five defendants were assisted by a lawyer. On July 29, 2015, the court sentenced six defendants to twenty years in prison and acquitted seven others, who were subsequently released. At the time of writing, the appeal at the Supreme Court is still pending.¹⁷⁶

- **Trial of Joel Mutabazi and 15 co-accused, Kigali, October 2015**

Sixteen people were tried by the Military High Court in Kigali on several security-related charges. Joel Mutabazi, a former presidential bodyguard, was accused of planning to kill President Paul Kagame and of coordinating grenade attacks in 2013 (see Box 6). Eight defendants, including Mutabazi, stated in court that they had been tortured. One said he had been detained in Kami. Most were assisted by a lawyer. In October 2014, the court sentenced Joel Mutabazi and one co-accused to life imprisonment. Twelve other defendants received sentences ranging from four months to twenty-five years, and two were acquitted. Eleven defendants, including Mutabazi, have appealed to the Supreme Court. At the time of writing, no date has been announced for the appeal.¹⁷⁷

Box 6 –

Joel Mutabazi: Tortured in Kami, Abducted from Uganda, Sentenced to Life Imprisonment

Joel Mutabazi, a former bodyguard of Rwandan President Paul Kagame, was arrested in April 2010 and detained in Kami. Four former detainees informed Human Rights Watch that they saw him while he was detained there. He was reportedly arrested because of his suspected links with the RNC and because he had a picture in his phone of Kayumba Nyamwasa, a former senior military official currently in exile and leader in the RNC. Former detainees said he was regularly beaten in Kami, permanently handcuffed, and had padlocks on his ankles. Mutabazi was quoted in a news article

¹⁷⁶ Human Rights Watch trial observation, *Prosecutor v. Xaverina Mukashyaka et al.*, High Court of Musanze, case No. RP 0021/14/HC/MUS, July 29, 2015.

¹⁷⁷ Human Rights Watch trial observation, *Military Prosecutor vs. Joel Mutabazi et al.*, Military High Court, Kigali, RP 0003/013/MHC, October 3, 2015.

saying that he had been half-suffocated and was given electric shocks.¹⁷⁸ He was released from Kami in October 2011.

Mutabazi's wife and brother stated, in an unrelated extradition hearing in the United Kingdom, that they had seen evidence of torture on Mutabazi's body after his release from Kami, which the court found "compelling."¹⁷⁹ Mutabazi later stated in his own trial that he had been tortured and forced to sign statements in Kami.¹⁸⁰

Mutabazi fled Rwanda and sought asylum in Uganda in October 2011. He was granted refugee status. After an assassination attempt in July 2012 by unknown perpetrators, he was moved to a safe house for his protection. In August 2013, a bungled-up abduction attempt failed. But in October 2013, he was abducted and forcibly returned by Ugandan police to Rwanda.¹⁸¹ His whereabouts were unknown for six days, until the Rwandan police announced that he was in their custody. Several of his co-accused were arrested around the same time.

In October 2014, the military high court in Kigali found Mutabazi guilty of terrorism, forming an armed group, and other offenses linked to alleged collaboration with the RNC and the FDLR, as well as accusations that he had planned to kill President Paul Kagame and had coordinated grenade attacks in Kigali in 2013. He was sentenced to life in prison.

Several of Mutabazi's family members were also arrested and stood trial with him. His younger brother, Jackson Karemera, who also lived in Uganda, was sentenced to four months in prison in the same trial, released, and then rearrested. The fate and whereabouts of Karemera remain unknown. Mutabazi's brother-in-law, John Ndararasa, a journalist, disappeared in Kigali on August 7, 2016. He resurfaced in Kigali on March 6, 2017, nearly seven months after his disappearance. He told media that he had fled the country, but decided voluntarily to come back. This story raised suspicions among many observers. Human Rights Watch has documented numerous cases in Rwanda, some outlined in this report, where former detainees were forced to make false claims following months of illegal, secret detention, and torture.¹⁸²

¹⁷⁸ Jerome Starkey, "On the run from Rwandan assassins: 'Paul Kagame has no mercy. He is a killer,'" *The Times*, October 8, 2012, <https://www.thetimes.co.uk/article/on-the-run-from-rwandan-assassins-paul-kagame-has-no-mercy-he-is-a-killer-v7sknbjpodz> (accessed September 28, 2017).

¹⁷⁹ *The Government of the Republic of Rwanda v. Vincent Brown, et al.*, Westminster Magistrates' Court, December 22, 2015.

¹⁸⁰ Human Rights Watch trial observation, Military High Court, Kigali, May 13, and October 3, 2014.

¹⁸¹ "Uganda/Rwanda: Forcible Return Raises Grave Concerns," Human Rights Watch news release, November 4, 2013, <https://www.hrw.org/news/2013/11/04/uganda/rwanda-forcible-return-raises-grave-concerns>.

¹⁸² "Rwanda: Opposition Activist Missing," Human Rights Watch news release, September 29, 2016, <https://www.hrw.org/news/2016/09/29/rwanda-opposition-activist-missing>.

Allegations of Torture and Illegal Detention in Court, and Unfair Trials

In numerous trials observed by Human Rights Watch, judges put pressure on defendants to prevent them from testifying about their time in military detention. Despite this, in trials observed by Human Rights Watch, at least 51 defendants¹⁸³ stated in court that they had been detained illegally, often mentioning Kami, Mukamira, the “Gendarmerie,” MINADEF, or other locations. Twenty-nine defendants stated in court during trials observed by Human Rights Watch that they were tortured, and some described the torture methods in detail (for more information, see the table in Appendix I).

One defendant told the court:

I was kidnapped on April 25, 2014, and I was taken to a military camp where I was illegally detained for 40 days. The torture they inflicted on me is beyond comprehension. They tied a string to my genitals weighed down with a stone and forced me to stand up and walk while pulling that string. Let me undress to show you how I suffered from that torture.¹⁸⁴

The judge responded:

No, you don’t need to undress because it won’t prove what you are saying. Instead, prove to me that you were kidnapped and made to disappear. Do not come back to [the issue of] torture. You don’t have any evidence to prove it.¹⁸⁵

In the appeal proceedings in another trial, the Supreme Court took a similar position:

The court thinks that even if [name of the accused withheld] says that he was beaten by intelligence agents and that he was ill-treated, what brought him to confess that he is a member of the FDLR and contributed 20,000

¹⁸³ A total of 51 defendants stated in trials observed by Human Rights Watch that they had been illegally detained. Human Rights Watch also spoke to many of these defendants about their conditions of detention.

¹⁸⁴ Human Rights Watch trial observation, Musanze High Court, May 27, 2014.

¹⁸⁵ Ibid.

Rwandan Francs [about \$24] [to the FDLR]? This doesn't clear his charges, as he has not been able to prove [the allegations of mistreatment].¹⁸⁶

These responses illustrate the attitude of many Rwandan judges to defendants' torture allegations. In all the trials observed by Human Rights Watch, judges failed to order a thorough and independent investigation into torture allegations, as required by their obligations under international human rights law. On the contrary: judges placed the onus on defendants to prove they had been tortured, which, in most cases, was very difficult, as significant time had elapsed since the torture, and most torture victims had not had access to medical examinations. In cases where the defendants wanted to show the judges evidence of torture, such as scars, photographs, or medical documents, the judges often refused to consider such evidence. In some cases, judges told defendants who said they had been tortured that they were lying. In the conclusion of the trial of Mutabazi and his co-accused, the president of the court said that the court had sentenced several defendants to long prison terms because they had lied about being tortured.¹⁸⁷

Citing what they claimed was absence of proof, judges also refused to dismiss evidence or confessions which, according to the defendants, were obtained under torture. Under Rwandan law, an individual can only withdraw a confession when he or she is able to prove that it was a result of physical torture.¹⁸⁸ However, under international law, the obligation is on the state, not the accused, to ensure that any statement "made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."¹⁸⁹

Several defendants in the trials observed by Human Rights Watch were convicted solely based on their earlier confessions, which they said were extracted under torture and which they retracted during the trial. Others were convicted based on accusations of their co-defendants, some of whom also told the judges that they had been tortured. This raises serious questions about the fairness of such trials.

¹⁸⁶ *Prosecutor v. Mukeshimana Jean Berchmans et al.*, Supreme Court, Case No. RPA 0090/12/CS, March 4, 2016, para. 102.

¹⁸⁷ Human Rights Watch trial observation, Kigali High Court, October 3, 2014.

¹⁸⁸ Law relating to evidence and its production, No. 15 of 12/06/2004, art. 110.

¹⁸⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, entered into force June 26, 1987, ratified by Rwanda December 15, 2008, art. 15.

Only a small number of defendants in trials observed by Human Rights Watch were assisted by a lawyer. Those who were assisted told Human Rights Watch about the limitations of their legal assistance. One former detainee told Human Rights Watch that his lawyer withdrew from the case before the trial started, because he was afraid.¹⁹⁰ Another said his lawyer had advised him not to speak about the torture inflicted on him, as it would complicate his case.¹⁹¹ Several detainees confirmed that lawyers were afraid to take on such sensitive cases and reluctant to mention their clients' torture and illegal detention in court. Some lawyers, however, did mention in court that their clients had been tortured or illegally detained.

Box 7 – Military Court Fails to Investigate Torture Allegations

The conviction of three former Rwandan military officials in a flawed trial in 2016 is a clear example of the military high court's disregard of torture allegations.

Starting in January 2015, three (retired) military officials—retired Brig. Gen. Frank Rusagara (former secretary general of the Defence Ministry and military attaché in the Rwandan High Commission in the United Kingdom), Col. Tom Byabagamba (former head of the presidential guard), and retired Sgt. François Kabayiza—were tried by the Military High Court in Kanombe. Rusagara and Byabagamba were charged with inciting insurrection and tarnishing the government's image, in relation to private comments critical of government policy.

Kabayiza said in court that military personnel had tortured him in detention. The judges did not order an investigation into his allegations, claiming he had no proof that he was tortured.

On March 31, 2016, the court sentenced Byabagamba and Rusagara to 21 and 20 years in prison respectively, and sentenced Kabayiza to five years for concealing evidence. Byabagamba and Rusagara are being detained in Kanombe military camp. All three announced they would appeal. At the time of writing, the date of the appeal has not been set.¹⁹²

¹⁹⁰ Human Rights Watch interview with former detainee, Huye, June 27, 2012.

¹⁹¹ Human Rights Watch interview with former detainee, Kampala, Uganda, July 10, 2012.

¹⁹² Human Rights Watch trial observation, *Military prosecutor v. Tom Rusagara et al.*, Military High Court, case No. 0006/014/HCM, March 31, 2016. For more information, see "Rwanda: Ex-Military Officers Convicted Over Comments," Human Rights Watch news release, April 1, 2016, <https://www.hrw.org/news/2016/04/01/rwanda-ex-military-officers-convicted-over-comments>.

Impunity for Perpetrators

Former detainees, including a former soldier, told Human Rights Watch that several officials who detained and ill-treated them were working for the Directorate of Military Intelligence (DMI). The DMI, officially known as “J2,” is the branch of the RDF responsible for military intelligence and security.¹⁹³ Since the late 1990s, military intelligence officials have been involved in numerous cases of human rights violations such as those documented in this report.¹⁹⁴ Former detainees also mentioned the involvement of other military, police, and local government officials, as well as officials of the National Intelligence and Security Service (NISS), the civilian intelligence agency.

Many former detainees knew the identity of some of the officials who tortured or ill-treated them. Human Rights Watch received information about dozens of officials involved in such practices, but this report only names those cited by multiple former detainees.

At least five former detainees mentioned the involvement of each of the following officers in illegal detention and torture in MINADEF and Kami in 2010 and 2014:

- **Lt. Emmanuel Karemera:** Nine former detainees mentioned his presence in Kami in 2010. Several described him as a commanding officer who oversaw detention in Kami and said he was involved in threatening and torturing detainees.¹⁹⁵
- **Lt.-Col. Faustin Tinka:** Seven former detainees mentioned his involvement in interrogations at MINADEF and Kami in 2010. Several told Human Rights Watch that Tinka worked for military intelligence. One of them knew Tinka personally from before his arrest.¹⁹⁶ In 2012, Tinka was appointed defense attaché at the Rwandan High Commission in Tanzania.¹⁹⁷

¹⁹³ Presidential Order determining the responsibilities, composition and functioning of the decision making councils of the Rwanda Defence Force, No. 34/01 of 03/09/2012, art. 34.

¹⁹⁴ See for example Human Rights Watch, *Rwanda: The Search for Security and Human Rights Abuses*, Vol. 12, no. 1(A) April 2000, <https://www.hrw.org/reports/pdfs/r/rwanda/rwan004.pdf>, p. 4.

¹⁹⁵ Human Rights Watch interviews with former detainees, Cyangugu, Kigali, Rubavu, Kampala (Uganda), and via phone, between August 2011 and September 2016.

¹⁹⁶ Human Rights Watch interviews with former detainees, Cyangugu, Rubavu, Bujumbura (Burundi), Cibitoke (Burundi), and Kampala (Uganda), between April 2012 and March 2016.

¹⁹⁷ “Itangazo ry’ibyemezo by’Inama y’Abaminisitiri yo kuri uyu wa 16 Werurwe 2012,” *Igihe*, March 16, 2012, <http://igihe.com/amakuru/u-rwanda/itangazo-ry-ibyemezo-by-inama-y-abaminisitiri-yo-kuri-uyu-wa-16-werurwe-2012> (accessed September 28, 2017); “High Commission Staff,” High Commission of the Republic of Rwanda in Tanzania, no date, <http://tanzania.embassy.gov.rw/about-the-high-commission/high-commission-staff.html> (accessed September 28, 2017).

- **Captain Murenzi:** Eight former detainees told Human Rights Watch that an official known as “Captain Murenzi” oversaw interrogations, forced confessions and torture in Kami and MINADEF in 2010. Human Rights Watch was unable to confirm his first name. One detainee could read his name on his military uniform. Another mentioned his involvement in arrests in 2014.¹⁹⁸ Murenzi was believed to be responsible for operations at the NISS.
- **Major Prosper, alias “Kaceri”:** Six former detainees mentioned to Human Rights Watch his involvement in interrogation and threats against detainees in MINADEF and Kami in 2010. One said that in 2010, he worked at DMI. He showed his ID card to one detainee and told another his name.¹⁹⁹ In one trial, one of the accused mentioned that, “he confessed after being tortured and repeated [the same confession] again [during questioning] at the prosecutor’s office. Major “Gaceri” [“Kaceri”] was present during interrogations by the military prosecution and forced him to repeat the same thing in front of the civilian prosecutor.”²⁰⁰
- **Capt. Richard Ndakaza:** Six former detainees told Human Rights Watch that he oversaw interrogations, forced confessions, and torture at Kami in 2014.²⁰¹

At least two defendants mentioned the names of Lt. Emmanuel Karemera, Captain Murenzi, and Major Prosper, alias “Kaceri,” in their appeal trial submission at the Supreme Court. One also mentioned Lt.-Col. Faustin Tinka.²⁰²

Human Rights Watch is not aware of any investigation, by any official Rwandan institution, into allegations of illegal detention, torture or ill-treatment in military centers, or into the alleged role of the above-named officers, or their commanding officers.

The military intelligence department of the RDF (J2) is headed by Colonel Jeannot Kibenzi Ruhunga, who replaced Maj. Gen. Richard Rutatina when the latter was dismissed in February 2016. Rutatina served as head of military intelligence for two periods between

¹⁹⁸ Human Rights Watch interviews with former detainees, Cyangugu, Kigali, Rubavu, Bujumbura (Burundi), Kampala (Uganda), and over the phone, between May 2012 and September 2016.

¹⁹⁹ Human Rights Watch interviews with former detainees, Cyangugu, Huye, Kigali, Cibitoke (Burundi), Bujumbura (Burundi), between April and July 2012.

²⁰⁰ *Prosecutor v. Mukeshimana Jean Berchmans et al.*, Supreme Court, Case No. RPA 0090/12/CS, March 4, 2016, para. 75.

²⁰¹ Human Rights Watch interviews with former detainees, Rubavu, between July and October 2014.

²⁰² Submission for appeal trial proceedings, on file with Human Rights Watch.

2011 and 2016. In 2011 he replaced Dan Munyuza, who became head of external intelligence at NISS, before both were suspended in January 2012 on grounds of indiscipline.²⁰³ Rutatina was replaced by Lt.-Col. Franco Rutagengwa,²⁰⁴ but took back over in October 2015.²⁰⁵ Dan Munyuza is currently the deputy Inspector General of Police in charge of operations.

Between 2010 and 2016, the NISS was headed by Colonel Dr. Emmanuel Ndahiro (until July 2011), Lt. Gen. Karenzi Karake (July 2011 – March 2016) and Brig. Gen. Joseph Nzwabamwita (March 2016 – current). Karake was security and defense advisor of president Paul Kagame, until he retired in July 2017, a post previously occupied by Rutatina (until July 2011) and Lt.-Col. Patrick Karuretha (July 2011 – March 2016), now principal private secretary to president Kagame.²⁰⁶

There have been a few cases in which members of the police were tried and convicted for torture. In 2013, two police officers were sentenced to seven years and one to three and a half years in prison on charges related to torture.²⁰⁷ The NCHR has intervened in response to a number of complaints of ill-treatment by police, resulting in administrative sanctions and the conviction of two policemen in 2009 and two others in 2015.²⁰⁸ However, none of the NCHR's annual reports between 2010 and 2016 mention unlawful or arbitrary detention or torture in military custody, nor has the NCHR intervened on behalf of detainees in such cases, to Human Rights Watch's knowledge, despite the fact that former detainees wrote

²⁰³ James Karuhanga, "Top RDF officers suspended," *The New Times*, January 19, 2012, <http://www.newtimes.co.rw/section/article/2012-01-19/38726/> (accessed September 28, 2017).

²⁰⁴ "Rwanda: RDF Gets New Army Chief of Staff," *News of Rwanda*, July 19, 2016, <http://www.newsofrwanda.com/ibikorwa/11326/rwanda-rdf-army-chief-staff/> (accessed September 28, 2017).

²⁰⁵ Rodrigue Wirahira, "New changes in RDF leadership," *The New Times*, October 29, 2015, <http://www.newtimes.co.rw/section/article/2015-10-29/193931/> (accessed September 28, 2017).

²⁰⁶ Edmund Kagire, "New security chiefs appointed," *The New Times*, July 14, 2011, <http://www.newtimes.co.rw/section/article/2011-07-14/33013/> (accessed September 28, 2017); "Itangazo Riturutse Muri Perezidansi Ya Repubulika," Rwandan presidency press release, March 22, 2016.

²⁰⁷ Government of Rwanda, "Consideration of reports submitted by States parties under article 10 of the Convention, Second periodic reports of States parties due in 2016, Rwanda", CAT/C/RWA/2, September 5, 2016, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FRWA%2F2&Lang=en (accessed September 28, 2017), para. 89.

²⁰⁸ National Commission for Human Rights, "Annual Activity Report July 2012 – June 2013," September 2013, http://www.cndp.org.rw/fileadmin/user_upload/reports/Annual%20Report%202012-2013.pdf (accessed September 28, 2017), pp. 70-74; National Commission for Human Rights, Annual Activity Report July 2013 – June 2014, September 2014, http://www.cndp.org.rw/fileadmin/user_upload/Annual_Report_2013-2014.pdf (accessed September 28, 2017), pp. 59-60; and Izuba Rirashe, "Ubushinjacyaha bukomeje gukurikirana Abapolisi bakekwaho gukora 'iyicarubozo,'" *Igihe*, April 23, 2015, <http://igihe.com/amakuru/u-rwanda/article/ubushinjacyaha-bukomeje> (accessed September 28, 2017).

to the NCHR to bring their cases to its attention. Furthermore, the NCHR has the power to visit detention sites and request relevant organs to bring to justice any person suspected of having committed human rights violations.²⁰⁹

The office of the Ombudsman also has the power to receive complaints and to investigate actions of government institutions “in which the population finds injustice,” to request disciplinary sanctions against government employees, to prosecute any offence in its mission and to request the Supreme Court to reconsider and review last instance judgments by ordinary and military courts “if there is any persistence of injustice.”²¹⁰ Human Rights Watch is not aware of any action by the office of the Ombudsman on cases of unlawful detention or torture in military custody.

Both chambers of parliament—the Chamber of Deputies and the Senate—have the responsibility to exercise oversight over government activities and have the power to ask written and oral questions, organize hearings, and set up commissions of inquiry.²¹¹

None of the detainees or former detainees interviewed by Human Rights Watch had filed a complaint against officials for illegal detention or torture, partly out of fear and partly out of a lack of faith in the independence of the justice system and in the possibility of obtaining redress. One former detainee had filed a complaint at a lower instance court after military and police beat him in August 2008, but an RDF major called the detainee’s lawyer to try to dissuade him from filing the complaint. He still filed the complaint but the court rejected it.²¹²

After Release

Several of those released from military detention continued to face difficulties with the authorities and with their community after their release, as they were perceived as collaborators of the FDLR or other opposition groups. Many found it hard to reintegrate into

²⁰⁹ Law determining missions, organization and functioning of the National Commission for Human Rights, no. 19/2013 of 25/03/2013, art. 7.

²¹⁰ Law determining the mission, powers, organization and functioning of the Office of the Ombudsman, No 76/2013 of 11/9/2013, arts. 4, 6, 10, 13, and 15.

²¹¹ Constitution of the Republic of Rwanda of 2003, revised in 2015, arts. 128 and 131.

²¹² Human Rights Watch interview with former detainee, Cibitoke, Burundi, July 1, 2012.

normal life because of this stigma, as well as the serious physical and psychological problems caused by torture and their experiences in detention.

A former detainee held in Mukamira and Kami, who was released in July 2015 after being acquitted, told Human Rights Watch:

People I know are scared of me. They don't talk to me. I try to find work, but I'm told I'm dirty. People call me an "infiltrator." My friends don't want to speak to me because they don't want to be associated with me. I had to move house.... Because of the torture I suffered, it is difficult for me to do manual labor. It is difficult to get medicine because I have no money.... I have a problem with my eyes. I was beaten in the head at Mukamira and Kami and now I'm seeing spots.²¹³

Human Rights Watch documented several cases of people who were released from military detention and rearrested. A man who was detained in the "Gendarmerie" and Mukamira in 2011, and was later tried and acquitted, told Human Rights Watch that he was rearrested in March 2013 and taken to Kami, where he was interrogated again about his links with the FDLR.²¹⁴

Another man, who was detained in the "Gendarmerie" in early 2014, told Human Rights Watch that when he arrived home after his release, he found that his house had been robbed. When he reported this to the local authorities, they called the military, who rearrested him, because he had mentioned his detention in the "Gendarmerie." He spent six days in a police cell and was then released.²¹⁵

²¹³ Human Rights Watch interview with former detainee, Musanze, October 12, 2016.

²¹⁴ Human Rights Watch interview with former detainee, Kampala, Uganda, June 30, 2013.

²¹⁵ Human Rights Watch interview with former detainee, Musanze, May 3, 2014.

V. Government response

On December 14, 2016, Human Rights Watch sent a detailed letter to the Rwandan justice minister, its principal interlocutor within the Rwandan government, presenting the research findings described in this report and requesting a response to specific questions. Despite more than 10 reminders, Human Rights Watch received no reply. A senior Human Rights Watch staff went to Kigali in February 2017 to discuss these findings with the Rwandan government, but no Rwandan government official was willing to meet him. Human Rights Watch sent a second detailed letter to the justice minister on August 23, 2017 (see Appendix II), but did not receive a response.

The Rwandan government has stated on other occasions that, “There is no unofficial detention in Rwanda.”²¹⁶ In a submission for the United Nations Committee Against Torture (CAT), a body of independent experts that monitors the implementation of the Convention against Torture, the government said that “Kami is a military barracks in Kinyinya sector and not a place of detention. As such no individuals are held or interrogated there.”²¹⁷ Justice Minister Johnston Busingye previously voiced this position during a review before the Human Rights Committee (HRC), a body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its state parties, in March 2016, where he stated that “no interrogation of suspects is carried out” in Kami, and “no people are imprisoned there.”²¹⁸

During the HRC review, Busingye said that “by law and practice, the RDF does not detain individuals.”²¹⁹ In a meeting with Human Rights Watch in May 2014, he said, “You can be temporarily detained by the military, even a citizen can arrest you, but then you must be taken to a police station.”²²⁰

²¹⁶ Government of Rwanda, “Consideration of reports submitted by States parties under article 19 of the Convention, Second periodic reports of States parties due in 2016, Rwanda,” CAT/C/RWA/2, September 5, 2016, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FRWA%2F2&Lang=en (accessed September 28, 2017), para. 101.

²¹⁷ *Ibid.*, para. 104.

²¹⁸ Human Rights Watch observation of Human Rights Committee review of Rwanda, Geneva, March 18, 2016.

²¹⁹ *Ibid.*

²²⁰ Human Rights Watch meeting with Justice Minister Johnston Busingye, Kigali, May 13, 2014.

In the same meeting Busingye said that arbitrary arrests are against the law, but can still happen for different reasons. He explained that Rwandan law allows victims or family members to take proactive steps to find their loved ones who may be arbitrarily detained, and that this can then result in an order from a judge to either release the individual or legalize the detention. If a judge finds that the detention was unlawful, Busingye said, a judge can decide to prosecute the person who is responsible, and can reduce the time in illegal detention when the victim is convicted.²²¹

In its submission to the CAT, the government asserted that “appropriate measures and steps have been put in place to effectively protect all persons from enforced disappearance” and that “all cases of alleged disappearances reported to the police have been duly investigated.”²²²

During the HRC review, Minister Busingye said that there should be zero tolerance for torture.²²³ He told Human Rights Watch in 2014 that if there is proof of torture, “there must be institutional measures taken to stop it” and that “the individual responsible must be brought to account.” He said: “Let us agree that if this happens, then it should stop. Torture is not needed to gather evidence and it is not needed to get a confession.” He added: “If there are scores of RDF doing these bad things, then we will address it.”²²⁴

In its presentation at the Universal Periodic Review (UPR) process, a periodic review of the human rights record of UN member states at the UN Human Rights Council, the Rwandan government delegation said, referencing the CAT and the International Covenant on Civil and Political Rights, to which Rwanda is party, that “all security forces, including the military and police, were required to uphold the tenets of those important international standards in the conduct of their work, and failing to do so would result in disciplinary as well as legal action.”²²⁵ In reply to a recommendation to ensure conformity of military detention centers

²²¹ Ibid.

²²² Government of Rwanda, “Consideration of reports submitted by States parties under article 19 of the Convention, Second periodic reports of States parties due in 2016, Rwanda,” para. 114.

²²³ Human Rights Watch observation of Human Rights Committee review of Rwanda, Geneva, March 18, 2016.

²²⁴ Human Rights Watch meeting with minister of justice Johnston Busingye, Kigali, May 13, 2014.

²²⁵ Human Rights Council, “Report of the Working Group on the Universal Periodic Review, Rwanda,” A/HRC/31/8, December 18, 2015, <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/17/4&Lang=E> (accessed September 28, 2017), para. 16.

with Rwanda's laws and international standards, the delegation said that the "compliance of the conditions in military detention centres and prisons was taking place."²²⁶

In its UPR roadmap and National Human Rights Action plan for 2017-2020, the government committed to improve conditions in detention facilities to ensure that they meet international standards, including by capacity building of the Ministry of Defence.²²⁷

In the May 2014 meeting with Human Rights Watch, Busingye said he was told that lawyers are reluctant to raise torture during judicial proceedings, but that he did not know if this was correct. He said that "judges are due to make determinations on these things [torture allegations] when raised."²²⁸

In its submission for the upcoming review at the CAT, the government said that there had been a small number of torture cases prosecuted in Rwandan courts.²²⁹

On incommunicado detention, Busingye said in March 2016 that it is not acceptable and that victims should present such cases to court.²³⁰

²²⁶ "Human Rights Council adopts outcomes of Universal Periodic Review of Rwanda, Nepal, and Austria," Human Rights Council press release, March 16, 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17241&LangID=E#sthash.K1oRJg7a.dpuf> (accessed September 28, 2017).

²²⁷ Rwandan Government, "Roadmap for implementation of Rwanda's UPR Recommendations 2015," Recommendation No. 13; Ministry of Justice, "National Human Rights Action plan of Rwanda: 2017-2020," pp. 35-36.

²²⁸ Human Rights Watch meeting with Justice Minister Johnston Busingye, Kigali, May 13, 2014.

²²⁹ Government of Rwanda, "Consideration of reports submitted by States parties under article 19 of the Convention, Second periodic reports of States parties due in 2016, Rwanda," CAT/C/RWA/2, para. 89.

²³⁰ "Human Rights Committee reviews the report of Rwanda," OHCHR press release, March 18, 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18473&LangID=E#sthash.nPbJ395E.dpuf> (accessed September 28, 2017).

VI. National and International Legal Standards

The violations documented in this report are in clear violation of Rwandan and international law, which prohibit enforced disappearances, arbitrary and unlawful arrest and detention, and the use of torture and other ill-treatment. Rwandan and international law require detainees to be held in humane conditions and treated with dignity, and impose legal obligations regarding procedural safeguards for arrest, detention, and the treatment of detainees. Rwanda is a party to the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) and the African Charter on Human and Peoples' Rights (African Charter), all of which prohibit violations of these fundamental norms.

Torture and Forced Confessions

Rwanda's constitution states that "no one shall be subjected to torture or physical abuse, or cruel, inhuman or degrading treatment."²³¹ Torture is a crime under Rwanda's 2012 penal code, which uses a definition largely inspired by the wording of the Convention against Torture. Torture is punishable with up to two years in prison, increased to seven when there are permanent consequences, or life imprisonment when torture results in the death of a victim. Maximum sentences are applied when the offender is a security service officer or a civil servant.²³²

Under international law, states are obligated to ensure that any statement "made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."²³³ States must ensure that, even without an official complaint, allegations of torture are promptly, impartially, independently, and thoroughly investigated, that victims have access to an effective remedy and receive reparation, and that those responsible are brought to justice.²³⁴

²³¹ Constitution of the Republic of Rwanda of 2003, revised in 2015, art. 14.

²³² Organic Law instituting the penal code, No. 01/2012/OL of 02/05/2012, arts. 176 and 177.

²³³ Convention against Torture, art. 15.

²³⁴ UN Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (2004), paras. 15 and 16; UN Committee Against Torture, General Comment No. 3, Implementation of article 14 by States parties, U.N. Doc. CAT/C/GC/3 (2012), para. 27.

According to Rwandan law, a victim has the right to be interrogated in the presence of a trusted person, to remain silent, and to be protected if he or she expresses concern for his or her safety.²³⁵ Rwandan law prohibits “torture or brain washing to extort an admission from the parties or the testimony of witnesses.”²³⁶ Illegally obtained evidence is considered null and void before Rwandan courts.²³⁷ However, Rwandan law relating to evidence and its production states that a person cannot retract a judicial admission unless it can be proved it was a result of physical torture. But the same law specifies that a judicial admission refers to “statements the accused or his or her representative makes before the court.”²³⁸ Signed confessions submitted by prosecutors do not therefore supersede the defendant’s statement in court.

International law prohibits anyone from being compelled to testify against themselves or to confess guilt.²³⁹

During its latest review of Rwanda in March 2016, the UN Human Rights Committee (HRC) expressed its concern about “allegations that torture and ill treatment has been practiced in these places [unofficial detention centers] as a means to elicit confessions.” The CAT expressed similar concerns during its 2012 review of Rwanda, mentioning beatings and electric shocks in Kami. Both committees recommended prompt investigations into these violations and action to bring the perpetrators to justice.²⁴⁰

On June 30, 2015, Rwanda ratified the Optional Protocol to the Convention against Torture (OPCAT), thereby allowing visits to places of detention by the Subcommittee on Prevention

²³⁵ Law relating to the code of criminal procedure, No. 30/2013 of 2013, art. 53.

²³⁶ Law relating to evidence and its production; International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, art. 14(g); and Convention against Torture, arts. 1 and 15.

²³⁷ Government of Rwanda, “Consideration of reports submitted by States parties under article 19 of the Convention, Second periodic reports of States parties due in 2016, Rwanda,” CAT/C/RWA/2, September 5, 2016, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FRWA%2F2&Lang=en (accessed September 28, 2017), para. 92; Law relating to evidence and its production, arts. 6, 7, and 8.

²³⁸ Law relating to evidence and its production, art. 110.

²³⁹ ICCPR, art. 14(g); and Convention against Torture, arts. 1 and 15.

²⁴⁰ Human Rights Committee, “Concluding observations on the fourth periodic report of Rwanda,” CCPR/C/RWA/CO/4, May 2, 2016, <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CCPR/C/RWA/CO/4&Lang=E> (accessed September 28, 2017), paras. 19 and 20; Committee Against Torture, “Consideration of reports submitted by States parties under article 19 of the Convention, Concluding observations of the Committee Against Torture, Rwanda,” CAT/C/RWA/CO/1, June 26, 2011, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/RWA/CO/1&Lang=En (accessed September 28, 2017), paras. 10 and 11.

of Torture (SPT), a UN body. The SPT has a state visit to Rwanda planned for mid-October 2017. The OPCAT requires ratifying states to set up a national preventive mechanism for the prevention of torture at the domestic level, at the latest one year after its entry into force, ratification or accession.²⁴¹ Rwanda has yet to create such a mechanism, despite accepting a recommendation during the Universal Periodic Review (UPR) to “swiftly” establish one.²⁴²

Safeguards and Procedure for Arrests and Detention

Under Rwandan law, judicial police officers enjoy the power to arrest and detain suspects, subject to several conditions. Intelligence officers of the National Intelligence and Security Service (NISS) also have powers of judicial police.²⁴³

Under the 2008 counterterrorism law, other security agents or “any other authorized person” can arrest persons suspected of having or attempting to commit acts of terrorism, but must hand them over to the nearest police station within 48 hours.²⁴⁴

After a person is arrested, a judicial police officer must prepare a case-file or a statement, and submit it to a competent prosecutor. If the prosecutor decides that is appropriate to prosecute the accused, he/she shall petition the court to order provisional detention of the suspect. The court shall be required to try the case on merit within 15 days of receipt of the case file.²⁴⁵

A person held in custody must be informed about the charges against him or her and about his or her right to be assisted by a lawyer.²⁴⁶

²⁴¹ Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), adopted December 18, 2002, G.A. res. A/RES/57/199, [reprinted in 42 I.L.M. 26 (2003)], entered into force June 22, 2006, arts. 3 and 17.

²⁴² Human Rights Council, “Report of the Working Group on the Universal Periodic Review, Rwanda,” A/HRC/31/8, December 18, 2015, <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/17/4&Lang=E> (accessed September 28, 2017); see also Human Rights Watch, “Submission to the Human Rights Committee in advance of the fourth periodic review of Rwanda,” February 12, 2016, <https://www.hrw.org/news/2016/02/12/submission-human-rights-committee-advance-fourth-periodic-review-rwanda>. The Universal Periodic Review is a mechanism of the United Nations Human Rights Council that periodically examines the human rights record of member states.

²⁴³ Law determining the powers, mission, organisation and functioning of the national intelligence and security service, No. 73/2013, art. 9.

²⁴⁴ Law on counter terrorism, No. 45/2008, arts 44 and 45.

²⁴⁵ Law relating to the code of criminal procedure, arts. 34 and 37.

²⁴⁶ Law relating to the code of criminal procedure, arts. 38 and 39.

Military police officers, responsible for enforcing law and order within the army, can detain “members of the military and their co-offenders and accomplices” in custody facilities at each Brigade Headquarters or “at any other appropriate facility as may be determined by the Defence Management Committee.”²⁴⁷ If a suspect is arrested under the terrorism law, he or she could be held in “another place,” for a maximum of 48 hours. Under international law, detainees should only be held in “places officially recognized as places of detention.”²⁴⁸

Under international law, the grounds and procedure for any deprivation of liberty must be established by law, which should be precise, clear, and public. Persons who are deprived of their liberty must be informed at the time of arrest about the reason for the arrest and promptly of any charges against them. An arrested suspect has the right to defend him or herself through legal representation of his or her choosing at all stages of legal proceedings, including prior and during any questioning. Arrest and detention must be subject to prompt judicial review and the detained person is entitled to a trial in reasonable time.²⁴⁹

Detainees should be held only in facilities officially acknowledged as places of detention.²⁵⁰ States are obliged to ensure that detainees have access to necessities and services that satisfy their basic needs, including appropriate provisions for living accommodation, personal hygiene, food, and medical service. Every detainee has the right to health, including healthcare and adequate conditions of detention.²⁵¹

International human rights law and all the rights protected therein apply to all forms of arrest and detention including in the context of counterterrorism. The African Commission on Human and Peoples’ Rights has affirmed that, “African States should ensure that the measures taken to combat terrorism fully comply with their obligations under the African

²⁴⁷ Law relating to the code of criminal procedure, art. 40, Ministerial Order determining custody facilities for suspects being investigated by the military judicial police, No. 06/MINADEF/2014.

²⁴⁸ UN Human Rights Committee, General Comment No. 20, “Prohibition of torture or other cruel, inhuman or degrading treatment or punishment (article 7),” A/44/40, March 10, 1992, para. 11.

²⁴⁹ ICCPR, art. 9; ACHPR, art. 6; Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35 (2014); African Commission on Human and Peoples’ Rights, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, 55th Ordinary Session (2014).

²⁵⁰ Human Rights Committee, General Comment No. 35, paras. 58 and 20.

²⁵¹ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, entered into force January 3, 1976, article 12; Standard Minimum Rules for the Treatment of Prisoners, rule 17.

Charter on Human and Peoples' Rights and other international human rights treaties, including the right to life, the prohibition of arbitrary arrests and detention, the right to a fair hearing, the prohibition of torture and other cruel, inhuman and degrading penalties and treatment.”²⁵²

All detainees are to be given all reasonable facilities to communicate with and receive visits from family and friends. The former UN Special Rapporteur on Torture has called for authorities to inform relatives of the arrest and place of detention within 18 hours.²⁵³ The Principles on Fair Trial in Africa state that any confession or admission made during incommunicado detention should be considered as having been obtained by coercion, and therefore must be excluded from evidence.²⁵⁴ The former UN Special Rapporteur on torture has also noted that “torture is most frequently practiced during incommunicado detention” and that “[i]ncommunicado detention should be made illegal.”²⁵⁵

Arbitrary and Illegal Detention and Enforced Disappearances

According to Rwandan law, detention in violation of the provisions of the Code of Criminal Procedure is unlawful and punishable, including “detaining a person in a place other than a relevant custody facility.”²⁵⁶ When a civil servant detains a person without order or judgment in conformity in the law, he or she is liable to a term of imprisonment equivalent to the term incurred by the illegally detained person.²⁵⁷

Several treaties to which Rwanda is a party prohibit arbitrary or unlawful detention.²⁵⁸ Unlawful detention is defined as deprivation of liberty that is not imposed either on

²⁵² African Commission on Human and Peoples' Rights, Resolution on the Protection of Human Rights and the Rule of Law in the Fight against Terrorism, No. 88 (2005); African Commission on Human and Peoples' Rights, Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa (2015).

²⁵³ Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Report to the 59th session of the UN Commission on Human Rights, E/CN.4/2003/68, para. 26(g).

²⁵⁴ Human Rights Council, “Joint study on global practices in relation to secret detention in the context of countering terrorism,” A/HRC/13/42, February 19, 2010; African Commission on Human and Peoples' Rights, “Principles and guidelines on the right to a fair trial and legal assistance in Africa,” No. DOC/OS(XXX)247, para. N6(d)(i).

²⁵⁵ Special Rapporteur of the Commission on Human Rights, Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, Report to the UN General Assembly, A/56/156, para. 39 (f).

²⁵⁶ Law relating to the code of criminal procedure, art. 90.

²⁵⁷ Organic Law instituting the penal code, arts. 273 and 668.

²⁵⁸ ICCPR, art. 9; ACHPR, art. 6.

grounds provided for in law or not in accordance with procedures as established by law.²⁵⁹ The concept of “arbitrary” however is broader and includes “elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”²⁶⁰ Most detentions documented in this report can be categorized both as “arbitrary” and “unlawful.”

UN bodies have repeatedly condemned secret and incommunicado detention as a serious rights violation that should be proscribed by law.²⁶¹ Incommunicado detention is generally understood as a situation of detention in which an individual is denied access to family members, an attorney, or an independent physician.

In Rwandan and international law, a person deprived of liberty has the right to *habeas corpus*, meaning that they can request a court to order a review of the lawfulness of his detention and release, if the detention is not lawful.²⁶² Under Rwandan law, any action against unlawful detention can be instituted by the victim or “any other person with knowledge of such injustice.”²⁶³ A Rwandan judge may order an official detaining an individual to appear personally with that individual and justify the reasons and circumstances of the detention. The judge can then order that person’s detention or release, and can immediately try the person holding the other in detention.²⁶⁴ According to the Rwandan government, there have occasionally been *habeas corpus* cases in Rwanda,²⁶⁵ but relatives of disappeared persons are often too afraid to take the cases to court or doubt the effectiveness of such legal proceedings.²⁶⁶

²⁵⁹ Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), para. 11.

²⁶⁰ *Ibid.*, para. 12.

²⁶¹ Human Rights Council, “Joint study on global practices in relation to secret detention in the context of countering terrorism,” A/HRC/13/42, February 19, 2010; African Commission on Human and Peoples’ Rights, “Principles and guidelines on the right to a fair trial and legal assistance in Africa” No. DOC/OS(XXX)247, para. N6(d)(i).

²⁶² ICCPR, art 9(4) and Law N° 30/2013 of 24/5/2013 relating to the code of criminal procedure, art. 92.

²⁶³ Law relating to the code of criminal procedure, art. 92.

²⁶⁴ *Ibid.*, art. 91.

²⁶⁵ Minister of Justice of Rwanda, “Response to Reference,” in *Plaxeda Rugumba vs. the Secretary General of the East African Community and The Attorney General of the Republic of Rwanda*, No. 8 of 2010, December 23, 2010, para. 4.i., Human Rights Watch interview with Minister of Justice Johnston Busingye, Kigali, May 13, 2014.

²⁶⁶ Amnesty International, “Rwanda: Shrouded in Secrecy: Illegal detention and torture by military intelligence,” October 8, 2012, <https://www.amnesty.org/en/documents/AFR47/004/2012/en/> (accessed September 27, 2017), pp. 22-23.

Box 8 – Rugigana Ngabo: *Habeas Corpus* Case at the East African Court of Justice

Kayumba Nyamwasa's brother, Lt.-Col. Rugigana Ngabo, a serving military officer in Rwanda, was arrested in August 2010 and held incommunicado in military custody for five months. Even though a Rwandan army spokesman said Ngabo was being held in Kanombe military prison,²⁶⁷ family members were unable to locate him and were intimidated by intelligence officials.²⁶⁸ A former detainee in Kami military camp told Human Rights Watch that he saw Ngabo while he was detained at Kami during that period.²⁶⁹

In November 2010, Ngabo's family filed a *habeas corpus* application at the East African Court of Justice (EACJ), the court of the East African Community established in Arusha, Tanzania.

In January 2011, the Military High Court in Kigali ruled that Ngabo's detention had been irregular and contrary to Rwandan law, but nevertheless ordered for him to remain in pre-trial detention due to the gravity of the charges of endangering state security.

The EACJ ruled in December 2011 that Ngabo's incommunicado detention without trial had been illegal.²⁷⁰ The Rwandan government appealed this decision, but it was upheld by the EACJ's appellate division in June 2012.²⁷¹

Despite the EACJ ruling, Ngabo's trial at Rwanda's Military High Court began in November 2011, behind closed doors.²⁷² According to an individual at the trial, Ngabo said in court that his trial was related to Nyamwasa's problems with the government and criticized the evidence used against him for lack of credibility.²⁷³ In July 2012, the court sentenced him to nine years in prison for endangering state security and inciting violence.²⁷⁴

²⁶⁷ BBC, "Arrested brother of Rwanda ex-army chief 'alive'", August 23, 2010, <http://www.bbc.co.uk/news/world-africa-11064408> (accessed September 28, 2017).

²⁶⁸ Amnesty International, "Rwanda: Shrouded in Secrecy," p. 23.

²⁶⁹ Human Rights Watch interview with former detainee, Kigali, May 24, 2012.

²⁷⁰ *Plaxeda Rugumba vs. The Secretary General of East African Community and The Attorney General of the Republic of Rwanda*, East African Court of Justice, December 1, 2011, Case No. 8 of 2010.

²⁷¹ *Plaxeda Rugumba vs. and The Attorney General of the Republic of Rwanda, East African Court of Justice (Appellate Division)*, Case No. 1 of 2012, June 22, 2012.

²⁷² "Rugigana Ngabo trial opens in substance," Ministry of Defence new release, no date, http://mod.gov.rw/news-detail/?tx_ttnews%5Btt_news%5D=742&cHash=3d1cce8e07a47620eff7548a853fa140 (accessed September 28, 2017).

²⁷³ Human Rights Watch interview with individual present at trial of Rugigana Ngabo, Kigali, August 3, 2012.

²⁷⁴ Bosco Asiimwe, "Military court hands nine years to Rugigana," *The New Times*, July 26, 2012, <http://www.newtimes.co.rw/section/article/2012-07-26/55495/> (accessed September 28, 2017).

The prohibition of enforced disappearances is codified in the International Convention for the Protection of All Persons from Enforced Disappearance and as a crime in the Statute of the International Criminal Court (ICC).²⁷⁵ The convention describes an enforced disappearance as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”²⁷⁶

Rwanda is not a party to either treaty and has not made enforced disappearance as a discrete violation a crime in national law. However, after its 2015 Universal Periodic Review (UPR), the Rwandan government described recommendations to ratify the Convention on Enforced Disappearances as “implemented or in the process of being implemented.”²⁷⁷ The absolute prohibition of enforced disappearances is, however, part of customary international law.²⁷⁸ It simultaneously violates multiple human rights, including the prohibition of torture and freedom from arbitrary arrest and detention, and has multiple victims, including family members of the disappeared.²⁷⁹ An enforced disappearance is also a “continuing crime”: it continues to take place so long as the disappeared person remains missing, and information about his or her fate or whereabouts has not been provided.²⁸⁰ Most arrests described in this report can be categorized as “enforced disappearances.” Individuals were deprived of their liberty by agents of the state and the authorities refused to acknowledge their detention or reveal their whereabouts.

During their last reviews of Rwanda, both the CAT (2012) and the HRC (2016) noted the Rwandan government’s denial of the existence of military detention centers, but expressed concern about continued unlawful detention in unofficial detention centers. The CAT mentioned 45 cases of unlawful detention in military camps between 2010 and 2011, with

²⁷⁵ United Nations Declaration on the Protection of All Persons from Enforced Disappearances, adopted December 18, 1992, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992), Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, art. 7.

²⁷⁶ *Ibid.*, art. 2.

²⁷⁷ Human Rights Council, “Report of the Working Group on the Universal Periodic Review, Rwanda.”

²⁷⁸ See International Committee of the Red Cross (ICRC), Henckaerts & Doswald-Beck, eds., *Customary International Humanitarian Law* (Cambridge: Cambridge Univ. Press 2005), rule 98.

²⁷⁹ United Nations Declaration on the Protection of All Persons from Enforced Disappearances.

²⁸⁰ Working Group on Enforced or Involuntary Disappearances, “General Comment on Enforced Disappearance as a Continuous Crime,” A/HRC/16/48 (2010).

detention lasting between ten days and two years. Both committees called for action to ensure that no one is detained in unofficial places of detention and that legal safeguards are provided. The CAT called on the government to close these military detention sites and establish and make public, in law, an official list of all places of detention.²⁸¹

During its 2015 UPR, Rwanda accepted recommendations to “ensure due process and conduct effective and objective investigations regarding cases of alleged arbitrary arrest and detention, including those which may constitute enforced disappearance” and to “take all appropriate measures to ensure that all reported cases of enforced disappearance are thoroughly investigated.”²⁸²

To Human Rights Watch’s knowledge, the Rwandan government has not implemented these recommendations.

²⁸¹ Human Rights Committee, “Concluding observations on the fourth periodic report of Rwanda,” paras. 19 and 20; Committee Against Torture, “Consideration of reports submitted by States parties under article 19 of the Convention, Concluding observations of the Committee Against Torture, Rwanda,” paras. 10 and 11.

²⁸² Human Rights Council, “Report of the Working Group on the Universal Periodic Review, Rwanda.”

Acknowledgments

This report was researched and written by Lewis Mudge and other researchers in the Africa division of Human Rights Watch between 2010 and 2017. It was reviewed by Ida Sawyer, Central Africa director, Aisling Reidy, senior legal advisor, and Babatunde Olugboji, deputy program director. Production and editing assistance was provided by Jean-Sébastien Sépulchre, associate in the Africa division, Madeline Cottingham, publications and photography coordinators, Fitzroy Hepkins, administrative manager, and Jose Martinez, senior coordinator, provided production assistance.

Danielle Serres translated the report into French. Peter Huvos, French website editor, and Jean-Sébastien Sépulchre vetted the French translation.

Human Rights Watch wishes to thank many former detainees and others who were willing to speak about their experiences, sometimes at great personal risk.

Appendix I: Court Cases

This table contains information about allegations of torture and illegal detention in the trials observed by Human Rights Watch in Rwanda between 2011 and 2016.

This information is based on defendants' statements in court hearings observed by Human Rights Watch and on court judgments.

This table only contains the names of individuals who stated in court that they were tortured or illegally detained, in public trials observed by Human Rights Watch. Other defendants in these trials told Human Rights Watch confidentially that they were tortured or illegally detained, but did not reveal this information in court. Their names are not included in the below table.

	Name of defendant	Trial	Sentence, Court of First Instance	Statements in Court
1	Joel Mutabazi	Mutabazi and co-accused	Life imprisonment	Torture and forced confession Illegal detention in Kami
2	Innocent Kalisa	Mutabazi and co-accused	25 years	Torture
3	Jean-Marie Vianney Ngabonziza	Mutabazi and co-accused	15 years	Torture to force him to confess
4	Aminadab Ndayambaje	Mutabazi and co-accused	15 years	Torture and forced confession
5	Balthazar Imaniriho	Mutabazi and co-accused	10 years	Torture

6	Pélagie Nizeyimana (female)	Mutabazi and co-accused	10 years	Beatings during interrogations
7	Simon Pierre Mahirwe	Mutabazi and co-accused	5 years	Torture to force him to confess
8	Jackson Karemera	Mutabazi and co-accused	4 months	Beatings and forced confession
9	Frodouard Rwandanga	Mukeshimana and co-accused	Life imprisonment	Illegal detention Torture and forced confession
10	Théophile Munyaneza	Mukeshimana and co-accused	Life imprisonment	Forced confession in Kami
11	Cléophas Harerimana	Mukeshimana and co-accused	Life imprisonment	Illegal detention
12	Anatole Kayisire	Mukeshimana and co-accused	Life imprisonment	Beatings, forced confession and illegal detention in Kami
13	Alexandre Havugimana	Mukeshimana and co-accused	Life imprisonment	Forced confession Illegal Detention in MINADEF
14	Jonas Ndahimana	Mukeshimana and co-accused	Life imprisonment	Illegal detention
15	Innocent Karuta	Mukeshimana and co-accused	Life imprisonment	Illegal Detention in MINADEF
16	Philippe Niyitegeka	Mukeshimana and co-accused	Life imprisonment	Confession after threats and torture in Kami

17	Alexis Ruzabavaho	Mukeshimana and co-accused	Life imprisonment	Illegal detention in a military camp
18	David Nshimiyimana Mpakaniye	Mukeshimana and co-accused	Life imprisonment	Illegal detention for 8 months
19	Elias Matakamba	Mukeshimana and co-accused	20 years	Illegal detention
20	Donat Munezero	Mukeshimana and co-accused	20 years	Tortured to confess Illegal detention for 9 months
21	Jonathan Habimana	Mukeshimana and co-accused	20 years	Illegal detention
22	Gaëtan Musafiri	Mukeshimana and co-accused	20 years	Illegal detention for 9 months
23	Jean Damascène Nsengumuremyi	Mukeshimana and co-accused	20 years	Torture and illegal detention
24	Naftal Nsengimana	Mukeshimana and co-accused	15 years	Illegal detention for 6 months in military camp
25	Charles Ririmunda	Mukeshimana and co-accused	10 years	Illegal detention for 7 months in Kami
26	Jean Baptiste Nsengiyumva	Mukeshimana and co-accused	10 years	Illegal detention
27	Jean Damascène Basabose	Mukeshimana and co-accused	5 years	Illegal detention by Rwandan intelligence services in Kigali

28	Jean Damascène Ngarambe	Mukeshimana and co-accused	5 years	Torture and forced confession Illegal detention for 9 months Lawyer and prosecution say he was in Kami
29	Jean Marie Vianney Byiringiro	Mukeshimana and co-accused	Acquitted	Illegally detention for 8 months
30	Matabara Déo	Mukeshimana and co-accused	Acquitted	Illegal detention
31	Jean de Dieu Nsengamungu	Mukeshimana and co-accused	Acquitted	Illegal detention in Kami
32	Jean Bosco Ngarama	Mukeshimana and co-accused	Acquitted	Illegal detention in Kami
33	Athanase Sebanani	Mukeshimana and co-accused	Acquitted	Illegal detention
34	Enos Habineza	Nsanzimana and co-accused	8 years	Illegal detention in Mukamira
35	Isaie Bazirufite	Nsanzimana and co-accused	7 years	Torture and illegal detention in Mukamira
36	Paulin Mukenga	Nsanzimana and co-accused	7 years	Illegal detention in Mukamira
37	Phocas Habiyambere	Nsanzimana and co-accused	7 years	Illegal detention in Mukamira
38	Jérôme Nsanzimana	Nsanzimana and co-accused	5 years	Illegal detention in Rwandan military camp

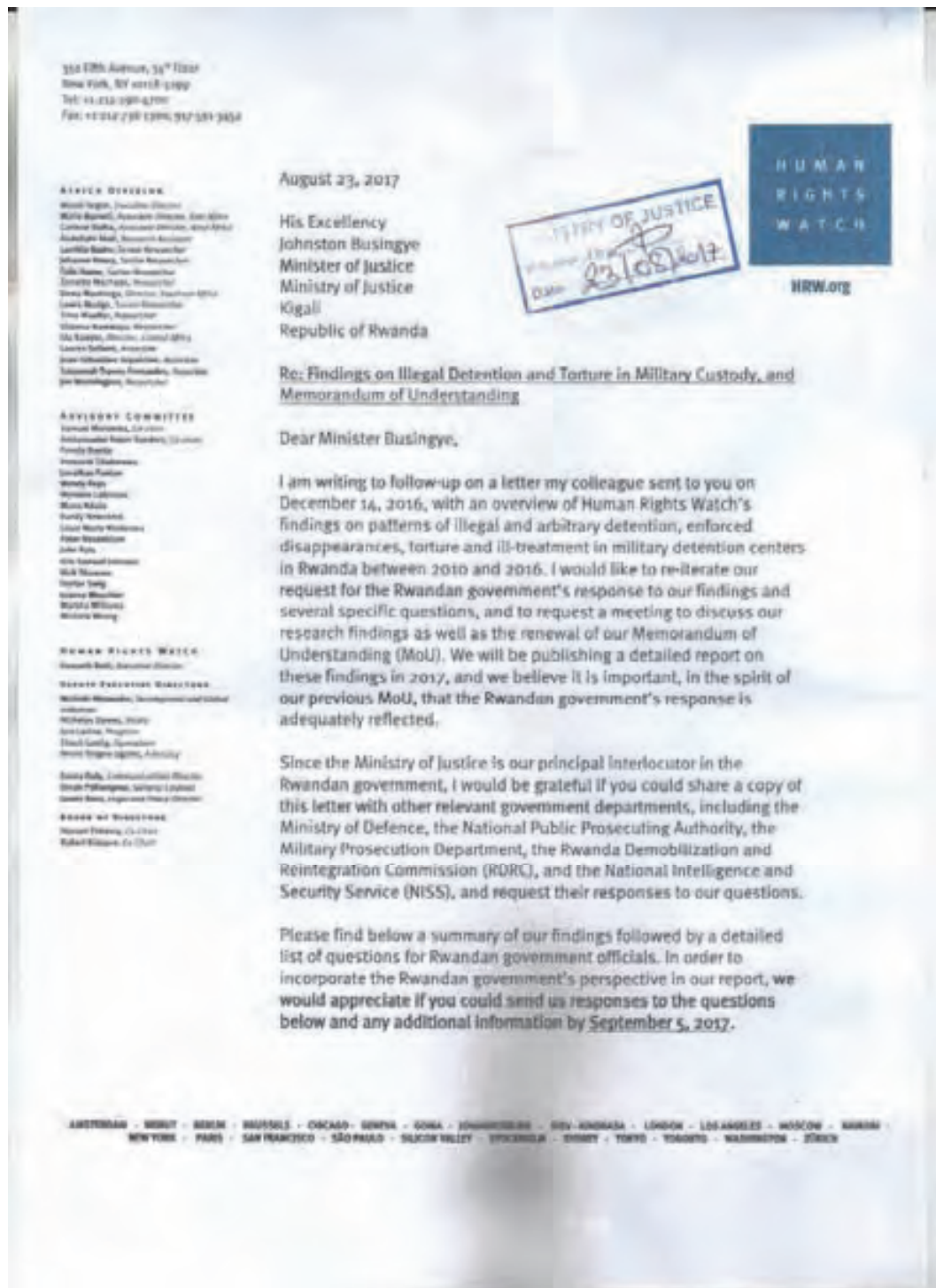
39	Jean Damascène Nsengiyumva	Nsanzimana and co-accused	Acquitted	Illegal detention in the “Gendarmerie” and Mukamira
40	Patrick Hakizimana	Nsanzimana and co-accused	Acquitted	Illegal detention in the “Gendarmerie” and Mukamira Tortured in Mukamira to force him to confess
41	Rafiki Mutabaruka	Nsanzimana and co-accused	Acquitted	Confessed because of beatings
42	Emmanuel Bucyekabiri	Nsanzimana and co-accused	Acquitted	Illegal detention in Mukamira for 3 months
43	Jean Pierre Bikorimana	Nsanzimana and co-accused	Acquitted	Illegal detention in the “Gendarmerie” and Mukamira Beaten and forced to confess
44	Heshima Gasore	Nsanzimana and co-accused	Acquitted	Illegal detention in Mukamira
45	Cyiza Gatashya	Nsanzimana and co-accused	Acquitted	Illegal detention in Mukamira
46	Xaverina Mukashyaka (female)	Xaverina and co-accused	20 years	Torture and forced confession Illegal detention in Kami
47	Norbert Manirafasha	Xaverina and co-accused	20 years	Torture and forced confession
48	Gilbert Rwego Maniraguha	Xaverina and co-accused	20 years	Torture and forced confession
49	Alphonse Ndarusanuye	Xaverina and co-accused	20 years	Torture in Kami and forced confession

50	Jean Damascène Ntabwoba	Xaverina and co-accused	20 years	Illegal detention in Kami
51	Elie Semajeri	Xaverina and co-accused	Acquitted	Illegal detention in Kami for 1 month Forced confession
52	Jean Bosco Bizimungu	Xaverina and co-accused	Acquitted	Torture and forced confession in Kami
53	Jean Baptiste Kanyamuhanda	Kanyamuhanda and co-accused	Life imprisonment	Torture and forced confession in Mukamira
54	Ismaël Bihoyiki	Kanyamuhanda and co-accused	Life imprisonment	Torture and forced confession in Mukamira
55	Félicien Irankunda	Kanyamuhanda and co-accused	Life imprisonment	Illegal detention in Mukamira
56	Florence Akimanizanye (female)	Kanyamuhanda and co-accused	Life imprisonment	Illegal detention in Mukamira
57	Amani Ngarambe	Kanyamuhanda and co-accused	Life imprisonment	Forced to sign statement he was not allowed to read
58	Vianney Dusabimana	Kanyamuhanda and co-accused	Life imprisonment	Forced confession in Mukamira
59	Cyiza Evariste Ngendahimana	Kanyamuhanda and co-accused	Life imprisonment	Torture and forced confession in Mukamira
60	Marcel Habinshuti	Kanyamuhanda and co-accused	Life imprisonment	Forced confession in Mukamira

61	Papias Nzayisenga	Kanyamuhanda and co-accused	10 years	Torture and forced confession Illegal detention in the “Gendarmerie” and Mukamira
62	Ndagijimana Banyangandora	Kanyamuhanda and co-accused	Acquitted	Forced confession
63	Jean Baptiste Yandagiye	Ndayambaje and co-accused	20 years	Beatings
64	Ephrem Hitiyaremye	Ndayambaje and co-accused	3 years	Illegal detention in Mukamira
65	Innocent Uwuzuyishema	Ndayambaje and co-accused	Acquitted	Torture

For more information and references to some of the trials, see Section IV.

Appendix II: Letter to Minister of Justice



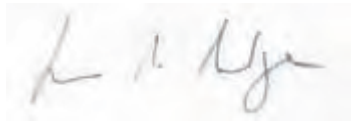
I also would like to request a meeting with you on September 6, 7, or 8 at a time of your convenience to discuss both our research findings and renewing our MoU. I can be reached on + [REDACTED] or at [REDACTED]@hrw.org.

We have not received any answer to our numerous earlier requests for information and meetings, despite the commitment undertaken by the Rwandan government in our previous MoU to facilitate such requests.

Finally, Human Rights Watch would like to request authorization to visit the detention centers mentioned below, including Kami, Mukamira, and the “gendarmerie.” We would be grateful if you could facilitate this.

I look forward to your reply and to our continued collaboration.

Yours sincerely,



Lewis Mudge
Senior Researcher
Human Rights Watch

Annexes:

- Annex 1: Summary of Human Rights Watch’s Findings
- Annex 2: Request for Information

Annex 1: Summary of Human Rights Watch's Findings

Based on interviews with over 150 people, including 61 former detainees, and observation of at least seven trials in Rwanda, Human Rights Watch has documented dozens of cases of people who were detained unlawfully and arbitrarily and, in many cases, tortured, in military custody, between 2010 and 2016. The detainees included people accused of involvement in grenade attacks, real or suspected members or collaborators of the Democratic Forces for the Liberation of Rwanda (FDLR) and suspected members or collaborators of the Rwanda National Congress (RNC) or opposition parties.

Many of these detainees were held incommunicado in military detention centers in harsh conditions, often for several months. In many cases, the torture appeared designed to extract confessions or other information from suspects.

Military officials, sometimes assisted by police, intelligence or local government officials, arrested most of these former detainees in Rwanda. Several others were arrested in Burundi or the Democratic Republic of Congo and transferred to Rwanda. Rwandan officials were sometimes involved in arrests in Burundi and Congo. Some of those arrested were former FDLR combatants but most were civilians. Several individuals were arrested while they were undergoing the Disarmament, Demobilization, Repatriation, Reintegration and Resettlement (DDRRR) process.

In some cases, family members or friends witnessed the person being taken away by state agents. They inquired about their whereabouts with local government or security officials, but authorities rarely revealed any information and usually did not acknowledge the detention. Families therefore remained without news of their loved ones for several weeks or months. Some of these cases can therefore be qualified as enforced disappearances and incommunicado detention.

Unlawful Detention and Torture in Military Centers

Human Rights Watch interviewed 39 former detainees who said they were detained in Kami military camp between 2010 and 2016, in some cases for up to nine months, and received information about multiple other cases. At least 13 defendants stated in trials observed by

Human Rights Watch that they had been detained in Kami and some said in court that they were tortured there.

Many former detainees interviewed by Human Rights Watch described beatings, electrocution, asphyxiation, the use of acid and mock executions in Kami, in an apparent attempt to extract confessions about their alleged links with the FDLR or the RNC or to force them to accuse others, including political opposition members.

Most detainees transited through other centers before being sent to Kami. In 2010, military officials first interrogated and tortured several detainees at the Ministry of Defence (MINADEF) premises, before sending them to Kami. Human Rights Watch spoke to 11 former detainees who said that they had transited through MINADEF. Ten described being beaten during their interrogation. Two defendants also mentioned in court, in front of a judge, that they had been detained in MINADEF.

Others were detained in the military camp of Mukamira. Human Rights Watch interviewed 25 former detainees who were held there, some as recently as May 2016, in some cases for up to three months. From Mukamira, some were then transferred to Kami or other detention facilities. In trials observed by Human Rights Watch, at least 19 defendants stated in court that they had been illegally detained in Mukamira and some told the judges that they had been tortured there.

Former detainees told Human Rights Watch how military or intelligence officials tortured them in Mukamira, subjected them to electric shocks, beat them or threatened to kill them if they would not confess.

Some detainees who were arrested in Congo or near the Congolese border were first held in a military base known as the “gendarmerie.” Human Rights Watch interviewed 17 former detainees who were held there, some for two months. At least four defendants mentioned their detention in the “gendarmerie” in one of the trials observed by Human Rights Watch. In the “gendarmerie,” military officers beat detainees and held them in holes in the ground.

Other detainees told Human Rights Watch they were held in the military camps of Bigogwe, Mudende and Tumba, or in private houses in Kigali or Rubavu. Most said officials in those locations also ill-treated them.

Conditions of Detention

Former detainees described the inhuman conditions in which they were held in military detention facilities. Some were held in isolation, sometimes in a constantly dark or lit cell, others in holes in the ground. Most had very limited access to food, water, hygiene or visits. None of those we spoke to had access to medical care or were able to seek a judicial review of their detention.

Releases and Transfers

Some detainees were eventually released, while others were transferred to official prisons or police stations and sent to trial. Before their transfer, military, police or judicial officials often told them not to reveal anything about their detention in military custody and their treatment there. Police statements claimed they were arrested just before their transfer to the regular justice system, thereby concealing the period of their military detention from the official record.

Statements during Trials

For reasons of confidentiality and security, we cannot provide you with the identity of the former detainees we interviewed as part of our research. However, several defendants made similar allegations of unlawful military detention and torture during their trials, and these statements are on the public record. Human Rights Watch observed some or all of the hearings in the following trials, among others:

- Prosecutor v. Jean Berchimans Mukeshimana et al., Kigali High Court, Case No. RP0027/11/HC/KIG-RP 0036/11/HC/KIG, first instance judgement on January 13, 2012 & Supreme Court, Case No. RPA 0090/12/CS, appeal judgement on March 4, 2016. 25 defendants made statements in court about their illegal detention, out of whom six said they had been detained in Kami and two in MINADEF. Six said they had been tortured with a view to extracting confessions.

- Prosecutor v. Jean Kanyamuhanda et al., Musanze High Court, Case No. RP 0054/HC/MUS, first instance judgment on December 6, 2012. Eight defendants said they had been detained in Mukamira, one after transiting through the “gendarmerie”. Four said they had been tortured.
- Prosecutor v. Janvier Ndayambaje et al., Musanze High Court, Specialized Chamber, Case No. RP 0108/11/HC/MUS, first instance judgment on January 8, 2013. One defendant said that he had been detained in Mukamira, two that they had been tortured.
- Prosecutor v. Jérôme Nsanzimana et al., Musanze High Court, Case No. RP 004611/HC/MUS, first instance judgment on March 21, 2013. Eleven defendants said they had been illegally detained, ten of them in Mukamira and three in the “gendarmerie”. Four said they had been tortured.
- Prosecutor v. Aboubacar Nsabiyeze et al., Musanze High Court, Case No. RP0052/13/HC/MUS, first instance judgment on May 22, 2014.
- Prosecutor v. Xaverina Mukashyaka et al., Musanze High Court, Case No. RP 0021/14/HC/MUS, first instance judgment on July 29, 2015. Five defendants said they had been detained in Kami. Five told the judges they had been tortured in detention.
- Military Prosecutor vs. Joel Mutabazi et al., Military High Court, Case No. RP 0003/013/MHC, first instance judgment on October 3, 2015. Eight defendants stated in court that they had been tortured. One said he had been detained in Kami.

In these trials, at least 51 defendants told the judges that they had been illegally detained, and at least 29 that they had been tortured. To our knowledge, those judges never ordered an in-depth investigation into these allegations and did not dismiss evidence obtained under torture. In several trials, judges dismissed defendants’ allegations that they had been tortured, claiming they had no proof, even when defendants offered to show their injuries or relevant documentation. Some of the accused were sentenced to long prison terms, based in part on forced confessions or witness testimony obtained under torture. We are deeply concerned that these people did not receive a fair trial.

Alleged Perpetrators

According to detainees, most of these abuses were carried out by military officials, many of whom detainees believed to be working for the military intelligence agency. In some cases, members of the police or the National Intelligence and Security Service (NISS) were also

involved. Human Rights Watch received information about dozens of officials allegedly involved in such practices. These include the following officials, who were cited in each case by at least six different sources that we interviewed independently:

- Lieutenant Emmanuel Karemera: Nine former detainees mentioned his presence in Kami in 2010. Several described him as a commanding officer who oversaw detention and said he was involved in threatening and torturing detainees. At least two defendants mentioned his involvement in abuses during their trial.
- Lieutenant-Colonel Faustin Tinka: Seven former detainees mentioned his involvement in interrogations at MINADEF and Kami in 2010. Several told Human Rights Watch that Tinka worked for the military intelligence agency. At least one defendant mentioned his involvement in abuses during his trial.
- Captain Murenzi: Eight former detainees told Human Rights Watch that an official known as Captain Murenzi oversaw interrogations, forced confessions and torture in Kami and MINADEF in 2010. Human Rights Watch was unable to confirm his first name. One detainee was able to read his name on his military uniform. Another mentioned his involvement in arrests in 2014. At least two defendants mentioned his involvement in abuses during their trial.
- Major Prosper alias Kaceri: Six former detainees mentioned to Human Rights Watch his involvement in interrogations and threats against detainees in MINADEF and Kami in 2010. One said that in 2010, he worked at the military intelligence department. He showed his ID card to one detainee and told another his name. At least two defendants mentioned his involvement in abuses during their trial. Human Rights Watch was unable to verify his full name.
- Captain Richard Ndakaza: Six former detainees told Human Rights Watch that he oversaw interrogations, forced confessions and torture at Kami in 2014.

Annex 2: Request for Information

We would be grateful if you could provide us with responses to the questions below. If some of this information is not immediately available to the Ministry of Justice, we hope that you can request clarification from the relevant authorities.

1. Have there been any investigations into unlawful detention and torture in military detention between 2010 and 2016? If so, could you provide us with detailed information about such investigations?
2. Have there been any prosecutions, convictions or disciplinary actions against officials involved in the human rights abuses described above? If so, could you provide us with detailed information about the number of cases, the nature of the abuses, and the actions taken?
3. Have any judges ordered an in-depth investigation into defendants' allegations in court that they were unlawfully detained, tortured or ill-treated in military custody? Have any judges refused to consider evidence allegedly obtained under torture or during illegal detention? If so, could you give us details of these cases?
4. What is the legal framework governing the arrest, detention and interrogation of suspects by the military *other than* the detention of persons at official military prisons such as Mulindi or Kanombe? To confirm our concerns here relate to processes of detention in locations that are not official military detention facilities.
5. What are the official functions and uses of the military camps of Kami, Bigogwe, Mukamira, Tumba and Mudende, and the military barracks at the "gendarmerie"? Are they used at least in part as detention centers and, if so, on what legal basis?
6. Are private houses ever used to detain people suspected of security-related offences? If so, under what legal framework?

7. Which officials are or were responsible for overseeing the military camps of Kami, Mukamira, Bigogwe, Tumba and Mudende between 2010 and 2016? Which officials were in charge of the “gendarmerie” and of interrogations in MINADEF? Could you provide us with their names, military ranks and positions between 2010 and 2016?
8. Could you provide us with the positions held between 2010 and 2016 and the contact details of the five military officers named above, so that we can contact them prior to publishing our findings and give them the opportunity to respond?
9. Which internal mechanisms are in place in the military and intelligence services to report and investigate abuses, and, where appropriate, refer cases to the Rwandan judiciary?
10. How many former FDLR members have been arrested during their demobilization process since 2010? What were the reasons for their arrest and who carried out the arrests? What happened to those arrested?
11. Could you provide us with up-to-date information on grenade attacks in Rwanda since 2008, including the number, date and location of the attacks, the number of people killed or injured, and the number and identity of those arrested in connection with these attacks?
12. Which governmental and national or international non-governmental organizations have been able to visit the detention centers mentioned above between 2010 and 2016? Have they been able to visit and speak to detainees there without restriction?
13. In 2012, the UN Committee Against Torture recommended that the Rwandan government establish and make public an official list of all places of detention. Has the government established and published such a list? If so, could you share it with us?

14. In June 2015 Rwanda ratified the Optional Protocol to the Convention against Torture (OPCAT). Can you provide us with more information about the creation of a national preventive mechanism, as required by the OPCAT?
15. During the Universal Periodic Review (UPR) process, the Rwandan government considered recommendations to ratify the International Convention for the Protection of All Persons from Enforced Disappearance as “implemented or in the process of being implemented”. Could you provide us with more information about the process of ratification of this convention?
16. Could you provide us with information about the number of *habeas corpus* cases handled by Rwandan courts since 2010, and information about each case?

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Ms. Madeleine Nirere
Chairperson
National Commission for Human Rights
Kigali
Rwanda

August 22, 2017

Dear Ms. Nirere,

I am writing to follow up on the letter sent to you by my colleague on January 30, 2017 and to request a meeting.

In explained in our letter of January 30, we wish to share with you a summary of Human Rights Watch's research on patterns of illegal and arbitrary detention, enforced disappearances, torture and ill-treatment in military detention centers in Rwanda between 2010 and 2016, and to request information from the National Commission for Human Rights regarding our findings. We will soon publish a report on our findings.

Based on interviews with more than 150 people, including 61 former detainees, and observation of at least seven trials in Rwanda, Human Rights Watch has documented dozens of cases of people who were detained unlawfully and arbitrarily – and in many cases, tortured – in military custody between 2010 and 2016. The detainees included people accused of involvement in grenade attacks, real or suspected collaborators of the Democratic Forces for the Liberation of Rwanda (FDLR) and, to a lesser extent, suspected members or collaborators of the Rwanda National Congress (RNC) or opposition parties. They were held in military detention centers in Kaml, Mukamira, Bigogwe, Mudende and Tumba military camps, in the premises of the ministry of defense, in the military barracks referred to as the "gendamerie" (in Rubavu), and in private houses in Kigali or Rubavu.

Most of these detainees were held incommunicado in harsh conditions, sometimes for several months. Many of the detainees were tortured as security force officers attempted to extract confessions or other information from suspects. Former detainees spoke of beatings, mock executions, asphyxiations, the use of acid to cause burns on their skin, death threats, electrocution and other torture methods.

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Former detainees described the inhuman conditions in which they were held in military detention facilities. Some were held in isolation, sometimes in a constantly dark or lit cell, others in holes in the ground. Most had very limited access to food, water, hygiene or visits. None of those we spoke to had access to medical care or were able to seek a judicial review of their detention.

Military officials, sometimes assisted by police, intelligence or local government officials, arrested most of these former detainees in Rwanda. Several others were arrested in Burundi or the Democratic Republic of Congo and transferred to Rwanda. Some of those arrested were former FDLR combatants but most were civilians.

In some cases, family members or friends witnessed those people being taken away by state agents. They inquired about their whereabouts with local government or security officials, but authorities rarely revealed any information and usually did not acknowledge the detention. Families therefore remained without news for several weeks or months. Some of these cases can therefore be qualified as enforced disappearances.

Some detainees were eventually released, while others were transferred to official prisons or police stations and sent to trial. Human Rights Watch observed at least seven trials, in which many defendants made allegations of unlawful detention and torture. Some of the accused were sentenced to long prison terms, based in part on confessions or witness testimony obtained under torture.

Role of the National Commission for Human Rights

Several former detainees in military custody told Human Rights Watch that men who said they were from the National Commission for Human Rights (NCHR) came to visit them in 2014 after they had been transferred to a regular detention center, and asked them questions about their detention. These men were accompanied by a prosecutor, who told the detainees not to reveal anything about their illegal detention. Another former detainee said that in 2016, he had been interrogated by someone working for “human rights” in Mukamira military camp.

Human Rights Watch saw six letters written to the NCHR by people close to individuals who disappeared in 2014, alerting the NCHR about the disappearances and providing

additional information. Human Rights Watch documented the illegal detention in Kami military camp of three of the cases described in these letters. Two of them were detained in Mukamira military camp before their transfer to Kami, and two were seriously beaten in illegal detention, in an apparent attempt to extract confessions.

All three were later sent to trial. One of them said in front of the judges that he had been detained in Kami and was forced to confess; another said he was tortured and forced to confess.

In the NCHR's annual reports from 2010 to 2016, there is no mention of illegal detention in military facilities, or such abuses by members of the military as described in this letter. In the 2003 annual report, however, the NCHR reported on illegal detention in the Kami and Mukamira military camps and reportedly discussed these issues with military authorities.

Questions

Following are specific questions that we hope you can address to help us ensure that the NCHR's perspective is incorporated in our upcoming report:

1. Between 2010 and 2016, did the NCHR visit any of the detention sites at military camps in Kami, Mukamira, Bigogwe, Mudende or Tumba, any places of detention within the premises of the ministry of defense, or the detention site referred to as the "gendarmerie" in the military barracks in Rubavu? If so, which detention sites, and when? Would you please share with us any information about those visits?
2. Did the NCHR visit any other detention sites under military control and if so when? Would you please share with us any information about those visits?
3. Has the NCHR spoken to any individuals who have ever been held in illegal military detention either during their time in military custody, after their transfer to regular detention facilities, or after their release? If so, would you please share with us any information about this?
4. Has the NCHR ever raised any allegations or concerns about illegal detention or torture in military custody with any relevant government departments? If so what were the details of those concerns and what was the response from the government department, if any?

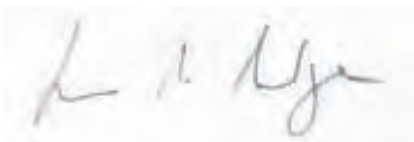
5. Has the NCHR received any complaints by former detainees who had been held in illegal military detention? Would you please share with us the number of complaints, and any detailed information about individual complaints? What actions were taken after such complaints were received, and what were the results of such actions?
6. Has the NCHR ever recommended that action be taken against any individuals suspected of having committed human rights violations connected to illegal or arbitrary detention in military custody or for ill treatment of detainees?
7. What is the standard procedure when the NCHR receives a letter from a family member alleging that someone has been forcibly disappeared? Could you please share with us information about the number of such letters received by the NCHR, the nature of the abuses alleged by family members, and the follow-up actions that were taken?

I would be grateful if you could reply to this letter before September 5, 2017.

I also request a meeting with the NCHR on September 6, 7, or 8 at a time of your convenience. I can be reached on + [REDACTED] or at [REDACTED]@hrw.org.

I look forward to your reply and to our continued collaboration.

Best regards,



Lewis Mudge
Senior Researcher



Between 2010 and 2016, the Rwandan army and intelligence services unlawfully detained and tortured scores of people suspected of collaborating with “enemies” of the Rwandan government in military detention centers. Some of these people were held incommunicado for prolonged periods, often several months, in inhuman conditions. Soldiers and intelligence officials used techniques including beatings, asphyxiations, mock executions, and electric shocks to torture the detainees. A key purpose of the abuses was to extract information from suspected members or sympathizers of the Democratic Forces for the Liberation of Rwanda (FDLR), a largely Rwandan armed group based in neighboring Democratic Republic of Congo, and the Rwanda National Congress (RNC), an opposition group in exile.

Based on interviews with over 220 people, including 61 former detainees, in Rwanda and neighboring countries as well as observations of court trials, and reviews of court records, “We Will Force You to Confess” documents how Rwanda’s military arbitrarily arrested suspects, held them in military camps, and tortured them. These abuses constitute serious crimes in clear violation of Rwandan and international law.

Human Rights Watch is not aware of any efforts by Rwandan authorities to investigate these crimes or to hold perpetrators accountable, and the authorities failed to provide any response to the allegations and evidence Human Rights Watch shared with them.

Human Rights Watch calls on the Rwandan government to end enforced disappearances, arbitrary and unlawful arrest and detention, and torture and other ill-treatment. The government should hold those responsible for these crimes to account. Military commanders implicated in the abuses should be suspended immediately pending a judicial investigation.

(above)

© 2017 John Emerson
for Human Rights Watch

(front cover) A detainee described being forced to lie on the ground with his hands handcuffed behind back as soldiers beat him on his feet and his head.

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for Human Rights Watch

ANNEX H

ECLI:NL:HR:2023:864

Instantie	Hoge Raad
Datum uitspraak	06-06-2023
Datum publicatie	06-06-2023
Zaaknummer	22/04607
Formele relaties	Conclusie: ECLI:NL:PHR:2023:473
Rechtsgebieden	Strafrecht
Bijzondere kenmerken	Cassatie
Inhoudsindicatie	Vervolgingsuitlevering opgeëiste persoon (Rwandese nationaliteit) aan Rwanda t.z.v. o.a. genocide en misdrijven tegen menselijkheid. Rb heeft uitlevering ontoelaatbaar verklaard wegens risico dat opgeëiste persoon door uitlevering zal worden blootgesteld aan risico van flagrante inbreuk op recht op eerlijk proces en dat voor opgeëiste persoon na uitlevering i.v.m. die inbreuk niet een effectief rechtsmiddel openstaat. OM-cassatie. Risico van flagrante inbreuk op recht op eerlijk proces a.b.i. art. 6 EVRM vanwege politieke inmenging en effectief rechtsmiddel daartegen? HR herhaalt relevante overwegingen uit HR:2017:463 m.b.t. bevoegdheidsverdeling tussen rechter en minister t.a.v. beroep op inbreuk op fundamentele rechten a.b.i. art. 6 EVRM. Rb heeft o.b.v. verschillende recente openbare bronnen vastgesteld dat objectief gerechtvaardigde twijfel bestaat over onafhankelijkheid rechtspraak in Rwanda in strafzaken tegen politieke opposenten, vanwege risico van politieke inmenging in die zaken. Rb heeft daarbij meerdere recente zaken in aanmerking genomen waarin politieke opposenten in Rwanda volgens Rb geen eerlijk proces hebben gehad. Rb heeft verder vastgesteld dat opgeëiste persoon, vanwege zijn positie als voormalig hooggeplaatst militair en zijn actieve lidmaatschap van oppositiepartij in Rwanda, kan worden aangemerkt als politiek opponent van Rwandees regime. Rb heeft daarbij mede betrokken dat opgeëiste persoon ook na emigratie naar Nederland in belangstelling Rwandese overheid is gebleven en dat pas nadat hij politiek actief was geworden tegen hem arrestatiebevel is uitgevaardigd. O.g.v. deze f&o heeft Rb geoordeeld dat reëel risico bestaat dat opgeëiste persoon in geval van uitlevering te maken zal krijgen met politieke inmenging en dat hij in dat geval niet zal worden berecht door onafhankelijk gerecht. Rb heeft verder geoordeeld dat garanties van Rwandese Transfer Law in dit geval onvoldoende waarborg bieden. Ten slotte heeft Rb geoordeeld dat voor opgeëiste persoon i.v.m. flagrante inbreuk op recht op eerlijk proces geen effectief rechtsmiddel openstaat, omdat risico op politieke inmenging zich ook zou voordoen bij berechting door hogere Rwandese rechter. Een en ander heeft Rb tot oordeel gebracht dat is komen vast te staan dat opgeëiste persoon door uitlevering zal worden blootgesteld aan risico van flagrante inbreuk op recht op eerlijk proces en dat voor opgeëiste persoon na uitlevering voor die inbreuk niet een effectief rechtsmiddel openstaat. Dat oordeel getuigt niet van onjuiste rechtsopvatting en is niet onbegrijpelijk. Volgt verwerping.
Vindplaatsen	Rechtspraak.nl SR-Updates.nl 2023-0114 NJB 2023/1572 RvdW 2023/669 NJ 2023/316 met annotatie van N. Keijzer

Uitspraak

HOGE RAAD DER NEDERLANDEN

STRAFKAMER

Nummer 22/04607 U

Datum 6 juni 2023

ARREST

op het beroep in cassatie tegen een uitspraak van de rechtbank Den Haag van 9 november 2022, nummer [001] , op verzoek van de Rwandese autoriteiten tot uitlevering

van

[de opgeëiste persoon] ,
geboren te [geboorteplaats] (Rwanda) op [geboortedatum] 1956,
hierna: de opgeëiste persoon.

1 Procesverloop in cassatie

Het beroep is ingesteld door het openbaar ministerie. Het heeft bij schriftuur een cassatiemiddel voorgesteld. De schriftuur is aan dit arrest gehecht en maakt daarvan deel uit.

De raadvrouw van de opgeëiste persoon, T.M.D. Buruma, advocaat te Amsterdam, heeft het beroep van het openbaar ministerie tegengesproken.

De advocaat-generaal E.J. Hofstee heeft geconcludeerd tot verwerving van het cassatieberoep.

2 Beoordeling van het cassatiemiddel

2.1 Het cassatiemiddel klaagt over het oordeel van de rechtbank dat de opgeëiste persoon door zijn uitlevering zal worden blootgesteld aan het risico van een flagrante inbreuk op het recht op een eerlijk proces en dat voor de opgeëiste persoon na zijn uitlevering in verband met die inbreuk niet een effectief rechtsmiddel openstaat.

2.2.1 De rechtbank heeft de uitlevering van de opgeëiste persoon aan Rwanda ontoelaatbaar verklaard voor strafvervolgning voor onder meer kort gezegd genocide en misdrijven tegen de menselijkheid.

2.2.2 De uitspraak van de rechtbank houdt onder meer het volgende in:

“3.7 Dreigende schending van fundamentele mensenrechten

De opgeëiste persoon heeft aangevoerd dat er feiten en omstandigheden zijn die de gerechtelijke onafhankelijkheid en onpartijdigheid in Rwanda in zaken tegen politieke

opponenten in twijfel trekken. Het meest verstrekkende verweer komt er kort gezegd op neer dat er volgens de opgeëiste persoon in Rwanda sprake is van politieke inmenging in processen tegen politieke opponenten. De opgeëiste persoon heeft gesteld dat hij aangemerkt kan worden als een politiek opponent. Daarom zou sprake zijn van een dreigende flagrante schending van zijn recht op een eerlijk proces, waartegen hem na zijn uitlevering niet een effectief rechtsmiddel ten dienste zou staan.

3.7.1 Juridisch kader

Uitgangspunt in uitleveringszaken is dat bij de beoordeling van een uitleveringsverzoek dat is gebaseerd op een verdragsrelatie, in beginsel moet worden uitgegaan van het vertrouwen dat de verzoekende staat bij de vervolging en berechting van de opgeëiste persoon de daarop betrekking hebbende fundamentele rechten zal respecteren (zie Hoge Raad 16 juni 2014, ECLI:NL:HR:2014:1441, en Hoge Raad 21 maart 2017, ECLI:NL:HR:2017:463). Dit uitgangspunt lijdt echter uitzondering indien bij de behandeling van het uitleveringsverzoek ter zitting naar aanleiding van een voldoende onderbouwd verweer is komen vast te staan dat de opgeëiste persoon door zijn uitlevering zal worden blootgesteld aan het risico van een flagrante inbreuk op enig hem ingevolge artikel 6, eerste lid, EVRM, toekomend recht en dat hem na zijn uitlevering ter zake van die inbreuk niet een rechtsmiddel als bedoeld in artikel 13 EVRM ten dienste staat.

Ingevolge artikel 6, eerste lid, EVRM heeft een ieder bij het bepalen van de gegrondheid van een tegen hem ingestelde vervolging recht op een eerlijke en openbare behandeling van zijn zaak, binnen een redelijke termijn, door een onafhankelijk en onpartijdig gerecht dat bij de wet is ingesteld. Kort gezegd gaat het hier om het recht op een eerlijk proces.

Uit de rechtspraak van het Europees Hof voor de Rechten van de Mens (hierna: EHRM) volgt dat niet snel sprake is van blootstelling aan het risico van een flagrante inbreuk op artikel 6, eerste lid, EVRM. Een flagrante schending van het recht op een eerlijk proces is volgens het EHRM synoniem aan een proces dat manifest in strijd is met de bepalingen of principes verwoord in artikel 6 EVRM.

Een van de belangrijkste rechten die voortvloeien uit artikel 6 EVRM is het recht op een eerlijke behandeling van zijn zaak door een onafhankelijk en onpartijdig gerecht. Dat is een absoluut recht waarvan geen derogatie mogelijk is. Schending van dat recht is manifest in strijd met de bepalingen en principes verwoord in artikel 6 EVRM en levert naar het oordeel van de rechtbank zodoende een flagrante schending van artikel 6 EVRM op.

3.7.2 Toepassing van het juridisch kader in deze zaak

Bronnen over (de berechting van) politieke opponenten in Rwanda

Ten betoge van zijn stelling dat de gerechtelijke onafhankelijkheid en onpartijdigheid in Rwanda in zaken tegen politieke opponenten in twijfel moet worden getrokken, heeft de opgeëiste persoon gewezen op diverse openbare bronnen. Uit die bronnen zou volgens de opgeëiste persoon blijken dat de onderdrukking van (vermeende) politieke tegenstanders of critici van de Rwandese overheid de laatste jaren is toegenomen.

Het beeld dat uit de door de opgeëiste persoon aangehaalde bronnen oprijst, komt overeen met de inhoud van andere openbare bronnen, zoals landenberichten en mensenrechtenrapportages. In het bijzonder heeft de rechtbank acht geslagen op de volgende bronnen.

In het thematisch ambtsbericht over mensenrechten en justitie in Rwanda uit 2016 van het Ministerie van Buitenlandse Zaken is opgenomen dat in theorie de rechtspraak in Rwanda onafhankelijk is, maar er volgens bronnen politieke invloed is op processen waarbij militairen,

leden van de politieke oppositie of vermogende zakenlieden zijn betrokken.

Het Ministerie van Buitenlandse Zaken van de Verenigde Staten heeft in een landenrapport over mensenrechten in Rwanda uit 2021 opgenomen dat nationale en internationale waarnemers vermelden dat de uitkomst in prominente genocidezaken, zaken over de staatsveiligheid en politiek gevoelige zaken op voorhand vast lijkt te staan.

De Mensenrechtenraad van de Verenigde Naties heeft ten behoeve van de Universal Periodic Review over Rwanda in 2021 haar zorgen geuit naar aanleiding van meldingen van onrechtmatige inmenging in de rechtspraak door regeringsambtenaren en de procedure voor het benoemen van rechters, die rechters mogelijk vatbaar maakt voor druk vanuit de politiek.

In 2017 publiceerde Human Rights Watch een rapport over de arbitraire vrijheidsberoving en foltering in detentiecentra van personen die verdacht worden van samenwerking met vijanden van de Rwandese overheid. Als verdachten of getuigen in de rechtbank vertellen dat zij zijn gefolterd, wordt dit niet door de rechtbank onderzocht.

Diverse waarnemers hebben in 2020 aan de Mensenrechtenraad van de Verenigde Naties gerapporteerd over onregelmatigheden in sommige politiek gemotiveerde processen, over inmenging van de uitvoerende macht in politiek gemotiveerde zaken en over het met de voeten treden van de rechten van de verdediging in zaken tegen critici van de overheid.

Human Rights Watch publiceerde in maart 2022 dat zij in 2020 en 2021 verschillende processen heeft gevolgd waarin politieke opposenten, commentatoren en journalisten werden vervolgd wegens politieke motieven.

Human Rights Watch rapporteerde in juni 2022 over de strafzaak tegen Aimable Karasira, een prominente Rwandese commentator op YouTube, dat Karasira zich bij de rechtbank heeft beklaagd over marteling in de gevangenis, waaronder slaapdeprivatie door middel van licht en luide muziek en mishandelingen. De rechters hebben geen nader onderzoek gelast naar de beschuldigingen.

In The Rwandan is in 2020 een artikel verschenen over een operatie van de Rwandese overheid genaamd Cleaning The West. In het artikel is beschreven dat het doel van deze operatie is het monddood maken van oppositieleiden en mensenrechtenactivisten buiten Rwanda. Als mogelijke methodes worden genoemd het vergiftigen, liquideren, kidnappen, het uitvaardigen van arrestatiebevelen en het in diskrediet brengen van personen.

Prof. dr. F.L.A.C. Reyntjens, emeritus hoogleraar aan de Universiteit Antwerpen, heeft als deskundige gerapporteerd in onderhavige zaak. Bij de beantwoording van de vraag van de rechtbank of en, zo ja, in welke rechtszaken in Rwanda concrete aanwijzingen bestaan die duiden op politieke bemoeienis, stelt de deskundige voorop dat het relevante onderscheid niet het verweten misdrijf is, maar of de verdachte aangemerkt kan worden als een politiek opponent. Hij acht het weinig waarschijnlijk dat een politiek opponent in Rwanda een eerlijk proces zal krijgen. De deskundige refereert daarbij aan de volgende voorbeelden.

- Paul Rusesabagina is in 2021 veroordeeld tot een gevangenisstraf voor de duur van 25 jaar wegens terrorisme. De verdenking van strafbare feiten volgde nadat Rusesabagina het Rwandese regime en president Kagame openlijk bekritiseerde. Rusesabagina werd onder valse voorwendselen naar Rwanda overgebracht. De Rwandese minister van Justitie heeft bevestigd dat het vliegtuig waarin Rusesabagina naar Rwanda werd gevlogen met dat doel door de Rwandese regering was gehuurd. Ook bevestigde hij dat inbreuk is gemaakt op het recht van Rusesabagina tot vertrouwelijke communicatie met zijn advocaat tijdens zijn hechtenis. Een Amerikaanse getuige in de zaak tegen Rusesabagina was tevens betaald consultant voor de Rwandese regering, waar in het vonnis geen overweging aan gewijd is. President Kagame heeft

zich vóór het vonnis meermalen uitgelaten over de schuld van Rusesabagina. Human Rights Watch noemde het proces “flawed” en stelde dat het proces toonde dat “the Rwandan Courts are overpowered by political influence”. Het Europees Parlement, de American Bar Association en de Belgische minister van Buitenlandse Zaken hebben zich kritisch uitgelaten over het proces in de zaak tegen Rusesabagina. Het Europees Parlement benadrukt in zijn resolutie dat Rwanda de onafhankelijkheid van de rechtspraak moet waarborgen. In de Trial Monitoring in de zaak van Rusesabagina wordt melding gemaakt dat Rusesabagina en zijn medeverdachten verklaringen onder druk (vastgebonden aan handen, voeten en gezicht) of marteling hebben afgelegd, waarnaar geen onderzoek door de rechtbank is gedaan. Deze verklaringen zijn door de Rwandese rechtbank voor het bewijs gebruikt.

-Victoire Ingabire Umuhoza was actief in verschillende Rwandese oppositiebewegingen, waaronder FDU-Inkingi. In 2010 is zij in Rwanda aangehouden op verdenking van medeplichtigheid aan terrorisme en het verspreiden van de ideologie van genocide. In 2013 is zij veroordeeld tot een gevangenisstraf voor de duur van 15 jaar wegens samenzwering tegen de Rwandese overheid door middel van terrorisme, geweld, het ontkennen van de genocide en opruiing. Het African Court on Human and Peoples Rights (hierna: het Afrikaans Hof) heeft in 2017 geoordeeld dat de Rwandese overheid het recht op de vrijheid van meningsuiting van Ingabire heeft geschonden. Rwanda heeft daags voor de behandeling van de zaak zijn erkenning van de bevoegdheid van het Afrikaans Hof ingetrokken.

-Rwanda is meermalen veroordeeld voor schendingen door het Afrikaans Hof maar heeft nooit uitvoering gegeven aan deze veroordelingen, hetgeen de toenmalige onderminister van Buitenlandse Zaken, de huidige Rwandese ambassadeur in Nederland, in 2018 als volgt rechtvaardigde in een tweet: “The rule of law is not to allow genociders or their accomplices to manipulate a human rights court to their profit”.

- Diane Rwigara had zich kandidaat gesteld voor de presidentsverkiezingen in Rwanda in 2017. De Rwandese overheid verklaarde dat Rwigara niet genoeg handtekeningen had om zich kandidaat te stellen, waarna zij werd gearresteerd. De arrestatie en detentie van Rwigara waren volgens de Mensenrechtenraad van de Verenigde Naties arbitrair. In 2018 werd Rwigara door de Rwandese High Court vrijgesproken. Het beroep van de procureur tegen deze vrijspraak werd op aanwijzing van de Rwandese minister van Justitie ingetrokken. De deskundige sluit een deal in deze zaak niet uit, nu Rwigara na deze uitspraak haar politieke activiteiten stopzette en thans niet meer in het openbaar optreedt. Dit zou volgens de deskundige kunnen wijzen op politieke manipulatie van de rechtsgang.

- De detentie van twee veroordeelde Rwandese (ex-)militaire officieren is door de VN Mensenrechtenraad als arbitrair bestempeld. De officieren, kolonel Tom Byabagamba en gepensioneerd brigadier-generaal Frank Rusagara, hebben zich tegen president Kagame uitgesproken en zijn vervolgens gearresteerd en in 2016 veroordeeld tot gevangenisstraffen voor de duur van 20 onderscheidenlijk 21 jaar. Over de procedure zijn verschillende onregelmatigheden vermeld in het rapport van de Mensenrechtenraad. Zo zou de rechter die het verzoek om borgtocht van de verdachten afwees, later als getuige hebben opgetreden tegen de verdachten. Ook zou een van de verdachten veroordeeld zijn door een militaire rechtbank voor feiten in een periode waar hij burger was. Een van de getuigen heeft later verklaard dat hij gedwongen was een belastende verklaring af te leggen. Geen van de verdachten is in de gelegenheid gesteld vragen te stellen aan de getuigen die belastend verklaarden. In beroep zijn de veroordelingen bevestigd.

Tussenconclusie

De rechtbank stelt op basis van het thematisch ambtsbericht van het Ministerie van Buitenlandse Zaken, het Amerikaanse landenrapport, het rapport van de Mensenrechtenraad van de Verenigde Naties, de berichten en rapporten van Human Rights Watch en de inbreng van prof. dr. Reyntjens vast dat er breed gedeelde twijfel bestaat over de onafhankelijkheid van de rechtspraak in Rwanda in strafzaken tegen politieke opposenten. Er zijn bovendien meerdere recente zaken aan

te wijzen waarin politieke opposenten geen eerlijk proces hebben gehad of waarin sprake was van onregelmatigheden. In het bijzonder kan worden gewezen op de zaken tegen Rusesabagina, Karasira, Byabagamba en Rusagara. In die processen is aan gevoerde verweren die de kern van het recht van een eerlijke berechting raken, door de betrokken rechters ongemotiveerd voorbijgegaan. Rapporten en verweren dat verklaringen onder dwang of marteling verkregen zijn, zijn niet nader onderzocht. Dit alles beziet de rechtbank tegen de achtergrond van het beeld dat uit de hiervoor weergegeven bronnen naar voren komt, namelijk dat (vermeende) leden van de oppositie nadat zij zich kritisch hebben uitgelaten over het regime of politiek actief zijn geworden, te maken kunnen krijgen met bedreiging, ontvoering, verdwijning en/of vervolging. Voorts lijkt de operatie "Cleaning the West" erop te duiden dat het regime zich tot doel lijkt te hebben gesteld ook oppositieleiden buiten Rwanda monddood te maken.

Op basis van het voorgaande, in samenhang bezien, is de rechtbank van oordeel dat er objectief gerechtvaardigde twijfels aan de rechterlijke onafhankelijkheid in Rwanda bestaan in geval van berechting van sommige (prominente) politieke opposenten van het regime, vanwege het risico van politieke inmenging in die berechting.

De opgeëiste persoon als politiek opponent

De opgeëiste persoon was tijdens de burgeroorlog in Rwanda officier in het Rwandese leger in de rang van majoor en hij heeft deelgenomen aan de vredesbesprekingen aan het einde van de burgeroorlog. Na de burgeroorlog in Rwanda is de opgeëiste persoon naar Nederland geëmigreerd. Hij is, zo heeft hij verklaard, nadien in beeld gebleven bij de Rwandese autoriteiten: in 2003 is hij benaderd door de Rwandese autoriteiten in een poging om hem te bewegen te repatriëren. De opgeëiste persoon vermoedde dat het doel hiervan was dat hij vervolgens in Rwanda voor politieke doeleinden zou kunnen worden ingezet door het regime. De opgeëiste persoon heeft dit geweigerd.

Sinds 2006 is hij vanuit Nederland politiek actief bij de politieke partij Forces Democratiques Unifiées Inkingi (hierna: FDU-Inkingi), een oppositiepartij in Rwanda. De opgeëiste persoon heeft twee functies bekleed bij FDU-Inkingi: Commissioner for Information and Documentation (2006-2018) en Commissioner for Discipline (2018-2022).

FDU-Inkingi is door de Rwandese overheid een terroristische organisatie genoemd en wordt genoemd als een van de doelwitten van operatie "Cleaning the West". In Rwanda zijn in de afgelopen jaren verschillende leden van FDU-Inkingi verdwenen, vermoord of veroordeeld. Zo is Illuminée Iragena in 2016 verdwenen en is haar verdwijning door de politie niet onderzocht. In 2017 zijn zeven FDU-Inkingi-leden gearresteerd wegens het vormen van een irregular armed group. Human Rights Watch rapporteert over intimidatie, arbitraire vrijheidsberoving en mishandeling van leden van FDU-Inkingi in Rwanda. In januari 2020 zijn zes leden van FDU-Inkingi in Rwanda veroordeeld tot straffen tussen de zeven en twaalf jaar wegens armed rebellion.

De rechtbank stelt vast dat de opgeëiste persoon gezien zijn actieve lidmaatschap van FDU-Inkingi kan worden aangemerkt als politiek opponent van het Rwandese regime. Daarbij komt dat hij een voormalig hooggeplaatste militair is en ook na zijn emigratie in de belangstelling van de Rwandese overheid is gebleven. Eerst nadat de opgeëiste persoon actief was geworden bij FDU-Inkingi werd tegen hem door de Rwandese autoriteiten een arrestatiebevel uitgevaardigd.

Deze omstandigheden maken naar het oordeel van de rechtbank dat er een reëel risico is dat de opgeëiste persoon in geval van uitlevering te maken zal krijgen met politieke inmenging in zijn berechting en hij in dat geval niet zal worden berecht door een onafhankelijk gerecht.

Dat het International Criminal Tribunal for Rwanda, zoals de officier van justitie heeft betoogd, in 2011 de overdracht van verdachten aan Rwanda heeft toegestaan en daarbij verweren over het gebrek aan een eerlijke berechting in Rwanda heeft verworpen, doet aan het voorgaande niet af. De beoordeling van dergelijke verweren geschiedt aan de hand van de feiten en omstandigheden van een zaak. In deze specifieke zaak komt de rechtbank tot een ander oordeel, mede in aanmerking genomen de hoedanigheid van de opgeëiste persoon en de thans bekende meer recente informatie over (de berechting van) politieke opposenten in Rwanda.

Conclusie

Uit hetgeen de rechtbank hiervoor heeft overwogen vloeit voort dat voldoende concreet is onderbouwd dat de opgeëiste persoon door zijn uitlevering zal worden blootgesteld aan het risico van een flagrante inbreuk op het hem ingevolge artikel 6, eerste lid, EVRM toekomende recht op een eerlijk proces.

Op zichzelf is het juist dat op de berechting van de opgeëiste persoon in Rwanda de zogenaamde Transfer Law van toepassing zou zijn. De Transfer Law bevat waarborgen voor een eerlijke berechting in Rwanda van (onder meer) uitgeleverde personen. In het uitleveringsverzoek heeft Rwanda gegarandeerd die waarborgen te zullen naleven. Naar het oordeel van de rechtbank bieden de garanties uit de Transfer Law in dit geval echter onvoldoende waarborg om een dreigende flagrante schending van het recht op een eerlijk proces te ondervangen, nu Rwanda als het aankomt op de vervolging en berechting van politieke tegenstanders van het regime van Rwanda zoals hiervoor uiteengezet een zeer zorgelijke recente geschiedenis kent.

Tot slot is de rechtbank van oordeel dat voor de opgeëiste persoon ter zake van de flagrante inbreuk geen effectief rechtsmiddel openstaat. Voor zover de opgeëiste persoon tegen een eventuele veroordeling een rechtsmiddel zou kunnen instellen, geldt dat het risico op politieke inmenging zich zoals ook uit de openbare bronnen en voorbeelden is gebleken evenzeer zou voordoen bij berechting door een hogere rechter in Rwanda.

De rechtbank zal de uitlevering van de opgeëiste persoon voor alle feiten dan ook ontoelaatbaar verklaren.”

- 2.3 In zijn arrest van 21 maart 2017, ECLI:NL:HR:2017:463, heeft de Hoge Raad over de bevoegdheidsverdeling tussen de rechter en de minister ten aanzien van een beroep op een inbreuk op de fundamentele rechten in artikel 6 van het Europees Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden en artikel 14 lid 1 van het Internationaal Verdrag inzake burgerrechten en politieke rechten onder meer het volgende overwogen:

“3.6 Bij een beroep op een inbreuk op de fundamentele rechten die de opgeëiste persoon in art. 6 EVRM zijn toegekend, geldt het volgende.

(...)

B. (i) Indien het gaat om een verzoek tot uitlevering ter strafvervolging en wordt aangevoerd dat in de desbetreffende strafzaak inbreuk dreigt te worden gemaakt op art. 6, eerste lid, EVRM en/of art. 14, eerste lid, IVBPR, is het in de regel niet aan de uitleveringsrechter te oordelen over de gegrondheid van zo een beroep op een dreigende mensenrechtenschending. In een dergelijk geval moet in beginsel worden uitgegaan van het vertrouwen dat de verzoekende Staat deze verdragsbepaling(en) zal eerbiedigen. Zo een verweer kan dus niet leiden tot ontoelaatbaarverklaring van de gevraagde uitlevering, zij het dat de uitleveringsrechter in het aangevoerde grond kan vinden de Minister in zijn advies als bedoeld in art. 30 UW, dan wel de Gouverneur deelgenoot te maken van zijn opvatting omtrent het aan het uitleveringsverzoek te geven gevolg, waaronder in voorkomende gevallen begrepen het vragen van garanties aan de verzoekende Staat om een dergelijke dreigende schending te voorkomen.

(ii) Op grond van het vertrouwensbeginsel moet voorts worden aangenomen dat het rechtssysteem van de verzoekende Staat de opgeëiste persoon in staat stelt om na diens uitlevering ter strafvervolgung een beroep op een mensenrechtenschending voor te leggen aan de rechter van de verzoekende Staat en dat deze daar dan een oordeel over geeft met het oog op de waarborging van het recht van de opgeëiste persoon op een eerlijk proces als bedoeld in art. 6, eerste lid, EVRM en/of art. 14, eerste lid, IVBPR. Daarbij verdient opmerking dat in geval van een uitlevering ter strafvervolgung de vraag of inbreuk is gemaakt op het recht van de opgeëiste persoon op een eerlijk proces, in de regel eerst kan worden beantwoord na de uitspraak van de strafrechter in de verzoekende Staat, omdat pas dan kan worden vastgesteld of de mensenrechtenschending niet (meer) vatbaar was voor herstel of compensatie. De uitleveringsrechter kan daarom in de regel niet toekomen aan de inhoudelijke beoordeling van een verweer dat sprake is van een reeds voltooide schending van art. 6, eerste lid, EVRM en/of art. 14, eerste lid, IVBPR.

(iii) Het uitgangspunt dat in de gevallen waarin de uitlevering ter strafvervolgung is gevraagd, de uitleveringsrechter in beginsel niet inhoudelijk oordeelt over een beroep op dreigende en/of voltooide mensenrechtenschendingen, kan evenwel uitzondering lijden indien naar aanleiding van een bij de behandeling van het uitleveringsverzoek ter zitting voldoende onderbouwd verweer is komen vast te staan

(a) dat de opgeëiste persoon door zijn uitlevering zal worden blootgesteld aan het risico van een flagrante inbreuk op enig hem ingevolge deze verdragsbepalingen toekomend recht, en tevens

(b) dat hem na zijn uitlevering ter zake van die inbreuk niet een rechtsmiddel als bedoeld in art. 13 EVRM respectievelijk art. 2, derde lid aanhef en onder a, IVBPR ten dienste staat.

In zo een geval staat de op de landen van het Koninkrijk rustende verplichting om de uit voormelde verdragsbepaling(en) voortvloeiende rechten van de opgeëiste persoon te verzekeren in de weg aan de nakoming van de verdragsrechtelijke verplichting tot uitlevering. Op grond van voormelde bevoegdheidstoedeling is het derhalve kort gezegd de uitleveringsrechter die tot oordelen is geroepen ingeval bij de behandeling van het uitleveringsverzoek ter zitting beroep is gedaan op het (dreigende) risico van een flagrante inbreuk op art. 6, eerste lid, EVRM onderscheidenlijk art. 14, eerste lid, IVBPR, doch uitsluitend indien tevens is aangevoerd dat en waarom de opgeëiste persoon na zijn uitlevering niet een rechtsmiddel als vorenbedoeld ten dienste staat.

Daarbij moet worden aangetekend dat uit de rechtspraak van het EHRM volgt dat niet snel wordt aangenomen dat sprake is van blootstelling aan het risico van een flagrante inbreuk op art. 6, eerste lid, EVRM die moet leiden tot ontoelaatbaarverklaring van de gevraagde uitlevering ter strafvervolgung. In dat verband kan worden gewezen op EHRM 17 januari 2012, Othman tegen V.K., nr. 8139/09, NJ 2013/360, rov. 259 waar gevallen zijn opgesomd waarin sprake is van een flagrant denial of justice."

2.4.1 De rechtbank heeft op basis van verschillende recente openbare bronnen, zoals een thematisch ambtsbericht van het ministerie van Buitenlandse Zaken, meerdere (mensenrechten)rapporten en de inbreng van een deskundige, vastgesteld dat er objectief gerechtvaardigde twijfel bestaat over de onafhankelijkheid van de rechtspraak in Rwanda in strafzaken tegen politieke opposenten, vanwege het risico van politieke inmenging in die zaken. De rechtbank heeft daarbij meerdere recente zaken in aanmerking genomen waarin politieke opposenten in Rwanda volgens de rechtbank geen eerlijk proces hebben gehad.

2.4.2 De rechtbank heeft verder vastgesteld dat de opgeëiste persoon, vanwege zijn positie als voormalig hooggeplaatst militair en zijn actieve lidmaatschap van een oppositiepartij in Rwanda, kan worden aangemerkt als politiek opponent van het Rwandese regime. De rechtbank heeft daarbij mede betrokken dat de opgeëiste persoon ook na zijn emigratie naar Nederland in de belangstelling van de Rwandese overheid is gebleven en dat pas nadat hij politiek actief was geworden bij de Rwandese oppositiepartij tegen hem een arrestatiebevel is uitgevaardigd.

2.4.3 Op grond van deze feiten en omstandigheden heeft de rechtbank geoordeeld dat er een reëel risico bestaat dat de opgeëiste persoon in geval van uitlevering te maken zal krijgen met politieke inmenging in zijn berechting en dat hij in dat geval niet zal worden berecht door een

onafhankelijk gerecht. De rechtbank heeft verder geoordeeld dat de garanties van de op deze zaak toepasselijke Rwandese "Transfer Law" in dit geval onvoldoende waarborg voor een eerlijke berechting bieden, gelet op de zeer zorgelijke recente geschiedenis van de vervolging en berechting van politieke tegenstanders van het regime in Rwanda. Ten slotte heeft de rechtbank geoordeeld dat voor de opgeëiste persoon in verband met de aldus omschreven flagrante inbreuk op het recht op een eerlijk proces geen effectief rechtsmiddel openstaat. Daarbij heeft de rechtbank in aanmerking genomen dat, voor zover de opgeëiste persoon tegen een eventuele veroordeling een rechtsmiddel zou kunnen instellen, het risico op politieke inmenging zich ook zou voordoen bij berechting door een hogere rechter in Rwanda.

2.4.4 Een en ander heeft de rechtbank tot het oordeel gebracht dat is komen vast te staan dat de opgeëiste persoon door zijn uitlevering zal worden blootgesteld aan het risico van een flagrante inbreuk op het recht op een eerlijk proces en dat voor de opgeëiste persoon na zijn uitlevering voor die inbreuk niet een effectief rechtsmiddel openstaat. Dat oordeel getuigt niet van een onjuiste rechtsopvatting en is toereikend gemotiveerd.

2.5 Het cassatiemiddel faalt.

3 Beslissing

De Hoge Raad:

- verwerpt het beroep;
- heft op het door de rechtbank gegeven bevel tot gevangenhouding van de opgeëiste persoon.

Dit arrest is gewezen door de vice-president J. de Hullu als voorzitter, en de raadsheren M.J. Borgers en T. Kooijmans, in bijzijn van de waarnemend griffier S.P. Bakker, en uitgesproken ter openbare terechtzitting van 6 juni 2023.

ANNEX I

ECLI:NL:GHDHA:2023:2469

Instantie	Gerechtshof Den Haag
Datum uitspraak	19-12-2023
Datum publicatie	21-12-2023
Zaaknummer	200.328.650/01
Formele relaties	Cassatie: ECLI:NL:HR:2025:664
Rechtsgebieden	Verbintenissenrecht
Bijzondere kenmerken	Hoger beroep kort geding
Inhoudsindicatie	Verbod tot uitlevering aan Rwanda; risico van flagrante schending van art. 6 EVRM.
Vindplaatsen	Rechtspraak.nl

Uitspraak

GERECHTSHOF DEN HAAG

Civil recht

Team Handel

Zaaknummer hof : 200.328.650/01

Zaaknummer rechtbank : C/09/645075/KG ZA 23-249

Arrest van 19 december 2023

in de zaak van

[appellant] ,

thans gedetineerd in [] ,

appellant,

advocaat: mr. T. de Boer in Amsterdam,

tegen

de Staat der Nederlanden,

zetelend in Den Haag,

verweerder in hoger beroep,

advocaat: mr. C.M. Bitter in Den Haag.

Het hof zal partijen hierna noemen [appellant] en de Staat.

1 De zaak in het kort

- 1.1 De Rwandese autoriteiten hebben aan de Staat verzocht [appellant] uit te leveren. Rwanda wil [appellant] strafrechtelijk vervolgen omdat hij verdacht wordt van deelname aan de genocide in 1994. De uitleveringsrechter heeft de uitlevering toelaatbaar verklaard en de Minister van Justitie en Veiligheid (hierna: de minister) heeft besloten [appellant] inderdaad naar Rwanda uit te leveren. [appellant] heeft vervolgens deze kort gedingprocedure aanhangig gemaakt, waarin hij vordert dat de Staat wordt verboden hem uit te leveren. [appellant] vreest dat bij berechting in Rwanda zijn fundamentele rechten zullen worden geschonden.
- 1.2 Het hof stelt [appellant] in het gelijk. De mensenrechtensituatie in Rwanda is zeer zorgwekkend. Er is een reëel risico dat als [appellant] naar Rwanda wordt uitgeleverd hij, als tegenstander van het regime van president Kagame, geen eerlijk proces zal krijgen. Het hof verbiedt daarom de Staat tot uitlevering van [appellant] over te gaan.

2 De procedure

Het verloop van de procedure blijkt uit de volgende stukken:

- de dagvaarding van 13 juni 2023, waarmee [appellant] in hoger beroep is gekomen van het vonnis van de voorzieningenrechter in de rechtbank Den Haag van 17 mei 2023, en waarin [appellant] zes grieven tegen dat vonnis heeft aangevoerd (met producties 40 tot en met 45);
- de memorie van antwoord van de Staat;
- de producties 46 tot en met 52 van [appellant] voor de mondelinge behandeling op 20 november 2023;
- de pleitnotities van mrs. Dölle en De Boer namens [appellant] , en van mr. Bitter namens de Staat, die het woord hebben gevoerd tijdens de mondelinge behandeling op 20 november 2023;
- het proces-verbaal van die mondelinge behandeling, die met instemming van partijen is gecombineerd met de mondelinge behandeling in een andere uitleveringszaak naar Rwanda (zaaknummer 200.330.802/01).

3 Feiten en achtergronden

Achtergrond: genocide in Rwanda en het Rwanda Tribunaal

- 3.1 In Rwanda bestaan al decennia spanningen tussen de voornaamste bevolkingsgroepen, de Hutus en de Tutsis, waarbij de Hutus de meerderheid vormen maar niet altijd aan de macht waren. Vanaf 1950 en ook na de onafhankelijkheid in 1962 was in Rwanda de Hutu-meerderheid aan de macht. In 1994 werd het vliegtuig van (Hutu) president Habyarimana neergeschoten, waarbij hij om het leven kwam. Naar aanleiding van dit incident hebben zich in 1994 in Rwanda extreme gewelddadigheden voorgedaan, waarbij ongeveer 800.000 personen, merendeels Tutsis, om het leven zijn gebracht, zowel door het door Hutus gedomineerde Rwandese leger als door Hutu-milities. Deze gebeurtenissen zijn door het Rwanda Tribunaal (zie hierna) als genocide (volkerenmoord) gekwalificeerd.
- 3.2 Aan de genocide kwam een einde toen het Tutsi rebellenleger onder de naam *Rwandan Patriotic Front* (RPF) in juli 1994 de macht overnam in de Rwandese hoofdstad Kigali. De RPF is sindsdien aan de macht in Rwanda, sinds 2000 onder leiding van haar huidige president Paul Kagame, de voormalige bevelhebber van de RPF.
- 3.3 In 1997 heeft de Veiligheidsraad van de Verenigde Naties het Rwanda tribunaal (International Criminal Tribunal for Rwanda, hierna: ICTR) opgericht om de verdachten van deze misdaden te berechten. Per 31 december 2015 heeft het ICTR zijn werkzaamheden beëindigd. De nog lopende zaken van het ICTR worden thans afgewikkeld door het Mechanism for International Criminal Tribunals (MICT), dat dergelijke werkzaamheden ook voor het Joegoslavië Tribunaal (International Criminal Tribunal for the former Yugoslavia) verricht.
- 3.4 Het ICTR had de bevoegdheid bij hem aanhangig gemaakte zaken ter berechting over te dragen aan Rwanda. Vanaf 2011 heeft het daarvan gebruik gemaakt, omdat het oordeelde dat het Rwandese rechtssysteem inmiddels zodanige waarborgen bood dat verdachten van genocide in Rwanda een eerlijk proces zouden krijgen.
- 3.5 Verdachten van wie de vervolging is overgedragen aan Rwanda worden berecht onder het regime van de (Rwandese) *Transfer Law*. Deze *Transfer Law* voorziet in de berechting van overgedragen verdachten door een speciale kamer van het *High Court* in Kigali. De *Transfer Law* kent bepaalde procedurele waarborgen, zoals immuniteit voor de advocaten die de verdachte bijstaan. De personen die verdacht en veroordeeld worden onder het regime van de *Transfer Law* ondergaan hun hechtenis respectievelijk gevangenisstraf in afzonderlijke, speciaal voor hen ingerichte (afdelingen van) penitentiare faciliteiten.
- De positie van [appellant]*
- 3.6 , geboren op [geboortedatum] , heeft in 2000 in Nederland een verblijfsvergunning asiel gekregen. Deze verblijfsvergunning is in 2013 ingetrokken, waarbij aan [appellant] een inreisverbod van 10 jaar is opgelegd. Het tegen deze beslissing door [appellant] ingestelde beroep is door de rechtbank en de Afdeling Bestuursrechtspraak van de Raad van State (ABRvS) verworpen. De intrekking van de verblijfsvergunning berustte op een individueel ambtsbericht, waarin werd geconcludeerd dat er ernstige redenen waren om te veronderstellen dat [appellant] zich schuldig heeft gemaakt aan het voorbereiden en uitvoeren van aanvallen op en doden van Tutsis gedurende de genocide in Rwanda in 1994. Dit zou betekenen dat art. 1(F) van het Vluchtelingenverdrag op [appellant] van toepassing is zodat hij niet in aanmerking komt voor de verlening van asiel.
- 3.7 Op 15 september 2015 hebben de Rwandese autoriteiten de uitlevering van [appellant] verzocht met het oog op zijn vervolging voor verschillende strafbare feiten, die alle verband houden met de genocide.

- 3.8 In verband met dit uitleveringsverzoek is [appellant] op 26 oktober 2020 aangehouden. Sindsdien bevindt [appellant] zich in uitleveringsdetentie.
- 3.9 In haar uitspraak van 30 april 2021 heeft de uitleveringskamer van de rechtbank Den Haag de uitlevering (grotendeels) toelaatbaar verklaard. De rechtbank heeft daarbij de minister geadviseerd (i) het proces tegen [appellant] te laten waarnemen en de waarnemingsrapporten publiek toegankelijk te maken, (ii) zich ervan te vergewissen dat [appellant] zich desgewenst in de breedste zin van het woord in Rwanda kan laten bijstaan door (de Nederlandse advocaat) mr. [advocaat] en (iii) zich ervan te vergewissen dat [appellant] in Rwanda adequate medische zorg zal ontvangen, zowel gedurende het strafproces in Rwanda als daarna.
- 3.10 Het door [appellant] tegen deze uitspraak ingestelde cassatieberoep heeft de Hoge Raad in zijn arrest van 25 januari 2022 verworpen.
- 3.11 In het uitleveringsverzoek hebben de Rwandese autoriteiten (i) verklaard dat op de vervolging van [appellant] de Transfer Law van toepassing zal zijn en uiteengezet welke *fair trial guarantees* in de Transfer Law zijn opgenomen, (ii) informatie verschaft over de wijze waarop rechterlijke onafhankelijkheid en onpartijdigheid zijn gewaarborgd ([appellant] zal in eerste instantie worden berecht door het *High Court*, waarvan de leden voor het leven zijn benoemd), (iii) de mogelijkheden voor hoger beroep en herziening uiteengezet en (iv) de garanties gegeven dat Nederland het proces van [appellant] zal kunnen monitoren, dat [appellant] zal worden gedetineerd in een penitentiaire inrichting die aan internationale eisen voldoet, dat de mogelijkheid bestaat om rechtsbijstandsfinanciering aan te vragen en dat een buitenlandse advocaat hem zal kunnen bijstaan indien deze voldoet aan de voorwaarden die de *Rwanda Bar Association* daaraan stelt. Ten slotte hebben de Rwandese autoriteiten in het uitleveringsverzoek bevestigd dat aan [appellant] niet de doodstraf of een levenslange gevangenisstraf zonder de mogelijkheid van strafbekorting, voorwaardelijke vrijlating of gratie zal worden opgelegd.
- 3.12 Bij brief van 9 januari 2023 hebben de Rwandese autoriteiten, op verzoek van de minister, aanvullend gegarandeerd (i) dat [appellant] medische zorg en behandeling zal ontvangen voor de medische indicaties die de minister heeft beschreven, (ii) dat de penitentiaire inrichting zal worden aangepast voor mindervaliden als [appellant] en (iii) dat de *International Commission of Jurists* (ICJ), afdeling Kenia, het proces, de penitentiaire inrichting en het welbevinden van [appellant] zal kunnen monitoren.
- 3.13 Bij beschikking van 6 maart 2023 heeft de minister besloten [appellant] aan Rwanda uit te leveren. De minister heeft daarbij onder meer in aanmerking genomen dat de Rwandese autoriteiten diverse garanties hebben verstrekt die zien op naleving van de fundamentele rechten van [appellant] . De minister overweegt dat het interstatelijk vertrouwensbeginsel meebrengt dat erop mag worden vertrouwd dat deze garanties worden nageleefd, tenzij er concrete aanwijzingen zijn dat dit niet het geval is. In dit verband acht de minister van belang dat het strafproces en de detentieomstandigheden van [appellant] nauwlettend zullen worden gemonitord door ICJ en dat de rapporten van deze organisatie openbaar zullen worden gemaakt. Daarnaast zal toezicht worden uitgeoefend door de Nederlandse ambassade, ook na afronding van het strafproces. De minister is van oordeel dat er vertrouwen is dat de fundamentele rechten van [appellant] bij uitlevering voldoende zijn gewaarborgd en dat er op effectieve wijze tot een oplossing kan worden gekomen bij dreigende frictie. [appellant] zal pas feitelijk worden uitgeleverd als de Nederlandse Ambassade in Kigali heeft geconstateerd dat de aanpassingen die nodig zijn om de penitentiaire faciliteit toegankelijk te maken voor mindervaliden zijn gerealiseerd. Ten slotte is de minister van oordeel dat uitlevering van [appellant] geen bijzondere hardheid oplevert als bedoeld in art. 10 lid 2 Uitleveringswet (Uw).
- 3.14 Bij uitspraak van 9 november 2022 heeft de uitleveringskamer van de rechtbank Den Haag, in een andere Rwandese uitleveringszaak, de uitlevering van de opgeëiste persoon (K.) ontoelaatbaar verklaard.¹ In die zaak overwoog de uitleveringskamer dat er objectief gerechtvaardigde twijfels bestaan aan de rechterlijke onafhankelijkheid in Rwanda in geval van sommige (vermeende) politieke opposenten van het regime, vanwege het risico op politieke inmenging in die berechting. Volgens de uitleveringsrechter bieden de garanties uit de Transfer Law onvoldoende waarborg indien het gaat om de vervolging en berechting van politieke tegenstanders van het Rwandese regime zoals K. De Hoge Raad heeft het tegen deze uitspraak ingestelde cassatieberoep verworpen.²

4 De procedure bij de rechtbank

De vordering van [appellant]

4.1 komt in dit kort geding op tegen de beschikking van de minister. [appellant] is van mening dat zijn uitlevering naar Rwanda onrechtmatig is. Hij vordert *primair* een verbod aan de Staat hem uit te leveren aan Rwanda en *subsidiar* een verbod hem uit te leveren zonder concrete garanties dat zijn rechten uit de artt. 2, 3 en 6 EVRM en art. 10 Uw niet zullen worden geschonden. Onder die nader te verstrekken garanties zouden zich in ieder geval de garanties moeten bevinden dat [appellant] zich in Rwanda, op kosten van de Staat, in de breedste zin van het woord kan laten bijstaan door mr. [advocaat], dat [appellant] ongelimiteerde toegang heeft tot de benodigde medicatie en dat hij niet zal worden uitgeleverd voordat de gevangenen voldoende toegankelijk zijn voor mindervaliden.

De grondslagen van de vordering van [appellant]

4.2 [appellant] legt aan zijn vordering, voor zover in hoger beroep nog van belang, het volgende ten grondslag:

(a) [appellant] zal als politieke tegenstander van het regime van president Kagame in Rwanda geen eerlijk proces krijgen; ook gelet op de mensen-rechtschendingen die in Rwanda plaatsvinden bestaat er een reëel risico dat een flagrante inbreuk op art. 6 EVRM plaatsvindt; bovendien zal zonder nadere specifieke garanties mr. [advocaat] [appellant] in Rwanda niet als advocaat kunnen bijstaan.

(b) [appellant] heeft een zwakke gezondheid en heeft verschillende medicijnen nodig; er is een reëel risico dat [appellant] in de Rwandese gevangenis onvoldoende medische zorg zal krijgen; bovendien loopt hij het risico op marteling of een andere onmenselijke behandeling; ook bestaat het risico dat [appellant] onder verdachte omstandigheden verdwijnt of om het leven komt; er is aldus een reëel risico op een behandeling in strijd met de artt. 2 en 3 EVRM.

(c) Ten aanzien van eventuele schendingen als bedoeld onder (a) en (b) zal [appellant] geen effectief rechtsmiddel ten dienste staan.

(d) Uitlevering van [appellant] zou van bijzondere hardheid zijn als bedoeld in art. 10 lid 2 Uw en in strijd komen met de zorgvuldigheid die de Staat jegens [appellant] in acht moet nemen.

Het oordeel van de voorzieningenrechter

4.3.1 De voorzieningenrechter heeft de vordering van [appellant] afgewezen op de volgende, hier samengevat weergegeven, gronden.

4.3.2 Ten aanzien van het beroep van [appellant] op art. 6 EVRM overweegt de voorzieningenrechter dat [appellant] zal worden berecht onder de Transfer Law, waarin diverse waarborgen ten aanzien van een eerlijk proces zijn opgenomen. Daarnaast heeft Rwanda specifieke garanties afgegeven. Van misstanden onder het regime van de Transfer Law is niet gebleken. Evenmin is gebleken dat door de Rwandese autoriteiten gegeven garanties in andere gevallen van uitlevering niet worden nageleefd. De mensenrechtenschendingen waarop [appellant] zich beroept hebben geen betrekking op zaken die onder de Transfer Law vallen. [appellant] heeft ook niet aangetoond dat hij een prominente politieke opponent van het regime in Rwanda is. Bijstand van een internationale advocaat is geen vereiste om een eerlijk proces te verzekeren. Bovendien hebben de Rwandese autoriteiten uitdrukkelijk gegarandeerd dat [appellant] zich zal

kunnen laten bijstaan door een Nederlandse advocaat.

4.3.3 Wat betreft het beroep van [appellant] op de artt. 2 en 3 EVRM overweegt de voorzieningenrechter dat de door [appellant] genoemde voorbeelden geen betrekking hebben op gevallen waarin personen aan Rwanda zijn uitgeleverd onder de Transfer Law. De Transfer Law brengt mee dat de detentieomstandigheden met extra waarborgen zijn omkleed. Bovendien hebben de Rwandese autoriteiten uitdrukkelijk garanties verstrekt voor de beschikbaarheid van medische zorg en medicatie. De Staat heeft ook toegezegd dat [appellant] niet zal worden uitgeleverd zolang de vereiste aanpassingen van de gevangenis voor mindervaliden niet zijn uitgevoerd.

4.3.4 [appellant] heeft onvoldoende aannemelijk gemaakt dat hij geen effectief rechtsmiddel zal kunnen aanwenden tegen een eventuele schending van de artt. 6, 2 en 3 EVRM. De Rwandese autoriteiten hebben gegarandeerd dat [appellant] hoger beroep zal kunnen instellen.

4.3.5 De uitlevering is niet van bijzondere hardheid. De noodzakelijke medicatie en behandeling zal voor [appellant] in Rwanda beschikbaar zijn.

5 Beoordeling van het hoger beroep

5.1 [appellant] bestrijdt het vonnis van de voorzieningenrechter met zes grieven. In grief 1 betoogt [appellant] dat er wel degelijk een reëel risico bestaat op een flagrante inbreuk op de hem op grond van art. 6 EVRM toekomende rechten. Met grief 2 betoogt [appellant] dat bij een eventuele schending van art. 6 EVRM voor hem geen effectief rechtsmiddel zal openstaan. Met grief 3 keert [appellant] zich tegen het oordeel van de voorzieningenrechter dat geen reëel risico bestaat op schending van de artt. 2 en 3 EVRM. Grief 4 heeft betrekking op de stelling dat uitlevering van bijzondere hardheid (art. 10 lid 2 Uw) en in strijd met de zorgvuldigheidsnorm zou zijn. In grief 5 voert [appellant] aan dat verder strekkende garanties nodig zijn. Grief 6 heeft geen zelfstandige betekenis.

5.2 Het hof zal eerst de grieven 1 en 2 (dreigende flagrante inbreuk op art. 6 EVRM) behandelen.

Juridisch beoordelingskader art. 6 EVRM bij uitlevering

5.3 Het hof stelt voorop dat op grond van de vaste jurisprudentie van het Europese Hof voor de Rechten van de Mens (EHRM), art. 6 EVRM eerst dan aan uitlevering in de weg staat, indien de opgeëiste persoon aantoont dat hij, indien hij wordt uitgeleverd, *"would be exposed to a real risk of being subject to a flagrant denial of justice"*³. Het EHRM oordeelde dat voor *"a flagrant denial of justice"* niet genoeg is dat zich een situatie voordoet die op nationaal niveau een schending van art. 6 EVRM inhoudt. Voor een *"flagrant denial of justice"* is nodig *"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"*⁴. *"Flagrant denial of justice"* is synoniem met een proces dat *"is manifestly contrary to the provisions of Article 6 or the principles embodied therein"*.⁵

5.4 Van belang hierbij is dat het er volgens constante rechtspraak van het EHRM om gaat of het proces *als geheel* eerlijk is verlopen, hetgeen meebrengt dat een uit een oogpunt van art. 6 EVRM bedenkelijke gang van zaken in beginsel kan worden hersteld, hetzij door de rechter zelf hetzij in hoger beroep.⁶ Voor een verbod op uitlevering is dan ook niet alleen vereist dat een flagrante schending van art. 6 EVRM dreigt, maar ook dat, indien de verzoekende staat partij is bij het EVRM of (zoals in het geval van Rwanda) het IVBPR, aan de opgeëiste persoon na zijn uitlevering ter zake van die inbreuk niet een rechtsmiddel als bedoeld in art. 13 EVRM of art. 2 lid 3 IVBPR ten dienste staat.⁷

5.5

Het is aan de opgeëiste persoon ([appellant]) om in dit kort geding aannemelijk te maken dat hij een reëel risico loopt op een flagrante inbreuk op art. 6 EVRM en dat hem daartegen geen effectief rechtsmiddel ten dienste zal staan. Nu het gaat om de toetsing van de (dreigende) schending van een fundamenteel recht is de toets die de burgerlijke rechter moet uitvoeren een volledige.⁸ Daarbij dient de rechter uit te gaan van het vertrouwensbeginsel, dat meebrengt dat erop moet worden vertrouwd dat de verzoekende staat na uitlevering de grondrechten van de opgeëiste persoon niet zal schenden en dat de garanties die de verzoekende staat afgeeft zullen worden nagekomen.⁹ Het vertrouwensbeginsel zal echter moeten wijken als de opgeëiste persoon aannemelijk maakt dat in zijn geval reden is om aan te nemen dat de grondrechten niet zullen worden gerespecteerd. Indien is aangevoerd dat eventueel door de verzoekende staat gegeven garanties niet zullen worden nageleefd, dient de rechter dat te onderzoeken.¹⁰ Het EHRM heeft richtsnoeren gegeven welke aspecten bij de toetsing van garanties kunnen worden gewogen. Het EHRM over zijn eigen rol in het beoordelen van garanties:

"its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment"

"In a case where assurances have been provided by the receiving State, those assurances constitute a further relevant factor which the Court will consider. However, assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time ()." ¹¹

Het hof zal dan ook dit beoordelingskader toepassen.

- 5.6 Bij de beoordeling van de grieven gaat het er steeds om of een reëel risico bestaat dat [appellant] bij uitlevering het slachtoffer zal worden van een flagrante schending van art. 6 EVRM. De uitlevering kan niet worden verboden op grond van de mensenrechtensituatie in Rwanda in het algemeen. Dit neemt niet weg dat het hof, bij de beoordeling van de vraag of een reëel risico bestaat dat [appellant] het slachtoffer wordt van een flagrante schending van art. 6 EVRM, alle relevante omstandigheden in aanmerking moet nemen. Tot die omstandigheden behoren niet alleen de berechting onder de Transfer Law en de verstrekte garanties, maar ook de algemene mensenrechtensituatie voor zover aannemelijk is dat deze van invloed zal zijn op de concrete situatie van [appellant] of van belang is voor de vraag of erop mag worden vertrouwd dat Rwanda de gegeven garanties zal naleven. Anders dan de Staat kennelijk voor ogen staat kan het hof er dus niet mee volstaan te toetsen of in het verleden mensenrechtenschendingen hebben plaatsgevonden bij de berechting van onder de Transfer Law berechte verdachten en meer in het bijzonder bij de berechting onder de Transfer Law van door Nederland uitgeleverde personen. De uitleveringsrechter in de zaak van K. heeft juist veel breder gekeken en de Hoge Raad overwoog dat dit oordeel geen blijk gaf van een onjuiste rechtsopvatting.¹²

Verhouding tot de uitleveringsrechter

- 5.7 De taakverdeling tussen uitleveringsrechter en burgerlijke rechter in uitleveringszaken brengt mee dat het in beginsel de uitleveringsrechter is die oordeelt over de vraag of een reëel risico bestaat dat de opgeëiste persoon te maken zal krijgen met een flagrante strijd met art. 6 EVRM.¹³ In de zaak van [appellant] heeft de uitleveringskamer van de rechtbank Den Haag in haar uitspraak van 30 april 2021 geoordeeld dat een dergelijk reëel risico niet is komen vast te staan. [appellant] heeft in dit kort geding echter een beroep gedaan op andere feiten, omstandigheden en bewijsmateriaal dan waarover de uitleveringsrechter heeft geoordeeld. Indien daarop voor de burgerlijke rechter een beroep is gedaan ter ondersteuning van het betoog dat uitlevering in strijd zou zijn met een of meer fundamentele rechten, moet deze rechter die andere feiten, omstandigheden of bewijsmateriaal in zijn beoordeling betrekken.¹⁴ In een dergelijk geval moet de burgerlijke rechter niet alleen over deze andere argumenten oordelen; hij zal moeten oordelen over de vraag of de reeds bij de

uitleveringsrechter aangevoerde argumenten en de (nadien aangevoerde) andere argumenten *tezamen* de conclusie rechtvaardigen dat sprake is van een reëel risico op schending van een fundamenteel recht.¹⁵

Feiten, omstandigheden en bewijsmateriaal waarover de uitleveringsrechter niet heeft geoordeeld

5.8.1 In dit kort geding heeft [appellant] een beroep gedaan op feiten, omstandigheden en bewijsmateriaal waarover de uitleveringsrechter niet heeft geoordeeld (en ook niet heeft kunnen oordelen), namelijk:

(a) de uitspraak van de uitleveringsrechter in een andere Rwandese uitleveringszaak van 9 november 2022 en het arrest van de Hoge Raad in die zaak van 6 juni 2023;¹⁶

(b) het rapport van de deskundige [deskundige] van 5 september 2022¹⁷ waarop de uitleveringsrechter in de onder (a) genoemde zaak zijn oordeel mede baseerde, alsmede de verklaring van [deskundige] van 6 juni 2023;¹⁸

(c) de verklaring van [A] van 14 februari 2022;¹⁹

(d) de verklaring van [B] van 19 juli 2023;²⁰

(e) de verklaring van [C] , de zoon van [appellant] , van 3 november 2023;²¹

(f) het thematisch ambtsbericht van het Ministerie van Buitenlandse Zaken van juni 2023;²²

(g) het rapport van Human Rights Watch "Join us or die" van oktober 2023;²³

(h) de uitspraak van het Court of Appeal van 29 juni 2023 over de "Rwanda deal" die het Verenigd Koninkrijk heeft gesloten met Rwanda²⁴, welke uitspraak op 15 november 2023 is bevestigd door het Supreme Court van het Verenigd Koninkrijk.²⁵

5.8.2 De Staat heeft nog aangevoerd dat het thematisch ambtsbericht uit 2023 niet veel toevoegt aan het vorige thematisch ambtsbericht. Dat is onjuist. Het vorige thematisch ambtsbericht dateert uit 2016. Het nieuwe ambtsbericht vermeldt recentere mensenrechtenschendingen, zoals het geval van [naam 1] , en bevestigt verder dat mensenrechtenschendingen ook na 2016 zijn gerapporteerd.

5.8.3 Het hof zal dit materiaal, naast de andere door [appellant] aangevoerde stellingen, betrekken in zijn oordeel over de vraag of er een reëel risico bestaat dat [appellant] na uitlevering een flagrante schending van zijn door art. 6 EVRM gewaarborgde rechten te wachten staat.

Plan van behandeling grieven 1 en 2

5.9 De kern van deze grieven is dat [appellant] van mening is dat hij, als tegenstander van het regime van president Kagame, geen eerlijk proces zal krijgen. Hij beargumenteert dat voor politieke tegenstanders van het regime, waartoe hij zichzelf ook rekent, rechterlijke onafhankelijkheid niet gewaarborgd is omdat zij het risico lopen op politieke inmenging in de rechtsgang. Het hof zal deze stelling als volgt behandelen. Eerst (onderdeel A) zal het hof ingaan op het argument dat politieke tegenstanders van het regime in het algemeen een risico lopen op politieke inmenging in de rechtsgang. Vervolgens (onderdeel B) zal het hof onderzoeken of [appellant] als een zodanige tegenstander van het Rwandese regime moet worden beschouwd, dat het reële risico bestaat dat ook hij met een dergelijke inmenging te maken zal krijgen. Daarna gaat het hof (in onderdeel C) in op de vraag of het door [appellant] gestelde risico wordt weggenomen door de omstandigheid dat hij na uitlevering zal worden berecht onder de Transfer Law en dat voor zijn berechting garanties zijn gegeven, waaronder de garantie dat

zijn proces zal worden gemonitord. Ten slotte (onderdeel D) zal het hof onderzoeken of een eventuele politieke inmenging de drempel haalt van een flagrante strijd met art. 6 EVRM zoals door het EHRM omschreven (zie hiervoor onder 5.3) en of [appellant] daartegen een effectief rechtsmiddel zal kunnen aanwenden. Onder E zal het hof een conclusie trekken over de gegrondheid van de grieven 1 en 2.

6. A. Een eerlijk proces voor tegenstanders van het regime in Rwanda?

- 6.1 Tussen partijen is in wezen niet in geschil dat in het algemeen prominente politieke opposanten van het regime van president Kagame, als zij niet vallen onder de Transfer Law en Rwanda voor hen geen garanties met betrekking tot een eerlijk proces heeft afgegeven, een reëel risico lopen dat zij in Rwanda te maken zullen krijgen met politieke inmenging of een niet onafhankelijk gerecht. Voor zover dit uitgangspunt nog nadere motivering behoeft verwijst het hof in de eerste plaats naar de conclusie van de uitleveringsrechter van 9 november 2022 inzake K.26, die erop neerkomt dat er breed gedeelde twijfel bestaat over de onafhankelijkheid van de rechtspraak in Rwanda tegen politieke opposanten, en naar de overwegingen die de uitleveringsrechter aan die conclusie ten grondslag heeft gelegd. Daarnaast acht het hof de volgende bronnen van belang:

(i) Thematisch Ambtsbericht juni 2023²⁷ p. 46-47 en 49-50: de invloed van de politiek en het veiligheidsapparaat op de rechtspraak was groot als de autoriteiten dat wensten over het algemeen om redenen van nationale veiligheid of zelfbehoud van het regime; niet uitgesloten is dat rechters zich lieten beïnvloeden als gevolg van politieke druk, waarbij ook sprake kan zijn van zelfcensuur om de president te plezieren; politieke druk kan ook via de openbare aanklager of de griffier worden uitgeoefend, zo konden critici van de autoriteiten met veel publieke of internationale aandacht lange tijd in voorarrest doorbrengen, ook al werden zij uiteindelijk door de rechter vrijgesproken; er waren enkele berichten over beschuldigingen van manipulatie van getuigen door de autoriteiten, de verdachte of de samenleving.

En op p. 13: in de 2022 *Ibrahim Index of Governance* scoort Rwanda laag in de categorie Impartiality of the Judicial System.

(ii) het rapport van Human Rights Watch "Join us or die" van oktober 2023²⁸ p. 73:

"Throughout this research, Human Rights Watch found that Rwandan authorities have sought to employ national and international judicial and law enforcement processes across the world, at times leveraging the support receives for the apprehension of genocide suspects, to target dissidents at large. In these cases, the authorities showed little regard for the independence of the judiciary and at times appeared to have interfered in cases and evidence to request the arrest or extradition of individuals."

(iii) Bertelsmann Stiftung 2020 Rwanda:²⁹

"Although the constitution provides for an independent judiciary, in practice, the courts are susceptible to government influence and manipulation. () The Rwandan judiciary has an important political function. Critics and opponents, considered dangerous by the regime, face fabricated charges of genocide, revisionism, genocide ideology, corruption, terrorism and immoral behavior. The judiciary is the tool by which the government perpetuates authoritarian rule by prosecuting opponents and critics."

(iv) Human Rights Watch, Rwanda-Events of 2021 p.1:30

"Arbitrary detention, ill-treatment, and torture in official and unofficial detention facilities was commonplace, and fair trial standards were routinely flouted in cases deemed sensitive."

(v) Human Rights Watch Submission to the Universal periodic Review of Rwanda, 9 juli 2019³¹ (par. 28):

"Fair trial standards are routinely flouted in many sensitive political cases, in which security-related charges are often used to prosecute prominent government critics. On March 31, 2016, the Military High Court of Kanombe sentenced Colonel [naam 2] and retired Brigadier General [naam 3] to 21 and 20 years in prison, respectively, on charges including inciting insurrection and tarnishing the governments image. Prosecutors accused them of criticizing the government. The Court of Appeal failed to investigate allegations of torture and witness tampering made during the trial and, on December 27, 2019, upheld the conviction." ³²

(vi) UK Court of Appeal 29 juni 2023³³ nrs. 100 e.v.:

Uit deze uitspraak blijkt dat de Engelse rechters ervan uitgaan dat de rechterlijke macht in Rwanda bloot staat aan politieke inmenging, in ieder geval in zaken tegen politieke tegenstanders.

(vii) US Country Report Rwanda 2019³⁴ p. 10:

"Judges tended to accept confessions obtained through torture despite defendants protests and failed to order investigations when defendants alleged torture during their trial."

Conclusie A: politieke tegenstanders lopen risico op oneerlijk proces

6.2 Het hof gaat er op grond van het voorgaande vanuit dat politieke tegenstanders van het regime in het algemeen een risico lopen op politieke inmenging in de rechtsgang. Dit wil niet zeggen dat politieke inmenging in rechtszaken van politieke tegenstanders in alle gevallen plaatsvindt, maar wel dat dergelijke inmenging vaak genoeg wordt gerapporteerd om aan te nemen dat daarop een reëel risico bestaat. Het hof wil in dit verband verduidelijken dat politieke inmenging ook kan bestaan uit zelfcensuur van de rechterlijke macht, namelijk indien rechters weten welke uitkomst het regime van Kagame wenst en hun oordeel daarop afstemmen (zie hiervoor onder 6.1 sub (i)). In hetgeen volgt zal het hof onder politieke inmenging ook verstaan deze vorm van rechterlijke zelfcensuur.

7. B. *Is [appellant] een (voldoende bekende) politieke tegenstander van het Rwandese regime?*

7.1 Tussen partijen is gedebatteerd over de vraag of [appellant] moet worden beschouwd als een, al dan niet prominente, politieke tegenstander van het Rwandese regime. Dit debat speelt zich af tegen de achtergrond van de hiervoor genoemde uitspraak van de uitleveringsrechter van 9 november 2022 in een andere Rwandese uitleveringszaak, waarin de uitleveringsrechter overwoog dat er objectief gerechtvaardigde twijfels bestaan aan de rechterlijke onafhankelijkheid in Rwanda in geval van berechting van politieke opposenten van het regime en dat de opgeëiste persoon in die zaak als een dergelijke politieke opposent moest worden beschouwd. In die zaak nam de uitleveringsrechter in aanmerking dat de opgeëiste persoon een voormalig hooggeplaatste militair is, dat hij ook na zijn emigratie in de belangstelling van de Rwandese overheid is gebleven en dat eerst nadat hij actief was geworden in de FDU-Inkingi tegen hem een arrestatiebevel werd uitgevaardigd. FDU-Inkingi (*Forces Démocratiques Unifiées Inkingi*), is een oppositiepartij in Rwanda die onder leiding stond van [B] en waarvan thans [A] president is. De uitleveringsrechter verklaarde de uitlevering van deze persoon ontoelaatbaar.

7.2 Het hof zal niet ingaan op de vraag of [appellant] een prominent tegenstander van het Rwandese regime is, omdat niet duidelijk is wat in dit verband onder prominent moet worden verstaan. In plaats daarvan zal het hof nagaan of [appellant] een zodanig bekende tegenstander³⁵ van het regime is (of was) dat het reële risico bestaat dat hij de Transfer Law en de garanties weggedacht te maken zal krijgen met politieke inmenging in zijn proces (al dan niet door rechterlijke zelfcensuur). Het is immers niet aannemelijk dat *elke* tegenstander van het regime met rechterlijke inmenging te maken zal

krijgen. Aannemelijk is dat dit alleen het geval is indien het regime ervan op de hoogte is dat de desbetreffende persoon een politieke tegenstander is en dat het die tegenstand van een zekere importantie acht. Anderzijds is het ook niet zo dat alleen prominente leden van de FDU-Inkingi in Rwanda voor hun veiligheid hebben te vrezen. Sinds de poging van FDU-Inkingi in 2010 om zich in Rwanda als partij in te schrijven en de aankondiging van [B] , destijds president van FDU-Inkingi, om mee te doen aan de presidentsverkiezingen, zijn meerdere leden van FPU-Inkingi verdwenen of vermoord, zoals [naam 4] , particulier secretaris van [B] (vermoord maart 2019), [naam 5] (ontvoerd juli 2019) en [naam 6] (ontvoerd november 2018).³⁶

7.3 [appellant] heeft aangevoerd dat hij actief lid is geweest van FDU-Inkingi. [appellant] stelt dat hij lid was van de politieke commissie van de Nederlandse afdeling van FDU-Inkingi en dat hij binnen deze afdeling diverse functies vervulde, in 2012-2014 als leider van deze afdeling. [appellant] stelt dat hij heeft deelgenomen aan partijmanifestaties, waaronder demonstraties tegen mensenrechtenschendingen die plaatsvinden in Rwanda, en dat hij aanwezig was bij de indiening van de aanklacht tegen president Kagame bij het Internationaal Strafhof in Den Haag op 17 augustus 2012. [appellant] had en heeft naar zijn zeggen nauw en regelmatig contact met [B] .

7.4 Uit de verklaring van [A] (hiervoor genoemd onder 5.8.1 (c)) blijkt het volgende:

(i) [appellant] was sinds 2000 actief lid van de oppositiepartij RDR (*Rassemblement Républicain pour la Démocratie au Rwanda*, een voorloper van FDU-Inkingi) en van FDU-Inkingi sinds haar oprichting in 2006;

(ii) [appellant] werd tijdens de uitoefening van zijn functie geïntimideerd en vervolgd door de FPR37 en door in Nederland opererende agenten van de FPR.

7.5 [B] heeft in haar verklaring (hiervoor genoemd onder 5.8.1 (d)) verklaard dat voormalige collegas binnen FDU-Inkingi onrechtmatig gevangen werden gezet, gemarteld, vermoord of vermist raakten en dat [appellant] "vanwege zijn lidmaatschap van FDU-Inkingi en zijn eerdere leiderschapspositie in Nederland" eenzelfde lot wacht als hij wordt uitgeleverd aan Rwanda.

7.6 [C] heeft in zijn verklaring (hiervoor genoemd onder 5.8.1 (e)) verklaard dat zijn vader ([appellant]) in feite het hoofd was van de FDU-Inkingi in Nederland, dat hij in die hoedanigheid de meest actieve, veerkrachtige en invloedrijke afdeling van de partij buiten Rwanda leidde en dat de Nederlandse afdeling van FDU-Inkingi onder leiding van zijn vader de hoeksteen werd van FDU-Inkingis activiteiten in het buitenland.

7.7 Het hof heeft geen aanleiding om aan de verklaringen van [A] , [B] en [C] aangaande de rol van [appellant] binnen FDU-Inkingi te twijfelen. De Staat heeft deze overigens ook niet voldoende gemotiveerd bestreden. Dat de Nederlandse afdeling van FDU-Inkingi internationaal een relatief belangrijke rol speelde komt niet onaannemelijk voor, nu [B] vanaf (in ieder geval) 1994 tot 2010 in Nederland woonde.³⁸ Dat [appellant] door het Rwandese regime als politiek opponent wordt beschouwd wordt bevestigd door het artikel van oktober 2020 in KT Press ("Things fall apart: luck runs out for the [achternaam appellant] ")³⁹. In dit artikel wordt [appellant] ervan beschuldigd actief betrokken te zijn geweest bij ondermijnende politiek in Europa, door de regering van Rwanda te chanteren en te besmeuren. In het artikel wordt de beoogd ambassadeur van Rwanda in Nederland geciteerd, die zou hebben gezegd "*the [achternaam appellant] have always been fraudsters*". Daarnaast bevat het artikel de volgende passage:

" [appellant] Snr , who is one of the founding members of [B] s unregistered political outfit FDU-Inkingi, was also a senior member of the former ruling party, National Republican Movement for Democracy and Development (MRND) of former President Juvenal Habyarimana, which is responsible for planning and executing the genocide against the Tutsi."

Hoewel op zichzelf niet blijkt dat dit artikel de opvatting van de Rwandese regering verwoordt, afgezien van het citaat van de beoogd ambassadeur, heeft de Staat niet weersproken dat het om een propagandistische (kennelijk in de zin van: regeringsgezinde) website gaat.⁴⁰ Bovendien blijkt uit dit artikel dat [appellant] in Rwanda bekend staat als lid van de FDU-Inkingi (en wel als *founding member*) en als een senior member van de partij van Habyarimana die verantwoordelijk wordt gehouden voor de genocide tegen de Tutsis.

- 7.8 Hoewel [appellant] niet veel concrete details verschaft over de activiteiten die hij voor de FDU-Inkingi heeft ondernomen en zijn periode van grootste activiteit (kennelijk: als voorzitter van de politieke commissie in 2012-2014) alweer een aantal jaren terug ligt, blijkt uit het vrij recente artikel in KT Press dat zijn verleden binnen FDU-Inkingi hem in Rwanda kennelijk nog steeds wordt nagedragen. In dat verband is van belang dat FDU-Inkingi door het regime in Rwanda kennelijk nog steeds als belangrijke oppositiepartij wordt beschouwd aangezien in de periode 2016-2023 zeker vijftien personen van de verschillende partijen van [B], FDU-Inkingi en DALFA-Umurinzi, gearresteerd en vervolgd zijn.⁴¹

Conclusie B: [appellant] is voldoende bekende tegenstander regime in Rwanda

- 7.9 Op grond van het voorgaande komt het hof tot de conclusie dat [appellant] door zijn activiteiten voor FDU-Inkingi in Rwanda bekend staat (en ook bij de Rwandese regering bekend is) als politiek tegenstander van het regime van president Kagame. Het is dan ook voldoende aannemelijk dat [appellant] als bekende tegenstander van het regime, de Transfer Law en de gegeven garanties weggedacht, het risico loopt dat hij te maken zal krijgen met politieke inmenging in zijn proces.

8. C. Transfer Law, garanties en monitoring

- 8.1 Het hof zal thans nagaan of het (algemene) risico dat [appellant] loopt om als (bekend) tegenstander van het Rwandese regime het slachtoffer te worden van vervolging en berechting in strijd met art 6 EVRM, wordt weggenomen door het feit dat [appellant] zal worden berecht onder toepassing van de Transfer Law en dat de Rwandese autoriteiten bepaalde garanties hebben gegeven, waaronder de garantie dat zijn proces in opdracht van Nederland zal worden gemonitord door ICJ Kenya.
- 8.2 Het hof stelt voorop dat uitgangspunt is dat het vertrouwensbeginsel ook op de door Rwanda gegeven garanties van toepassing is, ook al heeft Nederland met Rwanda geen uitleveringsverdrag gesloten.⁴² Nu [appellant] aanvoert dat de garanties, waaronder de garanties vervat in de Transfer Law, onvoldoende waarborgen bieden dat hij niet het slachtoffer zal worden van een flagrante schending van art. 6 EVRM, zal het hof die stelling moeten onderzoeken (zie hiervoor onder 5.5). Zoals het hof hiervoor (onder 5.6) heeft overwogen, moet het daarbij alle omstandigheden van het geval in aanmerking nemen. Het hof zal daarbij onder meer aandacht besteden aan de mensenrechtensituatie in Rwanda in het algemeen en aan de vraag of Rwanda er blijk van geeft te (willen) handelen conform regels van internationaal recht. Daarbij komt ook aan de orde de stelling van [appellant] dat bij twee eerdere door Nederland uitgeleverde personen de door Rwanda gegeven garanties zijn geschonden en dat dit ook gebeurde bij een door Canada uitgeleverde verdachte op wie ook de Transfer Law van toepassing was.

De algemene mensenrechtensituatie in Rwanda

- 8.3 Tussen partijen is niet in geschil dat de algemene mensenrechtensituatie in Rwanda (op zijn minst) zorgen baart. Het hof constateert dat Rwanda zich heeft aangesloten bij het IVBPR, maar dat desalniettemin, niet incidenteel maar zeer regelmatig, ernstige schendingen van de mensenrechten plaatsvinden tegen al dan niet vermeende tegenstanders van het regime. Het thematisch ambtsbericht vermeldt dat Rwanda beschuldigd bleef worden van ernstige mensenrechtenschendingen zoals excessief geweld, dood in detentie onder verdachte omstandigheden, buitengerechtelijke executies en verdwijningen, alsmede arbitraire detentie en onmenselijke en mensonterende behandeling in

detentie.⁴³ Rwanda heeft in 2016 haar verklaring onder art. 34 lid 6 bij het Protocol bij het African Charter on Human and Peoples Rights (hierna: het Charter) ingetrokken, als gevolg waarvan het individuele klachtrecht bij het African Court on Human and Peoples Rights (ACHPR) voor Rwanda kwam te vervallen. Hoewel dit Rwanda op zichzelf vrij staat, geeft dit geen blijk van een groot respect voor de eerbiediging van fundamentele rechten, zeker niet nu Rwanda als reden voor de intrekking opgaf dat "*its declaration under Article 34(6) was being exploited by convicted genocide fugitives*."⁴⁴ Waarom *convicted genocide fugitives* geen klacht bij het ACHPR zouden mogen indienen blijft daarbij onduidelijk.

8.4 In het 2022 US Country Reports on Human Rights Practices: Rwanda, wordt vermeld:

"Significant human rights issues included credible reports of: unlawful or arbitrary killings; torture or cruel, inhuman, or degrading treatment or punishment by the government; harsh and life-threatening prison conditions; arbitrary detention; political prisoners or detainees; transnational repression against individuals located outside the country, including killings, kidnappings, and violence; arbitrary or unlawful interference with privacy; serious restrictions on free expression and media, including threats of violence against journalists, unjustified arrests or prosecutions of journalists, and censorship; serious restrictions on internet freedom; substantial interference with the freedom of peaceful assembly and freedom of association, including overly restrictive laws on the organization, funding, or operation of nongovernmental and civil society organizations; serious and unreasonable restrictions on political participation; and serious government restrictions on or harassment of domestic and international human rights organizations."⁴⁵

8.5 In zijn arrest van 24 november 2017 heeft het ACHPR op een klacht van [B] geoordeeld (i) dat haar recht op een eerlijk proces zoals gewaarborgd door art. 7(1)(c) van het Charter was geschonden (par. 98) en (ii) dat de gevangenisstraf die aan haar was opgelegd in verband met bepaalde publieke uitlatingen niet noodzakelijk was in een democratische samenleving en dat de opgelegde straf disproportioneel was (par. 162). Het ACHPR beval Rwanda om alle noodzakelijke maatregelen te nemen om de rechten van [B] te herstellen en om binnen zes maanden hierover aan het ACHPR te rapporteren. Tussen partijen is niet in geschil dat Rwanda aan deze laatste verplichting niet heeft voldaan.⁴⁶

8.6 [B] heeft vervolgens bij het ACHPR een aanvraag voor *reparations* ingediend. Rwanda is in die procedure niet verschenen. Bij uitspraak van 7 december 2018 heeft het ACHPR Rwanda veroordeeld om bepaalde bedragen aan [B] te betalen wegens materiële en immateriële schadevergoeding. De Staat heeft niet weersproken dat Rwanda deze bedragen niet aan [B] heeft betaald.

8.7 Op 27 november 2020 heeft het ACHPR uitspraak gedaan naar aanleiding van een door [naam 7] ingediende klacht.⁴⁷ De uitspraak vermeldt dat [naam 7] "*was extradited by the Government of Canada*" en dat hij in Rwanda in detentie verbleef in verband met de vervolging voor genocide gepleegd in 1994. Rwanda verscheen niet in die procedure. Het ACHPR oordeelde dat Rwanda (i) het *right to a defence* (art. 7(1)(a) Charter) had geschonden, (par. 47) (ii) dat [naam 7] het slachtoffer was geworden van "*cruel, inhuman and degrading treatment*" (art. 5 Charter), (par. 91-93), (iii) dat de door [naam 7] ondergane behandeling, gezien zijn gevorderde leeftijd, neerkwam op een schending van zijn recht op leven (art. 4 Charter) (par. 107) en (iv) dat het beperkte contact dat hij met zijn gezin mocht onderhouden een schending opleverde van zijn *right to family* (art. 18(1) Charter), (par. 121). Het ACHPR heeft Rwanda veroordeeld schadevergoeding aan [naam 7] te betalen, om een onafhankelijke arts te benoemen om de gezondheidstoestand van [naam 7] te onderzoeken en om maatregelen voor te stellen die hem zouden kunnen helpen, en om aan het ACHPR te rapporteren welke maatregelen zijn genomen om de uitspraak uit te voeren. De Staat heeft niet betwist dat Rwanda aan deze verplichtingen niet heeft voldaan.

8.8 De Staat heeft aangevoerd dat nu Rwanda niet in het geding bij het ACHPR is verschenen, de diverse door het ACHPR geconstateerde schendingen moeten worden gerelativeerd. Het hof is dat niet met de

Staat eens. Uit het arrest van het ACHPR blijkt dat het de klachten inhoudelijk heeft behandeld en uitvoerig heeft gemotiveerd waarom het sommige klachten gegrond heeft bevonden. Het ACHPR heeft ook niet alle klachten gegrond bevonden. Zo is de klacht van [naam 7] dat hij niet door een onafhankelijk en onpartijdig gerecht is terecht ongrond bevonden.

8.9 Uit Human Rights Council, Working Group on the Universal Periodic Review, 37th session van 18-29 januari 2020,⁴⁸ die verwijst naar een rapport van de Secretaris-Generaal uit 2018, blijkt dat Rwanda, toen het *Subcommittee on Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* een bezoek bracht aan Rwanda, deze commissie door de Rwandese autoriteiten zodanig werd tegengewerkt dat de commissie haar bezoek aan Rwanda heeft opgeschort. In het najaar van 2022 heeft de Rwandese minister van Justitie toegezegd dat het VN-subcomité welkom zou zijn Rwanda te bezoeken, maar of dat inmiddels is gebeurd blijkt niet.⁴⁹

8.10 [naam 1], die kritisch was over de Rwandese autoriteiten, is in 2020 tegen zijn zin naar Rwanda overgebracht met een vliegtuig dat, naar de Minister van Justitie toegaf, Rwanda voor dat doel had gehuurd. [naam 1] is in Rwanda veroordeeld tot 25 jaar gevangenisstraf. In maart 2023 verleende president Kagame onder grote Amerikaanse druk gratie aan [naam 1] nadat deze had moeten beloven geen Rwandese politiek meer te bedrijven.⁵⁰ Het hof deelt niet de inschatting van de Staat dat de verleende gratie laat zien dat Rwanda zich de internationale kritiek heeft aangetrokken.⁵¹

Conclusie: de algemene mensenrechtensituatie in Rwanda biedt geen basis voor vertrouwen

8.11 De conclusie is dat de Rwandese autoriteiten er geen blijk van geven de mensenrechten te willen respecteren als hen dat niet uitkomt. Dat Rwanda zich heeft aangesloten bij het IVBPR verhindert kennelijk niet dat systematisch mensenrechten worden geschonden. Uitspraken van het ACHPR worden niet nagekomen. Van het vertrouwensbeginsel kan dan ook niet zonder meer worden uitgegaan.

De door Rwanda gegeven garanties voor een eerlijk proces

8.12 Het EHRM heeft in Othman⁵² een aantal aspecten genoemd die bij de beoordeling van garanties in aanmerking kunnen worden genomen. Eén van deze aspecten is *whether the assurances are specific or are general and vague*. In het uitleveringsverzoek heeft Rwanda onder het hoofd *Fair trial guarantees* erop gewezen dat de Transfer Law een aantal garanties bevat, waaronder “*the right to a fair and public hearing by a competent, independent and impartial court*.” Het hof constateert in de eerste plaats dat deze garantie niet specifiek voor de zaak van [appellant] is gegeven of voor de berechting van politieke tegenstanders in algemene zin, maar dat de garantie onderdeel is van de Transfer Law en dus, ook indien daarover in het uitleveringsverzoek niets zou zijn gezegd, toch al op [appellant] van toepassing zou zijn.

8.13 Daarnaast moet worden geconstateerd dat deze garantie, met name waar het gaat om de rechterlijke onafhankelijkheid en onpartijdigheid, erg algemeen geformuleerd is en op geen enkele wijze adresseert dat, zoals hiervoor is gebleken, de rechterlijke macht in Rwanda vatbaar is voor politieke inmenging als het gaat om tegenstanders van het regime. In het uitleveringsverzoek wordt ook algemene informatie gegeven over de inrichting van de rechterlijke organisatie, meer in het bijzonder de Rwandese grondwet en de wet op de rechterlijke organisatie waarin het principe van rechterlijke onafhankelijkheid is verankerd, de rechtsmiddelen die openstaan en de benoeming voor het leven van rechters in het *High Court* en het *Supreme Court*. Deze algemene informatie kan niet als afdoende garantie tegen politieke inmenging worden beschouwd, aangezien wel duidelijk is dat de rechterlijke macht in zaken tegen politieke tegenstanders van het regime niet in alle, maar wel in veel gevallen juist niet onafhankelijk van de politiek opereert. Meer in het bijzonder adresseren deze garanties en wettelijke bepalingen in het geheel niet de in de hiervoor genoemde bronnen gesignaleerde problemen

van politieke inmenging en het (hierna te noemen) uitoefenen van ongeoorloofde druk op getuigen.

8.14 Het EHRM heeft in de zaak Othman ook als een van de bij de beoordeling van garanties in aanmerking te nemen aspecten genoemd *"the length and strength of bilateral relations between the sending and receiving States, including the receiving States record in abiding by similar assurances"*. Over de bilaterale verhoudingen tussen Rwanda en Nederland heeft geen van partijen in dit verband iets gesteld. Wel heeft de Staat aangevoerd dat Rwanda de garanties die zij had gegeven inzake eerdere uitleveringen vanuit Nederland is nagekomen.

8.15 [appellant] bestrijdt dat Rwanda de in die gevallen verstrekte garanties is nagekomen. Volgens [appellant] komt uit de monitoringrapportages onder meer het volgende naar voren ten aanzien van de twee (M. en I.) in 2016 door Nederland uitgeleverde personen:

(i) tijdens de zitting van 29 januari 2019 in het proces tegen M. verklaart een getuige dat zijn verklaring al opgesteld was toen hij deze onder ogen kreeg, en dat de aanklager de getuige had verteld dat als de getuige de verklaring niet zou tekenen, de aanklager hem zou vinden en vermoorden;⁵³

(ii) volgens de advocaat van M. hebben getuigen erover geklaagd dat zij door de aanklager waren gemarteld om bewijs te fabriceren;⁵⁴

(iii) tijdens het proces tegen M. verklaarde een getuige dat hij door de aanklager *"under duress"* gedwongen werd een verklaring te ondertekenen en dat hij werd geslagen en bedreigd;⁵⁵

(iv) I. heeft tegen de monitor gezegd dat hij *"had been undergoing torture and harsh treatment by the prison officials"*.⁵⁶

Deze incidenten tonen volgens [appellant] aan dat op de door de Rwandese autoriteiten verstrekte garanties in zijn zaak niet mag worden vertrouwd.

8.16 De Staat heeft aangevoerd dat bedoeld incident ook aan de orde is geweest in de zaak die tot het arrest van dit hof van 4 mei 2021 heeft geleid en dat het hof dat betoog gemotiveerd heeft gepasseerd.⁵⁷ In die uitspraak overwoog dit hof, kort gezegd, dat uit het verslag niet blijkt dat de getuige daadwerkelijk is geslagen en dat het *High Court* aan de verdediging heeft meegedeeld dat zij zal onderzoeken of de beweringen waar zijn.⁵⁸

8.17 Het hof acht aannemelijk dat (ii) en (iii) in ieder geval deels (ii) maakt melding van (meerdere) *"witnesses"* betrekking hebben op de aantijgingen van dezelfde getuige, en dat dit ook bedoeld incident is waarop de Staat in zijn memorie van antwoord⁵⁹ doelt en waarover het hof heeft geoordeeld in het arrest van 4 mei 2021. Dat laat in ieder geval incidenten (i) en (iv) onvoldoende weersproken.⁶⁰ Het hof kan in dit kort geding niet vaststellen of de beweringen van de getuigen waarop [appellant] zich beroept op waarheid berusten. Het is verder juist dat het *High Court* aan de verdediging heeft meegedeeld dat zij zal onderzoeken of de beweringen waar zijn. Niet blijkt echter dat, waar het incident (ii)/(iii) betreft, inderdaad onderzoek naar deze (zeer ernstige) beschuldigingen is gedaan en wat daarvan het resultaat was. Hetzelfde geldt voor incident (i), dat eveneens ter zitting van het *High Court* ter sprake kwam. Hoewel dus niet vaststaat dat de bewuste aantijgingen op waarheid berusten, kan wel worden vastgesteld dat de Rwandese rechter daarnaar geen afdoende onderzoek heeft ingesteld.⁶¹

8.18 Bovendien blijkt niet dat Nederland, als ontvanger van de verstrekte garanties, in de door de monitors signaleerde (indien juist zeer ernstige) incidenten aanleiding heeft gezien om bij de Rwandese autoriteiten om opheldering te verzoeken. De Staat heeft wel gesteld dat er gevallen zijn waarin aandacht is gevraagd voor bepaalde klachten en dat dit steeds serieus en met bevredigend resultaat door de Rwandese autoriteiten is opgepakt. Niet blijkt echter dat dit ook op de beweerdelijke

gevallen van foltering betrekking heeft, laat staan dat duidelijk is gemaakt tot welk bevredigend resultaat de interventie van de Staat heeft geleid.

Conclusie: de garanties zijn ontoereikend

- 8.19 Op grond van het voorgaande is het hof van oordeel dat er weinig reden is erop te vertrouwen dat de door Rwanda verstrekte garanties met betrekking tot een eerlijk proces zullen worden nagekomen.

Monitoring

- 8.20 Monitoring (en publicatie) van de monitoringverslagen is in beginsel een nuttig instrument dat ertoe kan bijdragen dat een om uitlevering verzoekende staat de in dat kader gegeven garanties nakomt en dat het proces tegen de opgeëiste persoon eerlijk verloopt. Hiervoor is echter geconstateerd dat monitoring kennelijk niet ertoe geleid heeft dat aantijgingen van foltering door de rechter worden onderzocht of door de Staat bij Rwanda aan de orde zijn gesteld. Daar komt bij dat belangrijke inbreuken op een eerlijk proces niet noodzakelijkwijs door monitoring aan het licht worden gebracht. Het gaat daarbij met name om politieke inmenging en het onder druk zetten van getuigen. Zo zal het voor een monitor niet duidelijk hoeven te zijn dat de rechter zich in zijn uitspraak laat beïnvloeden door politieke inmenging of zelfcensuur, aangezien niet aannemelijk is dat dergelijke beïnvloeding op voor de monitor waarneembare wijze plaatsvindt. Zo is ook niet aannemelijk dat een getuige in aanwezigheid van de monitor onder druk zal worden gezet, zodat dit alleen waarneembaar is als een getuige hierover tijdens de zitting (of buiten de zitting tegenover de monitor) verklaart.

Conclusie: monitoring geen afdoende waarborg tegen een oneerlijk proces

- 8.21 De conclusie is dat niet valt te verwachten dat monitoring een wezenlijk gunstige bijdrage zal kunnen leveren op het eerlijk verloop van het proces tegen [appellant] indien hij wordt uitgeleverd. Zoals uit het voorgaande blijkt hebben de Rwandese autoriteiten onvoldoende respect voor de fundamentele rechten van politieke tegenstanders als [appellant] en moet er serieus rekening mee worden gehouden dat zij, als zij dat in hun belang achten, de rechten van [appellant] op een eerlijk proces zullen willen schenden. Er zijn dan voldoende mogelijkheden voor het regime om ervoor te zorgen dat dergelijke schendingen niet in de monitoring naar voren komen.

D. reëel risico op flagrante inbreuk op art. 6 EVRM en eventuele rechtsmiddelen

- 8.22 Het hof trekt uit het voorgaande de conclusie dat er een reëel risico bestaat dat [appellant] te maken zal krijgen met politieke inmenging in zijn proces en met ongeoorloofde beïnvloeding van belastende getuigen, onder meer door tegen deze getuigen uitgeoefende dwang, bedreigingen of foltering. Deze vormen van inmenging in het proces beoordeelt het hof als een flagrante inbreuk op art. 6 EVRM. Immers als de rechters worden beïnvloed of getuigen onder bedreigingen of foltering bewogen worden belastende verklaringen af te leggen, is in geen enkel opzicht meer sprake van een eerlijk proces. Het EHRM heeft in Othman dan ook overwogen dat het toelaten van bewijs dat door foltering is verkregen een "flagrant denial of justice" is.⁶²

De effectiviteit van rechtsmiddelen

- 8.23 Van de uitspraken van het *High Court* staat beroep open op het *Supreme Court*. Ook bestaat de mogelijkheid van *review* (kennelijk: herziening) bij het *High Court* zelf.⁶³ Het hof ziet echter geen aanleiding voor de veronderstelling dat het risico op politieke inmenging (waaronder begrepen rechterlijke zelfcensuur) bij het *Supreme Court* kleiner zou zijn dan bij het *High Court*. Daar komt bij dat het uitoefenen van ongeoorloofde druk op getuigen zich meestal buiten het zicht van de rechters van het *High Court* zal afspelen. Het valt dan ook niet te verwachten dat het *Supreme Court* daartegen een effectieve remedie zal kunnen bieden. Het is dus niet aannemelijk dat voor [appellant] een effectief rechtsmiddel zal openstaan. Die conclusie wordt ondersteund door het gegeven dat Rwanda

niet heeft voldaan aan de uitspraken van het ACHPR inzake [B] en [naam 7] , waaruit blijkt dat in ieder geval in deze zaken dit rechtsmiddel (dat na intrekking van het individuele klachtrecht inmiddels niet meer bestaat) niet effectief was.

E. Conclusie: een reëel risico op een flagrante schending van art. 6 EVRM

8.24 Op grond van de voorgaande overwegingen komt het hof tot de conclusie dat indien [appellant] aan Rwanda wordt uitgeleverd, er een reëel risico bestaat dat hij wordt blootgesteld aan een flagrante schending van art. 6 EVRM. De grieven 1 en 2 slagen. De uitlevering van [appellant] moet reeds op deze grond onrechtmatig worden geacht. De overige stellingen en grieven van [appellant] behoeven geen behandeling. Het hof zal de primaire vordering van [appellant] toewijzen en de uitlevering van [appellant] verbieden.

8.25 Het hof oordeelt in dit geval anders dan in zijn arresten uit 2016 en 2021. De arresten in die zaken en in de onderhavige zaak berusten op een waardering van alle omstandigheden van het geval, die in elke zaak anders liggen. Dit verklaart deels de verschillende uitkomsten. Ten aanzien van de zaken uit 2016 kan nog worden opgemerkt dat inmiddels meer bekend is geworden over de schending door Rwanda van mensenrechten: de mensenrechtensituatie is er na 2016 niet beter op geworden, met name zijn er meer aanwijzingen beschikbaar dat politieke opposenten van het regime regelmatig geen eerlijk proces krijgen. Een verschil met de zaak uit 2021 is verder dat in die zaak de uit te leveren persoon geen politieke activiteiten had ontplooid en nooit lid was geweest van enige politieke partij (rov. 5.26).

Slotsom

9.1 Nu grieven 1 en 2 slagen zal het hof het vonnis van de voorzieningenrechter vernietigen. Het hof zal de uitlevering van [appellant] naar Rwanda verbieden.

9.2 De Staat zal als de in het ongelijk gestelde partij worden veroordeeld in de kosten van het geding van [appellant] in beide instanties.

9.3 De Staat heeft te kennen gegeven de uitspraak van het hof te zullen afwachten mits het hoger beroep als spoedappel wordt behandeld. Dit laatste is gebeurd. Op de door [appellant] ingestelde incidentele vordering op grond van art. 223 jo. 353 Rv. hoeft dan ook niet te worden beslist.

Beslissing

Het hof:

- vernietigt het vonnis van de voorzieningenrechter in de rechtbank Den Haag van 17 mei 2023, en opnieuw rechtdoende:

- verbiedt de Staat [appellant] aan Rwanda uit te leveren;

- wijst af het meer of anders gevorderde;

- veroordeelt de Staat in de kosten van het geding in beide instanties, tot op heden aan de zijde van [appellant] begroot *in eerste aanleg* op 86,-- aan griffierecht en 129,14 aan kosten dagvaarding, en op 1.079,-- aan salaris van de advocaat, en *in hoger beroep* op 343,- aan griffierecht en 129,14 aan kosten dagvaarding, en op 3.549,-- aan salaris van de advocaat, en op 173,-- aan nasalaris voor de advocaat, nog te verhogen met 90,-- indien niet binnen veertien dagen na aanschrijving in der minne aan dit arrest is voldaan en vervolgens betekening van dit arrest heeft plaatsgevonden, en bepaalt dat

deze bedragen binnen 14 dagen na de dag van de uitspraak dan wel, wat betreft het bedrag van 90,--, na de datum van betekening, moeten zijn voldaan, bij gebreke waarvan deze bedragen worden vermeerderd met de wettelijke rente als bedoeld in artikel 6:119 BW vanaf het einde van genoemde termijn van 14 dagen tot aan de dag van voldoening;

- verklaart dit arrest uitvoerbaar bij voorraad.

Dit arrest is gewezen door mrs. S.A. Boele, E.M. Dousma-Valk en A. Dupain, en uitgesproken ter openbare terechtzitting van 19 december 2023, in aanwezigheid van de griffier.

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- ¹ Rechtbank Den Haag 9 januari 2022, ECLI:NL:RBDHA:2022:11719.
 - ² HR 6 juni 2023, ECLI:NL:HR:2023:864; NJ 2023, 316 m.n. N. Keijzer.
 - ³ EHRM 27 oktober 2011, *Ahorugeze t. Zweden*, nr. 37075/09.
 - ⁴ EHRM 27 oktober 2011, *Ahorugeze t. Zweden*, nr. 37075/09.
 - ⁵ EHRM 17 januari 2012, *Othman t. VK*, nr. 8139/09 par. 259.
 - ⁶ EHRM 27 oktober 1993, *Dombo Beheer t. Nederland*, nr. 14448/88; EHRM 9 juni 1998, *Twalib t. Griekenland*, nr. 42/1997/826/1032.
 - ⁷ HR 11 maart 2003, ECLI:NL:HR:2003:AF3312; NJ 2004, 42. HR 21 maart 2017, ECLI:NL:HR:2017:463; NJ 2017, 276; EHRM 17 juli 2008, *NA. t. Verenigd Koninkrijk*, nr. 25904/07, par. 111; EHRM 5 juli 2005, *Said t. Nederland*, nr. 2345/02, par. 49; EHRM 3 november 2022, *Sanchez-Sanchez t. VK*, nr. 22854/22 par. 87.
 - ⁸ HR 15 september 2006, ECLI:NL:HR:2006:AV7387; NJ 2007, 277; HR 11 juli 2014, ECLI:NL:HR:2014:1680; NJ 2016, 14.
 - ⁹ Zie: HR 7 september 2004, ECLI:NL:HR:2004:AP1534; NJ 2004, 595; HR 15 september 2006, ECLI:NL:HR:AV7387; NJ 2007, 277.
 - ¹⁰ EHRM 15 november 1996, *Chahal t. Verenigd Koninkrijk*, nr. 22414/93; NJ 1997, 301 par. 105; HR 15 september 2006, ECLI:NL:HR:AV7387; NJ 2007, 277.
 - ¹¹ EHRM 17 januari 2012, *Othman t. VK*, nr. 8139/09, par. 186 en 187.
 - ¹² Rechtbank Den Haag 9 januari 2022, ECLI:NL:RBDHA:2022:11719; HR 6 juni 2023, ECLI:NL:HR:2023:864; NJ 2023, 316 m.n. N. Keijzer.
 - ¹³ HR 21 maart 2017, ECLI:NL:HR:2017:463; NJ 2017, 276.
 - ¹⁴ HR 11 juli 2014, ECLI:NL:HR:2014:1680; NJ 2016, 14 rov. 3.4.5. Ook ten aanzien van een flagrante schending van art. 6 EVRM is dit denkbaar, zie ECLI:NL:PHR:2014:369 par. 7.2.
 - ¹⁵ Hof Den Haag 28 mei 2013, ECLI:NL:GHDHA:2013:CA0537 rov. 3.3.
 - ¹⁶ Rechtbank Den Haag 9 januari 2022, ECLI:NL:RBDHA:2022:11719; HR 6 juni 2023, ECLI:NL:HR:2023:864; NJ 2023, 316 m.n. N. Keijzer.
 - ¹⁷ Productie 2 bijlage 2 [appellant] .
 - ¹⁸ Productie 43 [appellant] .
 - ¹⁹ Productie 2 bijlage 1 [appellant] .
 - ²⁰ Productie 46 [appellant] .
 - ²¹ Productie 47 [appellant] .
 - ²² Productie 48 [appellant] .
 - ²³ Productie 50 [appellant] .

- ²⁴ Productie 52 [appellant] .
- ²⁵ [2023] UKSC 42.
- ²⁶ Rechtbank Den Haag 9 januari 2022, ECLI:NL:RBDHA:2022:11719; HR 6 juni 2023, ECLI:NL:HR:2023:864; NJ 2023, 316 m.n. N. Keijzer.
- ²⁷ Productie 48 [appellant] .
- ²⁸ Productie 50 [appellant] .
- ²⁹ Prod. 26 [appellant] .
- ³⁰ Prod. 20 [appellant] .
- ³¹ Productie 19 [appellant] nr. 28.
- ³² In gelijke zin: Human Rights Watch, Rwanda Events of 2021 p. 1 (productie 20 [appellant]).
- ³³ Productie 52 [appellant] ; bevestigd door het Supreme Court op 15 november 2023, [2023] EWCA Civ 745 (zie met name nrs. 82-83).
- ³⁴ Productie 8 bijlage 14 [appellant] .
- ³⁵ Vgl. Human Rights Watch, World report 2022, p. 3: known critics (productie 20 [appellant]).
- ³⁶ Zie verder prod. 21 [appellant] p. 7 en Thematisch Ambtsbericht juni 2023 p. 28-29 (productie 48 [appellant]).
- ³⁷ Front Patriotique Rwandais, de regerende partij van president Kagame; ook aangeduid als RPF (zie hiervoor onder 3.2).
- ³⁸ Thematisch Ambtsbericht par. 2.9.1 (productie 48 [appellant]).
- ³⁹ Productie 27 [appellant] .
- ⁴⁰ Appeldagvaarding nr. 34.
- ⁴¹ Thematisch ambtsbericht p. 28 (productie 48 [appellant]).
- ⁴² HR 17 juni 2014, ECLI:NL:HR:2014:1441 rov. 3.3.
- ⁴³ Prod. 48 [appellant] p. 14.
- ⁴⁴ International Justice Resource Center, bijlage 12 bij productie 8 [appellant] ; Human Rights Council 16 november 2020 nr. 10 (productie 14 [appellant]).
- ⁴⁵ Rwanda - United States Department of State (<https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/rwanda/>) p. 1-2.
- ⁴⁶ Aldus ook Thematisch ambtsbericht Rwanda, juni 2023 nr. 2.9.2 (productie 48 [appellant]); deskundige [deskundige] 5 september 2022 p. 6 (productie 2 [appellant] bijlage 3).
- ⁴⁷ [naam 7] v Rwanda (judgment) (2020) 4 AfCLR 834.
- ⁴⁸ Prod. 13 [appellant] .
- ⁴⁹ Thematisch ambtsbericht Rwanda, juni 2023 nr. 2.4.2 (productie 48 [appellant]).
- ⁵⁰ Thematisch ambtsbericht Rwanda juni 2023 p. 14 (productie 48 [appellant]).
- ⁵¹ Memorie van antwoord nr. 5.2.16 voetnoot 22.
- ⁵² EHRM 17 januari 2012, *Othman t. VK*, nr. 8139/09.
- ⁵³ Dagvaarding eerste aanleg nr. 42, verwijzend naar de brief aan de Minister van 14 maart 2022 p. 6 (productie 1 [naam 8]); de bewuste passage uit het monitoring rapport van december 2018-januari 2019 (nrs. 68-70) is niet overgelegd, maar het hof daarvan kennis genomen op de (openbare) website Monitoring Rwandese uitleveringszaken | Internationale vrede en veiligheid | Rijksoverheid.nl .
- ⁵⁴ Pleitnota [appellant] eerste aanleg nr. 18, monitoringsrapport april-mei 2019 nr. 494 (productie 41 [appellant]).
- ⁵⁵ Monitoringsrapport M. april-mei 2019 nr. 74 (productie 42 [appellant]).
- ⁵⁶ Monitoringsrapport I. februari-maart 2019 nr. 39 (productie 36 [appellant]).
- ⁵⁷ Memorie van antwoord nr. 5.2.20.

⁵⁸ Hof Den Haag 4 mei 2021, ECLI:NL:GHDHA:2021:763 rov. 5.23.

⁵⁹ Memorie van antwoord 5.2.20.

⁶⁰ Nota bene: de uitspraak van het Committee against Torture van 16 mei 2019 (productie 9 conclusie van antwoord) inzake de klacht van I. tegen Nederland heeft slechts betrekking op de uitlevering zelf, niet op wat daarna gebeurde.

⁶¹ Uit de Final Trial Monitoring Reports van I. en M. blijkt daarvan in ieder geval niets; zie de in noot 51 genoemde website waarop deze reports te raadplegen zijn.

⁶² EHRM 17 januari 2012, *Othman t. VK*, nr. 8139/09, par. 267.

⁶³ Uitleveringsverzoek nrs. 20-21 (productie 5 [appellant]).

ANNEX J

ECLI:NL:GHDHA:2023:2470

Instantie	Gerechtshof Den Haag
Datum uitspraak	19-12-2023
Datum publicatie	21-12-2023
Zaaknummer	200.330.802/01
Formele relaties	Cassatie: ECLI:NL:HR:2025:592
Rechtsgebieden	Verbintenissenrecht
Bijzondere kenmerken	Hoger beroep kort geding
Inhoudsindicatie	Verbod tot uitlevering aan Rwanda; risico van flagrante schending van art. 6 EVRM.
Vindplaatsen	Rechtspraak.nl

Uitspraak

GERECHTSHOF DEN HAAG

Civil recht

Team Handel

Zaaknummer hof : 200.330.802/01

Zaaknummer rechtbank : C/09/645278/KG ZA 23-260

Arrest van 19 december 2023

in de zaak van

[appellant] ,

thans gedetineerd in [] ,

appellant,

advocaat: mr. J.P.W. Temminck Tuinstra in Amsterdam,

tegen

de Staat der Nederlanden,

zetelend in Den Haag,

verweerder in hoger beroep,

advocaat: mr. C.M. Bitter in Den Haag.

Het hof zal partijen hierna noemen [appellant] en de Staat.

1 De zaak in het kort

- 1.1 De Rwandese autoriteiten hebben aan de Staat verzocht [appellant] uit te leveren. Rwanda wil [appellant] strafrechtelijk vervolgen omdat hij verdacht wordt van deelname aan de genocide in 1994. De uitleveringsrechter heeft de uitlevering toelaatbaar verklaard en de Minister van Justitie en Veiligheid (hierna: de minister) heeft besloten [appellant] inderdaad naar Rwanda uit te leveren. [appellant] heeft vervolgens deze kort gedingprocedure aanhangig gemaakt, waarin hij vordert dat de Staat wordt verboden hem uit te leveren. [appellant] vreest dat bij berechting in Rwanda zijn fundamentele rechten zullen worden geschonden.
- 1.2 Het hof stelt [appellant] in het gelijk. De mensenrechtensituatie in Rwanda is zeer zorgwekkend. Er is een reëel risico dat als [appellant] naar Rwanda wordt uitgeleverd hij, als tegenstander van het regime van president Kagame, geen eerlijk proces zal krijgen. Het hof verbiedt daarom de Staat tot uitlevering van [appellant] over te gaan.

2 De procedure

Het verloop van de procedure blijkt uit de volgende stukken:

- de dagvaarding van 4 augustus 2023, waarmee [appellant] in hoger beroep is gekomen van het vonnis van de voorzieningenrechter in de rechtbank Den Haag van 7 juli 2023, en waarin [appellant] vier grieven tegen dat vonnis heeft aangevoerd (met producties 34 tot en met 41);
- de memorie van antwoord van de Staat;
- de producties 42 tot en met 55 van [appellant] voor de mondelinge behandeling op 20 november 2023;
- de pleitnotities van mr. Temminck Tuinstra namens [appellant] , en van mr. Bitter namens de Staat, die het woord hebben gevoerd tijdens de mondelinge behandeling op 20 november 2023;
- het proces-verbaal van die mondelinge behandeling, die met instemming van partijen is gecombineerd met de mondelinge behandeling in een andere uitleveringszaak naar Rwanda (zaaknummer 200.328.650/01).

3 Feiten en achtergronden

Achtergrond: genocide in Rwanda en het Rwanda Tribunaal

- 3.1 In Rwanda bestaan al decennia spanningen tussen de voornaamste bevolkingsgroepen, de Hutus en de Tutsis, waarbij de Hutus de meerderheid vormen maar niet altijd aan de macht waren. Vanaf 1950 en ook na de onafhankelijkheid in 1962 was in Rwanda de Hutu-meerderheid aan de macht. In 1994 werd het vliegtuig van (Hutu) president Habyarimana neergeschoten, waarbij hij om het leven kwam. Naar aanleiding van dit incident hebben zich in 1994 in Rwanda extreme gewelddadigheden voorgedaan, waarbij ongeveer 800.000 personen, merendeels Tutsis, om het leven zijn gebracht, zowel door het door Hutus gedomineerde Rwandese leger als door Hutu-milities. Deze gebeurtenissen zijn door het Rwanda Tribunaal (zie hierna) als genocide (volkerenmoord) gekwalificeerd.
- 3.2 Aan de genocide kwam een einde toen het Tutsi rebellenleger onder de naam *Rwandan Patriotic Front* (RPF) in juli 1994 de macht overnam in de Rwandese hoofdstad Kigali. De RPF is sindsdien aan de macht in Rwanda, sinds 2000 onder leiding van haar huidige president Paul Kagame, de voormalige bevelhebber van de RPF.
- 3.3 In 1997 heeft de Veiligheidsraad van de Verenigde Naties het Rwanda Tribunaal (International Criminal Tribunal for Rwanda, hierna: ICTR) opgericht om de verdachten van deze misdaden te berechten. Per 31 december 2015 heeft het ICTR zijn werkzaamheden beëindigd. De nog lopende zaken van het ICTR worden thans afgewikkeld door het Mechanism for International Criminal Tribunals (MICT), dat dergelijke werkzaamheden ook voor het Joegoslavië Tribunaal (International Criminal Tribunal for the former Yugoslavia) verricht.
- 3.4 Het ICTR had de bevoegdheid bij hem aanhangig gemaakte zaken ter berechting over te dragen aan Rwanda. Vanaf 2011 heeft het daarvan gebruik gemaakt, omdat het oordeelde dat het Rwandese rechtssysteem inmiddels zodanige waarborgen bood dat verdachten van genocide in Rwanda een eerlijk proces zouden krijgen.
- 3.5 Verdachten van wie de vervolging is overgedragen aan Rwanda worden berecht onder het regime van de (Rwandese) *Transfer Law*. Deze *Transfer Law* voorziet in de berechting van overgedragen verdachten door een speciale kamer van het *High Court* in Kigali. De *Transfer Law* kent bepaalde procedurele waarborgen, zoals immuniteit voor de advocaten die de verdachte bijstaan. De personen die verdacht en veroordeeld worden onder het regime van de *Transfer Law* ondergaan hun hechtenis respectievelijk gevangenisstraf in afzonderlijke, speciaal voor hen ingerichte (afdelingen van) penitentiaire faciliteiten.
- De positie van [appellant]*
- 3.6.1 , geboren op [geboortedatum] , heeft in 2001 een verblijfsvergunning asiel gekregen. In 2006 is aan [appellant] het Nederlanderschap verleend.
- 3.6.2 De Immigratie en Naturalisatiedienst (IND) heeft in 2013 geconcludeerd dat er ernstige redenen waren om te veronderstellen dat [appellant] zich schuldig heeft gemaakt aan dan wel verantwoordelijk is te houden voor één of meerdere gedragingen als genoemd in art. 1(F) Vluchtelingenverdrag. Vervolgens is nader onderzoek gedaan hetgeen geresulteerd heeft in een individueel ambtsbericht van 31 augustus 2016.
- 3.6.3 In 2014 heeft de staatssecretaris van Justitie en Veiligheid het Nederlanderschap van [appellant] ingetrokken, omdat hij bij zijn naturalisatieverzoek zijn rol in de genocide in 1994 in Rwanda zou hebben verzwezen.
- 3.6.4 De verblijfsvergunning van [appellant] is bij besluit van 27 juli 2021 ingetrokken, waarbij aan [appellant] een inreisverbod van 10 jaar is opgelegd. Volgens de staatssecretaris, die zich

baseerde op het hiervoor genoemde individueel ambtsbericht uit 2016, is [appellant] betrokken geweest bij de genocide op de Tutsis in Rwanda en is daarom art. 1(F) Vluchtelingenverdrag op hem van toepassing.

- 3.6.5 [appellant] heeft tegen de intrekking van zijn Nederlanderschap en zijn verblijfsvergunning diverse rechtsmiddelen, waaronder een verzoek tot heroverweging van het besluit tot intrekking van zijn Nederlanderschap, aangewend. Voor zover in dit kort geding van belang hebben deze rechtsmiddelen vooralsnog het volgende resultaat gehad:
 - (i) bij uitspraak van 17 november 2023¹ heeft de rechtbank Amsterdam het besluit van de staatssecretaris van 22 november 2022, waarin het verzoek van [appellant] om de intrekking van zijn Nederlanderschap te heroverwegen werd afgewezen, vernietigd en de staatssecretaris opgedragen een nieuw besluit te nemen;
 - (ii) bij uitspraak van 17 november 2023² heeft de rechtbank Den Haag het besluit van de staatssecretaris van 27 juli 2021 tot intrekking van de verblijfsvergunning vernietigd.
- 3.7 Op 17 maart 2009 hebben de Rwandese autoriteiten de uitlevering van [appellant] verzocht met het oog op zijn vervolging voor verschillende strafbare feiten, die alle verband houden met de genocide. Bij brief van 12 juli 2021 hebben de Rwandese autoriteiten bevestigd dat dit uitleveringsverzoek nog steeds van kracht is en op 9 augustus 2021 hebben zij opnieuw een uitleveringsverzoek ingediend.³
- 3.8 In verband met dit al eerder ingediende uitleveringsverzoek is [appellant] op 29 juli 2021 aangehouden. Sindsdien bevindt [appellant] zich in uitleveringsdetentie.
- 3.9 In haar uitspraak van 12 november 2021 heeft de uitleveringskamer van de rechtbank Den Haag de uitlevering toelaatbaar verklaard. De rechtbank heeft daarbij de minister geadviseerd het proces tegen [appellant] en zijn detentieomstandigheden nauwlettend door de Kenyan Sector van de International Commission of Jurists (ICJ Kenya) te laten monitoren en de monitoring-rapporten publiek toegankelijk te maken.
- 3.10 Het door [appellant] tegen deze uitspraak ingestelde cassatieberoep heeft de Hoge Raad in zijn arrest van 12 april 2022 verworpen.
- 3.11 In de uitleveringsverzoeken hebben de Rwandese autoriteiten (i) verklaard dat op de vervolging van [appellant] de Transfer Law van toepassing zal zijn en uiteengezet welke *fair trial guarantees* in de Transfer Law zijn opgenomen, (ii) informatie verschaft over de wijze waarop rechterlijke onafhankelijkheid en onpartijdigheid zijn gewaarborgd ([appellant] zal in eerste instantie worden berecht door het *High Court*, waarvan de leden voor het leven zijn benoemd), (iii) de mogelijkheden voor hoger beroep en herziening uiteengezet en (iv) de garanties gegeven dat Nederland het proces en de detentieomstandigheden van [appellant] zal kunnen monitoren, dat [appellant] zal worden gedetineerd in een penitentiaire inrichting die aan internationale eisen voldoet, en dat de mogelijkheid bestaat om rechtsbijstandsfinanciering aan te vragen. Ten slotte hebben de Rwandese autoriteiten in het uitleveringsverzoek bevestigd dat aan [appellant] niet de doodstraf zal worden opgelegd.
- 3.12 Bij beschikking van 6 maart 2023 heeft de minister besloten [appellant] aan Rwanda uit te leveren. De minister heeft daarbij onder meer in aanmerking genomen dat de Rwandese autoriteiten diverse garanties hebben verstrekt die zien op naleving van de fundamentele rechten van [appellant] . De minister overweegt dat het interstatelijk vertrouwensbeginsel meebrengt dat erop mag worden vertrouwd dat deze garanties worden nageleefd, tenzij er concrete aanwijzingen zijn dat dit niet het geval is. In dit verband acht de minister van belang dat het strafproces en de detentieomstandigheden van [appellant] nauwlettend zullen worden gemonitord door ICJ en dat de rapporten van deze organisatie openbaar zullen worden gemaakt. Daarnaast zal toezicht worden uitgeoefend door de Nederlandse ambassade, ook na afronding van het strafproces. De minister is van oordeel dat er vertrouwen is dat de fundamentele rechten van [appellant] bij uitlevering voldoende zijn gewaarborgd en dat er op effectieve wijze tot een oplossing kan worden gekomen bij dreigende frictie.
- 3.13 Bij uitspraak van 9 november 2022 heeft de uitleveringskamer van de rechtbank Den Haag, in een andere Rwandese uitleveringszaak, de uitlevering van de opgeëiste persoon (K.) ontoelaatbaar verklaard.⁴ In die zaak overwoog de uitleveringskamer dat er objectief gerechtvaardigde twijfels bestaan aan de rechterlijke onafhankelijkheid in Rwanda in geval van sommige (vermeende) politieke opposanten van het regime, vanwege het risico op politieke inmenging in die berechting. Volgens de

uitleveringsrechter bieden de garanties uit de Transfer Law onvoldoende waarborg indien het gaat om de vervolging en berechting van politieke tegenstanders van het Rwandese regime zoals K. De Hoge Raad heeft het tegen deze uitspraak ingestelde cassatieberoep verworpen.⁵

4 De procedure bij de rechtbank

De vordering van [appellant]

4.1 komt in dit kort geding op tegen de beschikking van de minister. [appellant] is van mening dat zijn uitlevering naar Rwanda onrechtmatig is. Hij vordert, samengevat, *primair* een verbod aan de Staat hem uit te leveren aan Rwanda en *subsidiair* een verbod hem uit te leveren zonder dat toereikend onderzoek is gedaan naar, onder meer, de vraag of [appellant] de persoon is die door Rwanda wordt gezocht, althans voordat nadere, toereikende garanties zijn bedongen dat zijn fundamentele rechten niet zullen worden geschonden. Ook vordert [appellant] (subsidiair) dat de uitlevering wordt verboden totdat definitief is beslist in de zaken met betrekking tot de intrekking van zijn Nederlanderschap en zijn verblijfsvergunning.

De grondslagen van de vordering van [appellant]

4.2 [appellant] legt aan zijn vordering, voor zover in hoger beroep nog van belang, het volgende ten grondslag:

(a) [appellant] zal als politieke tegenstander van het regime van president Kagame en familielid van de voormalige president Habyarimana in Rwanda geen eerlijk proces krijgen; gelet op de mensenrechtenschendingen die in Rwanda plaatsvinden bestaat er een reëel risico op een schending van de artt. 2 en 3 EVRM en op een flagrante inbreuk op art. 6 EVRM;

(b) als de beroepen van [appellant] tegen de besluiten tot intrekking van zijn Nederlanderschap en zijn verblijfsvergunning gegrond worden verklaard staat het beginsel van *non-refoulement* aan uitlevering in de weg;

(c) ten aanzien van eventuele schendingen als bedoeld onder (a) zal [appellant] geen effectief rechtsmiddel ten dienste staan.

Het oordeel van de voorzieningenrechter

4.3.1 De voorzieningenrechter heeft (voor zover in hoger beroep van belang) de vordering van [appellant] afgewezen op de volgende, hier samengevat weergegeven, gronden.

4.3.2 Het vertrouwensbeginsel is van toepassing ook al geldt er tussen Nederland en Rwanda geen uitleveringsverdrag en is Rwanda geen partij bij het EVRM. Rwanda is wel aangesloten bij het Internationaal Verdrag inzake Burgerrechten en Politieke Rechten (IVBPR) en heeft garanties afgegeven om de rechten van [appellant] te waarborgen. Alleen als er gegronde redenen zijn om aan te nemen dat [appellant] bij uitlevering een reëel risico loopt op een schending van de artt. 2 en 3 EVRM of op een flagrante inbreuk op art. 6 EVRM is er reden om de uitlevering te verbieden.

4.3.3 [appellant] heeft niet aannemelijk gemaakt dat hij als prominent politiek opponent van het regime in Rwanda wordt gezien en daarom een (groter) risico loopt op schending van zijn fundamentele rechten.

- 4.3.4 [appellant] heeft onvoldoende aannemelijk gemaakt dat hij na uitlevering zal worden blootgesteld aan een flagrante inbreuk op art. 6 EVRM. [appellant] zal worden berecht onder de Transfer Law, waarin diverse waarborgen ten aanzien van een eerlijk proces zijn opgenomen. Uit de monitoring van eerder door Nederland naar Rwanda uitgeleverde personen komen geen aanwijzingen naar voren dat sprake was van een flagrante schending van art. 6 EVRM. [appellant] heeft ook niet aangetoond dat hij een prominente politieke opponent van het regime in Rwanda is.
- 4.3.5 [appellant] heeft evenmin aannemelijk gemaakt dat juist hij na uitlevering een reëel risico loopt op een behandeling in strijd met de artt. 2 en 3 EVRM. De door [appellant] genoemde voorbeelden hebben geen betrekking op gevallen waarin personen aan Rwanda zijn uitgeleverd onder de Transfer Law. De Transfer Law brengt mee dat de detentieomstandigheden met extra waarborgen zijn omkleed en ook zal monitoring plaatsvinden. Bij [appellant] spelen geen specifieke gezondheidsproblemen.
- 4.3.6 [appellant] heeft onvoldoende aannemelijk gemaakt dat hij geen effectief rechtsmiddel zal kunnen aanwenden tegen een eventuele schending van art. 6 EVRM. De Rwandese autoriteiten hebben gegarandeerd dat [appellant] hoger beroep zal kunnen instellen.
- 4.3.7 Er bestaat geen aanleiding voor uitstel van de uitlevering of aanhouding van het kort geding totdat is beslist op [appellant] verzoek om herziening van de intrekking van zijn Nederlanderschap en het beroep tegen de intrekking van zijn verblijfsvergunning. Over de intrekking van de Nederlandse nationaliteit is tot in hoger beroep beslist. Voor wat betreft zijn verblijfsvergunning is sprake van een situatie als bedoeld in art. 1(F) Vluchtelingenverdrag. Bovendien heeft de beoordeling in deze uitleveringszaak voorrang op de procedure met betrekking tot de verblijfsvergunning van [appellant] .

5 Beoordeling van het hoger beroep

- 5.1 [appellant] komt tegen het vonnis van de voorzieningenrechter op met vier grieven. In grief 1 bestrijdt [appellant] het oordeel van de rechtbank dat uitgegaan moet worden van het vertrouwensbeginsel en dat erop mag worden vertrouwd dat Rwanda de gegeven garanties zal nakomen. Met grief 2 betoogt [appellant] dat, anders dan de voorzieningenrechter heeft overwogen, zijn familiebanden met de voormalig president Habyarimana en zijn banden met de oppositie maken dat er een reële dreiging bestaat dat zijn fundamentele rechten zullen worden geschonden. Grief 3 is gericht tegen het oordeel van de voorzieningenrechter dat [appellant] geen reëel risico loopt op schending van de artt. 2 en 3 EVRM. [appellant] zal tegen een dergelijke schending ook geen effectief rechtsmiddel kunnen aanwenden. Als [appellant] zijn Nederlanderschap en zijn asielstatus herkrijgt staat dat bovendien aan uitlevering in de weg. In grief 4 voert [appellant] aan dat hij na uitlevering zal worden blootgesteld aan een reëel risico van een flagrante schending van art. 6 EVRM en dat hem in dat geval geen effectief rechtsmiddel ten dienste zal staan.
- 5.2 Het hof zal eerst het beroep van [appellant] op het risico van een flagrante schending van art. 6 EVRM (grief 4) behandelen, dit in samenhang met de grieven 1 en 2.

Juridisch beoordelingskader art. 6 EVRM bij uitlevering

- 5.3 Het hof stelt voorop dat op grond van de vaste jurisprudentie van het Europese Hof voor de Rechten van de Mens (EHRM), art. 6 EVRM eerst dan aan uitlevering in de weg staat, indien de opgeëiste persoon aantoont dat hij, indien hij wordt uitgeleverd, *"would be exposed to a real risk of being subject to a flagrant denial of justice"*⁶. Het EHRM oordeelde dat voor *"a flagrant denial of justice"* niet genoeg is dat zich een situatie voordoet die op nationaal niveau een schending van art. 6 EVRM

inhoudt. Voor een “*flagrant denial of justice*” is nodig “*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*”⁷. “*Flagrant denial of justice*” is synoniem met een proces dat “*is manifestly contrary to the provisions of Article 6 or the principles embodied therein*”.⁸

5.4 Van belang hierbij is dat het er volgens constante rechtspraak van het EHRM om gaat of het proces *als geheel* eerlijk is verlopen, hetgeen meebrengt dat een uit een oogpunt van art. 6 EVRM bedenkelijke gang van zaken in beginsel kan worden hersteld, hetzij door de rechter zelf hetzij in hoger beroep.⁹ Voor een verbod op uitlevering is dan ook niet alleen vereist dat een flagrante schending van art. 6 EVRM dreigt, maar ook dat, indien de verzoekende staat partij is bij het EVRM of (zoals in het geval van Rwanda) het IVBPR, aan de opgeëiste persoon na zijn uitlevering ter zake van die inbreuk niet een rechtsmiddel als bedoeld in art. 13 EVRM of art. 2 lid 3 IVBPR ten dienste staat.¹⁰

5.5 Het is aan de opgeëiste persoon ([appellant]) om in dit kort geding aannemelijk te maken dat hij een reëel risico loopt op een flagrante inbreuk op art. 6 EVRM en dat hem daartegen geen effectief rechtsmiddel ten dienste zal staan. Nu het gaat om de toetsing van de (dreigende) schending van een fundamenteel recht is de toets die de burgerlijke rechter moet uitvoeren een volledige.¹¹ Daarbij dient de rechter uit te gaan van het vertrouwensbeginsel, dat meebrengt dat erop moet worden vertrouwd dat de verzoekende staat na uitlevering de grondrechten van de opgeëiste persoon niet zal schenden en dat de garanties die de verzoekende staat afgeeft zullen worden nagekomen.¹² Het vertrouwensbeginsel zal echter moeten wijken als de opgeëiste persoon aannemelijk maakt dat in zijn geval reden is om aan te nemen dat de grondrechten niet zullen worden gerespecteerd. Indien is aangevoerd dat eventueel door de verzoekende staat gegeven garanties niet zullen worden nageleefd, dient de rechter dat te onderzoeken.¹³ Het EHRM heeft richtsnoeren gegeven welke aspecten bij de toetsing van garanties kunnen worden gewogen. Het EHRM over zijn eigen rol in het beoordelen van garanties:

“its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment”

*“In a case where assurances have been provided by the receiving State, those assurances constitute a further relevant factor which the Court will consider. However, assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time (.)”*¹⁴

Het hof zal dan ook dit beoordelingskader toepassen.

5.6 Bij de beoordeling van de grieven gaat het er steeds om of een reëel risico bestaat dat [appellant] bij uitlevering het slachtoffer zal worden van een flagrante schending van art. 6 EVRM. De uitlevering kan niet worden verboden op grond van de mensenrechtensituatie in Rwanda in het algemeen. Dit neemt niet weg dat het hof, bij de beoordeling van de vraag of een reëel risico bestaat dat [appellant] het slachtoffer wordt van een flagrante schending van art. 6 EVRM, alle relevante omstandigheden in aanmerking moet nemen. Tot die omstandigheden behoren niet alleen de berechting onder de Transfer Law en de verstrekte garanties, maar ook de algemene mensenrechtensituatie voor zover aannemelijk is dat deze van invloed zal zijn op de concrete situatie van [appellant] of van belang is voor de vraag of erop mag worden vertrouwd dat Rwanda de gegeven garanties zal naleven. Anders dan de Staat kennelijk voor ogen staat kan het hof er dus niet mee volstaan te toetsen of in het verleden mensenrechtenschendingen hebben plaatsgevonden bij de berechting van onder de Transfer Law berechte verdachten en meer in het bijzonder bij de berechting onder de Transfer Law van door Nederland uitgeleverde personen. De uitleveringsrechter in de zaak van K. heeft juist veel breder gekeken en de Hoge Raad overwoog dat dit oordeel geen blijk gaf van een onjuiste rechtsopvatting.¹⁵

Verhouding tot de uitleveringsrechter

5.7 De taakverdeling tussen uitleveringsrechter en burgerlijke rechter in uitleveringszaken brengt mee dat het in beginsel de uitleveringsrechter is die oordeelt over de vraag of een reëel risico bestaat dat de opgeëiste persoon te maken zal krijgen met een flagrante strijd met art. 6 EVRM.¹⁶ In de zaak van [appellant] heeft de uitleveringskamer van de rechtbank Den Haag in haar uitspraak van 12 november 2021 geoordeeld dat een dergelijk reëel risico niet is komen vast te staan. [appellant] heeft in dit kort geding echter een beroep gedaan op andere feiten, omstandigheden en bewijsmateriaal dan waarover de uitleveringsrechter heeft geoordeeld. Indien daarop voor de burgerlijke rechter een beroep is gedaan ter ondersteuning van het betoog dat uitlevering in strijd zou zijn met een of meer fundamentele rechten, moet deze rechter die andere feiten, omstandigheden of bewijsmateriaal in zijn beoordeling betrekken.¹⁷ In een dergelijk geval moet de burgerlijke rechter niet alleen over deze andere argumenten oordelen; hij zal moeten oordelen over de vraag of de reeds bij de uitleveringsrechter aangevoerde argumenten en de (nadien aangevoerde) andere argumenten *tezamen* de conclusie rechtvaardigen dat sprake is van een reëel risico op schending van een fundamenteel recht.¹⁸

Feiten, omstandigheden en bewijsmateriaal waarover de uitleveringsrechter niet heeft geoordeeld

5.8.1 In dit kort geding heeft [appellant] een beroep gedaan op feiten, omstandigheden en bewijsmateriaal waarover de uitleveringsrechter niet heeft geoordeeld (en ook niet heeft kunnen oordelen), namelijk:

(a) de uitspraak van de uitleveringsrechter in een andere Rwandese uitleveringszaak van 9 november 2022 en het arrest van de Hoge Raad in die zaak van 6 juni 2023;¹⁹

(b) het rapport van de deskundige [deskundige] van 5 september 2022²⁰ waarop de uitleveringsrechter in de onder (a) genoemde zaak zijn oordeel mede baseerde;

(c) de verklaring van [A] van 19 maart 2023;²¹

(d) de verklaring van [B] van 16 mei 2023;²²

(e) de verklaring van [C] van 22 september 2023;²³

(f) de verklaring van [D] van 14 mei 2023;²⁴

(g) het thematisch ambtsbericht van het Ministerie van Buitenlandse Zaken van juni 2023;²⁵

(h) het rapport van Human Rights Watch "Join us or die" van oktober 2023;²⁶

(i) een artikel uit The New Times van 2 augustus 2023;²⁷

(j) een artikel uit The Express News van 27 juni 2022;²⁸

(k) de verklaring van [D] van 14 mei 2023.²⁹

Daar komt bij dat de uitleveringsrechter de stellingen van [appellant] omtrent zijn familiebanden met de voormalige president Habyarimana en zijn lidmaatschap van FDU-Inkingi niet heeft betrokken in zijn oordeel over de vraag of [appellant] een reëel risico loopt op een flagrante strijd met art. 6 EVRM.³⁰

5.8.2 De Staat heeft nog aangevoerd dat het thematisch ambtsbericht uit 2023 niet veel toevoegt aan het vorige thematisch ambtsbericht. Dat is onjuist. Het vorige thematisch ambtsbericht dateert

uit 2016. Het nieuwe ambtsbericht vermeldt recentere mensenrechtenschendingen, zoals het geval van [naam 1] , en bevestigt verder dat mensenrechtenschendingen ook na 2016 zijn gerapporteerd.

- 5.8.3 Het hof zal dit materiaal, naast de andere door [appellant] aangevoerde stellingen, betrekken in zijn oordeel over de vraag of er een reëel risico bestaat dat [appellant] na uitlevering een flagrante schending van zijn door art. 6 EVRM gewaarborgde rechten te wachten staat.

Plan van behandeling grieven 1, 2 en 4

- 5.9 De kern van deze grieven is dat [appellant] van mening is dat hij, als tegenstander van het regime van president Kagame en familielid van voormalig president Habyarimana, in Rwanda geen eerlijk proces zal krijgen. Hij beargumenteert dat voor politieke tegenstanders van het regime, waartoe hij zichzelf ook rekent, rechterlijke onafhankelijkheid niet gewaarborgd is omdat zij het risico lopen op politieke inmenging in de rechtsgang. Het hof zal deze stelling als volgt behandelen. Eerst (onderdeel A) zal het hof ingaan op het argument dat politieke tegenstanders van het regime in het algemeen een risico lopen op politieke inmenging in de rechtsgang. Vervolgens (onderdeel B) zal het hof onderzoeken of [appellant] , al dan niet op grond van zijn familieband met Habyarimana, als een zodanige tegenstander van het Rwandese regime moet worden beschouwd, dat het reële risico bestaat dat ook hij met een dergelijke inmenging te maken zal krijgen. Daarna gaat het hof (in onderdeel C) in op de vraag of het door [appellant] gestelde risico wordt weggenomen door de omstandigheid dat hij na uitlevering zal worden berecht onder de Transfer Law en dat voor zijn berechting garanties zijn gegeven, waaronder de garantie dat zijn proces zal worden gemonitord. Ten slotte (onderdeel D) zal het hof onderzoeken of een eventuele politieke inmenging de drempel haalt van een flagrante strijd met art. 6 EVRM zoals door het EHRM omschreven (zie hiervoor onder 5.3) en of [appellant] daartegen een effectief rechtsmiddel zal kunnen aanwenden. Onder E zal het hof een conclusie trekken over de gegrondheid van de grieven 1, 2 en 4.

6. A. Een eerlijk proces voor tegenstanders van het regime in Rwanda?

- 6.1 Tussen partijen is in wezen niet in geschil dat in het algemeen prominente politieke opposanten van het regime van president Kagame, als zij niet vallen onder de Transfer Law en Rwanda voor hen geen garanties met betrekking tot een eerlijk proces heeft afgegeven, een reëel risico lopen dat zij in Rwanda te maken zullen krijgen met politieke inmenging of een niet onafhankelijk gerecht. Voor zover dit uitgangspunt nog nadere motivering behoeft verwijst het hof in de eerste plaats naar de conclusie van de uitleveringsrechter van 9 november 2022 inzake K.31, die erop neerkomt dat er breed gedeelde twijfel bestaat over de onafhankelijkheid van de rechtspraak in Rwanda tegen politieke opposanten, en naar de overwegingen die de uitleveringsrechter aan die conclusie ten grondslag heeft gelegd. Daarnaast acht het hof de volgende bronnen van belang:

(i) Thematisch Ambtsbericht juni 2023 p. 46-47 en 49-50: de invloed van de politiek en het veiligheidsapparaat op de rechtspraak was groot als de autoriteiten dat wensten over het algemeen om redenen van nationale veiligheid of zelfbehoud van het regime; niet uitgesloten is dat rechters zich lieten beïnvloeden als gevolg van politieke druk, waarbij ook sprake kan zijn van zelfcensuur om de president te plezieren; politieke druk kan ook via de openbare aanklager of de griffier worden uitgeoefend, zo konden critici van de autoriteiten met veel publieke of internationale aandacht lange tijd in voorarrest doorbrengen, ook al werden zij uiteindelijk door de rechter vrijgesproken; er waren enkele berichten over beschuldigingen van manipulatie van getuigen door de autoriteiten, de verdachte of de samenleving.

En op p. 13: in de 2022 *Ibrahim Index of Governance* scoort Rwanda laag in de categorie Impartiality of the Judicial System.

(ii) het rapport van Human Rights Watch "Join us or die" van oktober 2023 p. 73:

"Throughout this research, Human Rights Watch found that Rwandan authorities have sought to employ national and international judicial and law enforcement processes across the world, at times leveraging the support receives for the apprehension of genocide suspects, to target dissidents at large. In these cases, the authorities showed little regard for the independence of the judiciary and at times appeared to have interfered in cases and evidence to request the arrest or extradition of individuals."

(iii) Human Rights Watch, Rwanda-Events of 2021 p.1:34

"Arbitrary detention, ill-treatment, and torture in official and unofficial detention facilities was commonplace, and fair trial standards were routinely flouted in cases deemed sensitive."

(iv) US Rwanda 2021 Human Rights Report 35 p. 11:

"Judges tended to accept confessions allegedly obtained through torture and failed to order investigations when defendants alleged torture during their trial."

Conclusie A: politieke tegenstanders lopen risico op oneerlijk proces

6.2 Het hof gaat er op grond van het voorgaande vanuit dat politieke tegenstanders van het regime in het algemeen een risico lopen op politieke inmenging in de rechtsgang. Dit wil niet zeggen dat politieke inmenging in rechtszaken van politieke tegenstanders in alle gevallen plaatsvindt, maar wel dat dergelijke inmenging vaak genoeg wordt gerapporteerd om aan te nemen dat daarop een reëel risico bestaat. Het hof wil in dit verband verduidelijken dat politieke inmenging ook kan bestaan uit zelfcensuur van de rechterlijke macht, namelijk indien rechters weten welke uitkomst het regime van Kagame wenst en hun oordeel daarop afstemmen (zie hiervoor onder 6.1 sub (i)). In hetgeen volgt zal het hof onder politieke inmenging ook verstaan deze vorm van rechterlijke zelfcensuur.

7. B. *Is [appellant] een (voldoende bekende) politieke tegenstander van het Rwandese regime?*

7.1 Tussen partijen is gedebatteerd over de vraag of [appellant] moet worden beschouwd als een, al dan niet prominente, politieke tegenstander van het Rwandese regime. Dit debat speelt zich af tegen de achtergrond van de hiervoor genoemde uitspraak van de uitleveringsrechter van 9 november 2022 in een andere Rwandese uitleveringszaak, waarin de uitleveringsrechter overwoog dat er objectief gerechtvaardigde twijfels bestaan aan de rechterlijke onafhankelijkheid in Rwanda in geval van berechting van politieke opposenten van het regime en dat de opgeëiste persoon in die zaak als een dergelijke politieke opposent moest worden beschouwd. In die zaak nam de uitleveringsrechter in aanmerking dat de opgeëiste persoon een voormalig hooggeplaatste militair is, dat hij ook na zijn emigratie in de belangstelling van de Rwandese overheid is gebleven en dat eerst nadat hij actief was geworden in de FDU-Inkingi tegen hem een arrestatiebevel werd uitgevaardigd. FDU-Inkingi (*Forces Démocratiques Unifiées Inkingi*), is een oppositiepartij in Rwanda die onder leiding stond van [C] en waarvan thans [A] president is. De uitleveringsrechter verklaarde de uitlevering van deze persoon ontoelaatbaar.

7.2 Het hof zal niet ingaan op de vraag of [appellant] een prominent tegenstander van het Rwandese regime is, omdat niet duidelijk is wat in dit verband onder prominent moet worden verstaan. In plaats daarvan zal het hof nagaan of [appellant] een zodanig bekende tegenstander van het regime is (of was) dat het reële risico bestaat dat hij de Transfer Law en de garanties weggedacht te maken zal krijgen met politieke inmenging in zijn proces (al dan niet door rechterlijke zelfcensuur). Het is immers niet aannemelijk dat *elke* tegenstander van het regime met rechterlijke inmenging te maken zal krijgen. Aannemelijk is dat dit alleen het geval is indien het regime ervan op de hoogte is dat de desbetreffende persoon een politieke tegenstander is en dat het die tegenstand van een zekere importantie acht. Anderzijds is het ook niet zo dat alleen prominente leden van de FDU-Inkingi voor hun veiligheid hebben te vrezen. Sinds de poging van FDU-Inkingi in 2010 om zich in Rwanda als partij in te schrijven en de aankondiging van [C], destijds president van FDU-Inkingi, om mee te doen aan

de presidentsverkiezingen, zijn meerdere leden van FPU-Inkingi verdwenen of vermoord, zoals [naam 2] , particulier secretaris van [C] (vermoord maart 2019), [naam 3] (ontvoerd juli 2019) en [naam 4] (ontvoerd november 2018).³⁶

7.3 [appellant] heeft het volgende aangevoerd ter ondersteuning van zijn stelling dat hij een tegenstander van het regime van president Kagame is en dat hij ook als zodanig bij de Rwandese autoriteiten bekend staat. Hij is familie van voormalig president Habyarimana, zijn tante ([naam 5]) was de echtgenote van Habyarimana. Hij was een prominent lid van de MRND37, de partij van Habyarimana. Hij heeft in 2007, als getuige voor het Rwanda Tribunaal, aandacht gevraagd voor de moord op zijn vader in 1998 door de RPF. Hij is actief lid van FDU-Inkingi. Hij heeft de beweging van [C] met maandelijkse financiële bijdragen gesteund, meegelopen in diverse demonstraties en een (openbare) petitie voor de vrijlating van [C] ondertekend. In diverse internetbronnen wordt [appellant] genoemd als aanhanger van [C] .

7.4 Uit de verklaring van [A] (hiervoor genoemd onder 5.8.1 (c)) blijkt het volgende:

(i) [appellant] is *membre effectif* van FDU-Inkingi sinds 2006;

(ii) *"Il a été actif dans la section Hollande, où il contribuait dans les projets de recherche de solutions aux conflits qui gangrènent le Rwanda depuis plusieurs décennies. Il a notamment longtemps contribué au projet d'installation de notre parti à l'intérieur du Rwanda, précisément dans la mobilization des ressources financières."*

(iii) Als [appellant] wordt teruggezonden naar Rwanda zullen zijn fundamentele rechten worden geschonden en maakt hij geen kans op een eerlijk proces.

7.5 [C] heeft in haar verklaring (hiervoor genoemd onder 5.8.1 (e)) verklaard dat [appellant] heeft deelgenomen aan de demonstraties voor haar vrijlating en een petitie met die strekking heeft ondertekend. Ook verklaart zij dat het feit dat [appellant] lid is van de Habyarimana familie en heeft verzocht om gerechtigheid voor de moord op zijn vader, extra reden voor hem is om te vrezen voor een oneerlijk proces.

7.6 De verklaring van [B] (hiervoor genoemd onder 5.8.1 (d)) bevat gedetailleerde informatie over leden van de familie van Habyarimana die door het Rwandese regime zijn vervolgd en/of gedood. [B] is de zus van [appellant] . De verklaring van [naam 6] , de zus van [naam 5] en dus ook tante van [appellant] , bevat eveneens gedetailleerde informatie over leden van de familie van Habyarimana/ [appellant] die door het Rwandese regime zijn vervolgd.³⁸ Ook [D] (verklaring hiervoor genoemd onder 5.8.1(k)), die nauw met Habyarimana heeft samengewerkt, bevestigt dat personen die tot de kring van Habyarimana behoorden nog steeds voor vervolging moeten vrezen.

7.7 Het hof heeft geen aanleiding om aan de verklaringen van [A] , [C] aangaande de rol van [appellant] binnen FDU-Inkingi te twijfelen. De Staat heeft deze overigens ook niet voldoende gemotiveerd bestreden. Dat Habyarimana een prominent lid was van de MRND wordt bevestigd in de *International Arrest Warrant* van 19 februari 2009.³⁹ Ook acht het hof, anders dan de voorzieningenrechter, op grond van de gedetailleerde verklaringen van [B] , [naam 6] en [D] , alleszins aannemelijk dat familieleden van voormalig president Habyarimana, waaronder [appellant] , te vrezen hebben voor vervolging door het Rwandese regime.

7.8 [appellant] heeft verschillende (Rwandese) internetbronnen overgelegd, waaruit niet alleen blijkt dat [appellant] in Rwanda een bekende verdachte van de genocide is, maar ook dat hij in verband wordt gebracht met de FDU-Inkingi, dat zijn advocaat ([advocaat]) een *known genocide denier* wordt genoemd en dat FDU-Inkingi in verband wordt gebracht met, dan wel gelijk gesteld wordt aan, een *terrorist group*.⁴⁰ In dat verband is van belang dat FDU-Inkingi door het regime in Rwanda kennelijk nog steeds als belangrijke oppositiepartij wordt beschouwd aangezien in de periode 2016-2023 zeker

vijftien personen van de verschillende partijen van [C] , FDU-Inkingi en DALFA-Umurinzi, gearresteerd en vervolgd zijn.⁴¹

Conclusie B: [appellant] is voldoende bekende tegenstander regime in Rwanda

- 7.9 Op grond van het voorgaande komt het hof tot de conclusie dat aannemelijk is dat [appellant] , door zijn activiteiten voor FDU-Inkingi en zijn familiebanden met voormalig president Habyarimana, in Rwanda bekend staat (en ook bij de Rwandese regering bekend is) als politiek tegenstander van het regime van president Kagame. Het is dan ook voldoende aannemelijk dat [appellant] als bekende tegenstander van het regime, de Transfer Law en de gegeven garanties weggedacht, het risico loopt dat hij te maken zal krijgen met politieke inmenging in zijn proces.

8. C. Transfer Law, garanties en monitoring

- 8.1 Het hof zal thans nagaan of het (algemene) risico dat [appellant] loopt om als (bekend) tegenstander van het Rwandese regime het slachtoffer te worden van vervolging en berechting in strijd met art. 6 EVRM, wordt weggenomen door het feit dat [appellant] zal worden berecht onder toepassing van de Transfer Law en Rwandese autoriteiten bepaalde garanties hebben gegeven, waaronder de garantie dat zijn proces in opdracht van Nederland zal worden gemonitord door ICJ Kenya.
- 8.2 Het hof stelt voorop dat uitgangspunt is dat het vertrouwensbeginsel ook op de door Rwanda gegeven garanties van toepassing is, ook al heeft Nederland met Rwanda geen uitleveringsverdrag gesloten.⁴² Nu [appellant] aanvoert dat de garanties, waaronder de garanties vervat in de Transfer Law, onvoldoende waarborgen bieden dat hij niet het slachtoffer zal worden van een flagrante schending van art. 6 EVRM, zal het hof die stelling moeten onderzoeken (zie hiervoor onder 5.5). Zoals het hof hiervoor (onder 5.6) heeft overwogen, moet het daarbij alle omstandigheden van het geval in aanmerking nemen. Het hof zal daarbij onder meer aandacht besteden aan de mensenrechtensituatie in Rwanda in het algemeen en aan de vraag of Rwanda er blijk van geeft te (willen) handelen conform regels van internationaal recht. Daarbij komt ook aan de orde de stelling van [appellant] dat bij een eerder door Nederland uitgeleverde persoon de door Rwanda gegeven garanties zijn geschonden en dat dit ook gebeurde bij een door Canada uitgeleverde verdachte op wie ook de Transfer Law van toepassing was.

De algemene mensenrechtensituatie in Rwanda

- 8.3 Tussen partijen is niet in geschil dat de algemene mensenrechtensituatie in Rwanda (op zijn minst) zorgen baart. Het hof constateert dat Rwanda zich heeft aangesloten bij het IVBPR, maar dat desalniettemin, niet incidenteel maar zeer regelmatig, ernstige schendingen van de mensenrechten plaatsvinden tegen al dan niet vermeende tegenstanders van het regime. Het thematisch ambtsbericht vermeldt dat Rwanda beschuldigd bleef worden van ernstige mensenrechtenschendingen zoals excessief geweld, dood in detentie onder verdachte omstandigheden, buitengerechtelijke executies en verdwijningen, alsmede arbitraire detentie en onmenselijke en mensonterende behandeling in detentie.⁴³ Rwanda heeft in 2016 haar verklaring onder art. 34 lid 6 bij het Protocol bij het African Charter on Human and Peoples Rights (hierna: het Charter) ingetrokken, als gevolg waarvan het individuele klachtrecht bij het African Court on Human and Peoples Rights (ACHPR) voor Rwanda kwam te vervallen. Hoewel dit Rwanda op zichzelf vrij staat, geeft dit geen blijk van een groot respect voor de eerbiediging van fundamentele rechten.
- 8.4 In het 2022 US Country Reports on Human Rights Practice: Rwanda, wordt vermeld:

"Significant human rights issues included credible reports of: unlawful or arbitrary killings; torture or cruel, inhuman, or degrading treatment or punishment by the government; harsh and life-threatening

prison conditions; arbitrary detention; political prisoners or detainees; transnational repression against individuals located outside the country, including killings, kidnappings, and violence; arbitrary or unlawful interference with privacy; serious restrictions on free expression and media, including threats of violence against journalists, unjustified arrests or prosecutions of journalists, and censorship; serious restrictions on internet freedom; substantial interference with the freedom of peaceful assembly and freedom of association, including overly restrictive laws on the organization, funding, or operation of nongovernmental and civil society organizations; serious and unreasonable restrictions on political participation; and serious government restrictions on or harassment of domestic and international human rights organizations.” 44

- 8.5 In zijn arrest van 24 november 2017 heeft het ACHPR op een klacht van [C] geoordeeld (i) dat haar recht op een eerlijk proces zoals gewaarborgd door art. 7(1)(c) van het Charter was geschonden (par. 98) en (ii) dat de gevangenisstraf die aan haar was opgelegd in verband met bepaalde publieke uitlatingen niet noodzakelijk was in een democratische samenleving en dat de opgelegde straf disproportioneel was (par. 162). Het ACHPR beval Rwanda om alle noodzakelijke maatregelen te nemen om de rechten van [C] te herstellen en om binnen zes maanden hierover aan het ACHPR te rapporteren. Tussen partijen is niet in geschil dat Rwanda aan deze laatste verplichting niet heeft voldaan.⁴⁵
- 8.6 [C] heeft vervolgens bij het ACHPR een aanvraag voor *reparations* ingediend. Rwanda is in die procedure niet verschenen. Bij uitspraak van 7 december 2018 heeft het ACHPR Rwanda veroordeeld om bepaalde bedragen aan [C] te betalen wegens materiële en immateriële schadevergoeding. De Staat heeft niet weersproken dat Rwanda deze bedragen niet aan [C] heeft betaald.
- 8.7 Op 27 november 2020 heeft het ACHPR uitspraak gedaan naar aanleiding van een door [naam 7] ingediende klacht.⁴⁶ De uitspraak vermeldt dat [naam 7] “*was extradited by the Government of Canada*” en dat hij in Rwanda in detentie verbleef in verband met de vervolging voor genocide gepleegd in 1994. Rwanda verscheen niet in die procedure. Het ACHPR oordeelde dat Rwanda (i) het *right to a defence* (art. 7(1)(a) Charter) had geschonden, (par. 47) (ii) dat [naam 7] het slachtoffer was geworden van “*cruel, inhuman and degrading treatment*” (art. 5 Charter), (par. 91-93), (iii) dat de door [naam 7] ondergane behandeling, gezien zijn gevorderde leeftijd, neerkwam op een schending van zijn recht op leven (art. 4 Charter) (par. 107) en (iv) dat het beperkte contact dat hij met zijn gezin mocht onderhouden een schending opleverde van zijn *right to family* (art. 18(1) Charter), (par. 121). Het ACHPR heeft Rwanda veroordeeld schadevergoeding aan [naam 7] te betalen, om een onafhankelijke arts te benoemen om de gezondheidstoestand van [naam 7] te onderzoeken en om maatregelen voor te stellen die hem zouden kunnen helpen, en om aan het ACHPR te rapporteren welke maatregelen zijn genomen om de uitspraak uit te voeren. De Staat heeft niet betwist dat Rwanda aan deze verplichtingen niet heeft voldaan.
- 8.8 De Staat heeft aangevoerd dat nu Rwanda niet in het geding bij het ACHPR is verschenen, de diverse door het ACHPR geconstateerde schendingen moeten worden gerelativeerd. Het hof is dat niet met de Staat eens. Uit het arrest van het ACHPR blijkt dat het de klachten inhoudelijk heeft behandeld en uitvoerig heeft gemotiveerd waarom het sommige klachten gegrond heeft bevonden. Het ACHPR heeft ook niet alle klachten gegrond bevonden. Zo is de klacht van [naam 7] dat hij niet door een onafhankelijk en onpartijdig gerecht is berecht ongegrond bevonden.
- 8.9 Uit het Thematisch ambtsbericht van het Ministerie van Buitenlandse Zaken van juni 2023 blijkt dat Rwanda, toen het *Subcommittee on Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* een bezoek bracht aan Rwanda, deze commissie door de Rwandese autoriteiten zodanig werd tegengewerkt dat de commissie haar bezoek aan Rwanda heeft opgeschort.⁴⁷ In het najaar van 2022 heeft de Rwandese minister van Justitie toegezegd dat het VN-subcomité welkom zou zijn Rwanda te bezoeken, maar of dat inmiddels is gebeurd blijkt niet.⁴⁸

8.10

[naam 1] , die kritisch was over de Rwandese autoriteiten, is in 2020 tegen zijn zin naar Rwanda overgebracht met een vliegtuig dat, naar de Minister van Justitie toegaf, Rwanda voor dat doel had gehuurd. [naam 1] is in Rwanda veroordeeld tot 25 jaar gevangenisstraf. In maart 2023 verleende president Kagame onder grote Amerikaanse druk gratie aan [naam 1] nadat deze had moeten beloven geen Rwandese politiek meer te bedrijven.⁴⁹

Conclusie: de algemene mensenrechtensituatie in Rwanda biedt geen basis voor vertrouwen

- 8.11 De conclusie is dat de Rwandese autoriteiten er geen blijk van geven de mensenrechten te willen respecteren als hen dat niet uitkomt. Dat Rwanda zich heeft aangesloten bij het IVBPR verhindert kennelijk niet dat systematisch mensenrechten worden geschonden. Uitspraken van het ACHPR worden niet nagekomen. Van het vertrouwensbeginsel kan dan ook niet zonder meer worden uitgegaan.

De door Rwanda gegeven garanties voor een eerlijk proces

- 8.12 Het EHRM heeft in Othman⁵⁰ een aantal aspecten genoemd die bij de beoordeling van garanties in aanmerking kunnen worden genomen. Eén van deze aspecten is *whether the assurances are specific or are general and vague*. In het uitleveringsverzoek heeft Rwanda onder het hoofd *Fair trial guarantees* erop gewezen dat de Transfer Law een aantal garanties bevat, waaronder “*the right to a fair and public hearing by a competent, independent and impartial court*.” Het hof constateert in de eerste plaats dat deze garantie niet specifiek voor de zaak van [appellant] is gegeven of voor de berechting van politieke tegenstanders in algemene zin, maar dat de garantie onderdeel is van de Transfer Law en dus, ook indien daarover in het uitleveringsverzoek niets zou zijn gezegd, toch al op [appellant] van toepassing zou zijn.
- 8.13 Daarnaast moet worden geconstateerd dat deze garantie, met name waar het gaat om de rechterlijke onafhankelijkheid en onpartijdigheid, erg algemeen geformuleerd is en op geen enkele wijze adresseert dat, zoals hiervoor is gebleken, de rechterlijke macht in Rwanda vatbaar is voor politieke inmenging als het gaat om tegenstanders van het regime. In het uitleveringsverzoek wordt ook algemene informatie gegeven over de inrichting van de rechterlijke organisatie, meer in het bijzonder de Rwandese grondwet en de wet op de rechterlijke organisatie waarin het principe van rechterlijke onafhankelijkheid is verankerd, de rechtsmiddelen die openstaan en de benoeming voor het leven van rechters in het *High Court* en het *Supreme Court*. Deze algemene informatie kan niet als afdoende garantie tegen politieke inmenging worden beschouwd, aangezien wel duidelijk is dat de rechterlijke macht in zaken tegen politieke tegenstanders van het regime niet in alle, maar wel in veel gevallen juist niet onafhankelijk van de politiek opereert. Meer in het bijzonder adresseren deze garanties en wettelijke bepalingen in het geheel niet de in de hiervoor genoemde bronnen gesignaleerde problemen van politieke inmenging en het uitoefenen van ongeoorloofde druk op getuigen.
- 8.14 Het EHRM heeft in de zaak Othman ook als een van de bij de beoordeling van garanties in aanmerking te nemen aspecten genoemd “*the length and strength of bilateral relations between the sending and receiving States, including the receiving States record in abiding by similar assurances*”. Over de bilaterale verhoudingen tussen Rwanda en Nederland heeft geen van partijen in dit verband iets gesteld. Wel heeft de Staat aangevoerd dat Rwanda de garanties die zij had gegeven inzake eerdere uitleveringen vanuit Nederland is nagekomen.
- 8.15 [appellant] bestrijdt dat er aanleiding is om aan te nemen dat Rwanda de door haar verstrekte garanties nakomt. Volgens [appellant] heeft in het proces tegen M. (door Nederland uitgeleverd in 2016) een getuige tijdens de zitting verklaard dat zijn eerdere verklaring onder foltering was verkregen en dat hij deze verklaring introk.⁵¹ Dit is in zoverre juist, dat in de passage waarnaar mr. Temminck Tuinstra in haar pleitnota verwijst staat dat tijdens de zitting van 29 januari 2019 een getuige heeft verklaard dat zijn verklaring al was opgesteld toen hij deze onder ogen kreeg, en dat de aanklager de getuige had verteld dat als de getuige de verklaring niet zou tekenen, de aanklager hem

zou vinden en vermoorden.

8.16 Het hof kan in dit kort geding niet vaststellen of de beweringen van de getuige waarop [appellant] zich beroept op waarheid berusten. Wel constateert het hof dat het monitoringrapport niets omtrent enige reactie van het *High Court* op de (in beginsel zeer ernstige) beschuldiging van de getuige bevat. Van enige reactie op of onderzoek naar de aantijgingen van de getuige blijkt ook niet uit het *Final Trial Monitoring Report* inzake M.52

8.17 Ook blijkt niet dat Nederland, als ontvanger van de verstrekte garanties, in het door de monitorsesignaleerde (indien juist zeer ernstige) incident aanleiding heeft gezien om bij de Rwandese autoriteiten om opheldering te verzoeken. De Staat heeft wel gesteld dat er gevallen zijn waarin aandacht is gevraagd voor bepaalde klachten en dat dit steeds serieus en met bevredigend resultaat door de Rwandese autoriteiten is opgepakt. Niet blijkt echter dat dit ook op het beweerdelijke geval van foltering betrekking heeft, laat staan dat duidelijk is gemaakt tot welk bevredigend resultaat de interventie van de Staat heeft geleid.

8.18 [appellant] wijst verder op de uitspraak van het ACHPR inzake [naam 7]. Uit die uitspraak blijkt volgens [appellant] dat Rwanda de door haar aan Canada verstrekte garanties⁵³ niet is nagekomen. In de uitspraak inzake [naam 7] (zie hiervoor onder 8.7) heeft het ACHPR overwogen dat Rwanda (i) het *right to a defence* had geschonden, (ii) dat [naam 7] het slachtoffer was geworden van "*cruel, inhuman and degrading treatment*", (iii) dat de door [naam 7] ondergane behandeling, gezien zijn gevorderde leeftijd, neerkwam op een schending van zijn recht op leven en (iv) dat het beperkte contact dat hij met zijn gezin mocht onderhouden een schending opleverde van zijn *right to family*. De schending van het *right to a defence* had blijkens de uitspraak van het ACHPR met name betrekking op de weigering van het High Court "[to] hear his arguments, experts and witnesses" en op de weigering van de openbare aanklager om [naam 7] de nodige informatie te geven om zijn verdediging voor te bereiden (par. 45). Dat lijkt in ieder geval in strijd met garantie d ("*the right to have adequate time and facilities for the preparation of his or her defense*") en garantie h (recht om getuigen te horen). Rwanda heeft in het document waarin de garanties inzake [naam 7] zijn opgenomen ook verklaard dat het partij is bij het Charter. Uit de uitspraak van het ACHPR blijkt dat Rwanda verschillende bepalingen uit die verdragen heeft geschonden. Hiervoor is al vastgesteld dat Rwanda bovendien de uitspraak van het ACHPR inzake [naam 7] niet nakomt.

Conclusie: de garanties zijn ontoereikend

8.19 Op grond van het voorgaande is het hof van oordeel dat er weinig reden is erop te vertrouwen dat de door Rwanda verstrekte garanties met betrekking tot een eerlijk proces zullen worden nagekomen.

Monitoring

8.20 Monitoring (en publicatie) van de monitoringverslagen is in beginsel een nuttig instrument dat ertoe kan bijdragen dat een om uitlevering verzoekende staat de in dat kader gegeven garanties nakomt en dat het proces tegen de opgeëiste persoon eerlijk verloopt. Hiervoor is echter geconstateerd dat monitoring kennelijk niet ertoe geleid heeft dat een aantijging van foltering door de rechter worden onderzocht of door de Staat bij Rwanda aan de orde is gesteld. Daar komt bij dat belangrijke inbreuken op een eerlijk proces niet noodzakelijkwijs door monitoring aan het licht worden gebracht. Het gaat daarbij met name om politieke inmenging en het onder druk zetten van getuigen. Zo zal het voor een monitor niet duidelijk hoeven te zijn dat de rechter zich in zijn uitspraak laat beïnvloeden door politieke inmenging of zelfcensuur, aangezien niet aannemelijk is dat dergelijke beïnvloeding op voor de monitor waarneembare wijze plaatsvindt. Zo is ook niet aannemelijk dat een getuige in aanwezigheid van de monitor onder druk zal worden gezet, zodat dit alleen waarneembaar is als een getuige hierover tijdens de zitting (of buiten de zitting tegenover de monitor) verklaart.

Conclusie: monitoring geen afdoende waarborg tegen een oneerlijk proces

- 8.21 De conclusie is dat niet valt te verwachten dat monitoring een wezenlijk gunstige bijdrage zal kunnen leveren op het eerlijk verloop van het proces tegen [appellant] indien hij wordt uitgeleverd. Zoals uit het voorgaande blijkt hebben de Rwandese autoriteiten onvoldoende respect voor de fundamentele rechten van politieke tegenstanders als [appellant] en moet er serieus rekening mee worden gehouden dat zij, als zij dat in hun belang achten, de rechten van [appellant] op een eerlijk proces zullen willen schenden. Er zijn dan voldoende mogelijkheden voor het regime om ervoor te zorgen dat dergelijke schendingen niet in de monitoring naar voren komen.

D. reëel risico op flagrante inbreuk op art. 6 EVRM en eventuele rechtsmiddelen

- 8.22 Het hof trekt uit het voorgaande de conclusie dat er een reëel risico bestaat dat [appellant] te maken zal krijgen met politieke inmenging in zijn proces en met ongeoorloofde beïnvloeding van belastende getuigen, onder meer door tegen deze getuigen uitgeoefende dwang, bedreigingen of foltering. Deze vormen van inmenging in het proces beoordeelt het hof als een flagrante inbreuk op art. 6 EVRM. Immers als de rechters worden beïnvloed of getuigen onder bedreigingen of foltering bewogen worden belastende verklaringen af te leggen, is in geen enkel opzicht meer sprake van een eerlijk proces. Het EHRM heeft in Othman dan ook overwogen dat het toelaten van bewijs dat door foltering is verkregen een “*flagrant denial of justice*” is.⁵⁴

De effectiviteit van rechtsmiddelen

- 8.23 Van de uitspraken van het *High Court* staat beroep open bij het *Supreme Court*. Ook bestaat de mogelijkheid van *review* (kennelijk: herziening) bij het *High Court* zelf.⁵⁵ Het hof ziet echter geen aanleiding voor de veronderstelling dat het risico op politieke inmenging (waaronder begrepen rechterlijke zelfcensuur) bij het *Supreme Court* kleiner zou zijn dan bij het *High Court*. Daar komt bij dat het uitoefenen van ongeoorloofde druk op getuigen zich meestal buiten het zicht van de rechters van het *High Court* zal afspelen. Het valt dan ook niet te verwachten dat het *Supreme Court* daartegen een effectieve remedie zal kunnen bieden. Het is dus niet aannemelijk dat voor [appellant] een effectief rechtsmiddel zal openstaan. Die conclusie wordt ondersteund door het gegeven dat Rwanda niet heeft voldaan aan de uitspraken van het ACHPR inzake [C] en [naam 7], waaruit blijkt dat in ieder geval in deze zaken dit rechtsmiddel (dat na intrekking van het individuele klachtrecht inmiddels niet meer bestaat) niet effectief was.

E. Conclusie: een reëel risico op een flagrante schending van art. 6 EVRM

- 8.24 Op grond van de voorgaande overwegingen komt het hof tot de conclusie dat indien [appellant] naar Rwanda wordt uitgeleverd, er een reëel risico bestaat dat hij wordt blootgesteld aan een flagrante schending van art. 6 EVRM. De grieven 1, 2 en 4 slagen. De uitlevering van [appellant] moet reeds op deze grond onrechtmatig worden geacht. De overige stellingen en grieven van [appellant] behoeven geen behandeling. Het hof zal de primaire vordering van [appellant] toewijzen en de uitlevering van [appellant] verbieden.
- 8.25 Het hof oordeelt in dit geval anders dan in zijn arresten uit 2016 en 2021. De arresten in die zaken en in de onderhavige zaak berusten op een waardering van alle omstandigheden van het geval, die in elke zaak anders liggen. Dit verklaart deels de verschillende uitkomsten. Ten aanzien van de zaken uit 2016 kan nog worden opgemerkt dat inmiddels meer bekend is geworden over de schending door Rwanda van mensenrechten: de mensenrechtensituatie is er na 2016 niet beter op geworden, met name zijn er meer aanwijzingen beschikbaar dat politieke opposanten van het regime regelmatig geen eerlijk proces krijgen. Een verschil met de zaak uit 2021 is verder dat in die zaak de uit te leveren persoon geen politieke activiteiten had ontplooid en nooit lid was geweest van enige politieke partij (rov. 5.26).

Slotsom

- 9.1 Nu grieven 1, 2 en 4 slagen zal het hof het vonnis van de voorzieningenrechter vernietigen. Het hof zal de uitlevering van [appellant] naar Rwanda verbieden.
- 9.2 De Staat zal als de in het ongelijk gestelde partij worden veroordeeld in de kosten van het geding van [appellant] in beide instanties.

Beslissing

Het hof:

- vernietigt het vonnis van de voorzieningenrechter in de rechtbank Den Haag van 7 juli 2023, en opnieuw rechtdoende:
- verbiedt de Staat [appellant] aan Rwanda uit te leveren;
- wijst af het meer of anders gevorderde;
- veroordeelt de Staat in de kosten van het geding in beide instanties, tot op heden aan de zijde van [appellant] begroot *in eerste aanleg* op 86,-- aan griffierecht en 129,14 aan kosten dagvaarding, en op 1.079,-- aan salaris van de advocaat, en *in hoger beroep* op 343,- aan griffierecht en 129,14 aan kosten dagvaarding, en op 3.549,-- aan salaris van de advocaat, en op 173,-- aan nasalaris voor de advocaat, nog te verhogen met 90,-- indien niet binnen veertien dagen na aanschrijving in der minne aan dit arrest is voldaan en vervolgens betekening van dit arrest heeft plaatsgevonden, en bepaalt dat deze bedragen binnen 14 dagen na de dag van de uitspraak dan wel, wat betreft het bedrag van 90,--, na de datum van betekening, moeten zijn voldaan, bij gebreke waarvan deze bedragen worden vermeerderd met de wettelijke rente als bedoeld in artikel 6:119 BW vanaf het einde van genoemde termijn van 14 dagen tot aan de dag van voldoening;
- verklaart dit arrest uitvoerbaar bij voorraad.

Dit arrest is gewezen door mrs. S.A. Boele, E.M. Dousma-Valk en A. Dupain, en uitgesproken ter openbare terechtzitting van 19 december 2023, in aanwezigheid van de griffier.

¹ ECLI:NL:RBAMS:2023:7390.

² ECLI:NL:RBDHA:2023:17975.

³ Productie 1 [appellant] bij dagvaarding eerste aanleg.

⁴ Rechtbank Den Haag 9 januari 2022, ECLI:NL:RBDHA:2022:11719.

⁵ HR 6 juni 2023, ECLI:NL:HR:2023:864; NJ 2023, 316 m.n. N. Keijzer.

⁶ EHRM 27 oktober 2011, *Ahorugeze t. Zweden*, nr. 37075/09.

⁷ EHRM 27 oktober 2011, *Ahorugeze t. Zweden*, nr. 37075/09.

⁸ EHRM 17 januari 2012, *Othman t. VK*, nr. 8139/09 par. 259.

⁹ EHRM 27 oktober 1993, *Dombo Beheer t. Nederland*, nr. 14448/88; EHRM 9 juni 1998, *Twalib t. Griekenland*, nr. 42/1997/826/1032.

¹⁰ HR 11 maart 2003, ECLI:NL:HR:2003:AF3312; NJ 2004, 42. HR 21 maart 2017, ECLI:NL:HR:2017:463; NJ 2017, 276; EHRM 17 juli 2008, *NA. t. Verenigd Koninkrijk*, nr. 25904/07, par. 111; EHRM 5 juli 2005,

Said t. Nederland, nr. 2345/02, par. 49; EHRM 3 november 2022, *Sanchez-Sanchez t. VK*, nr. 22854/22 par. 87.

¹¹ HR 15 september 2006, ECLI:NL:HR:2006:AV7387; NJ 2007, 277; HR 11 juli 2014, ECLI:NL:HR:2014:1680; NJ 2016, 14.

¹² Zie: HR 7 september 2004, ECLI:NL:HR:2004:AP1534; NJ 2004, 595; HR 15 september 2006, ECLI:NL:HR:AV7387; NJ 2007, 277.

¹³ EHRM 15 november 1996, *Chahal t. Verenigd Koninkrijk*, nr. 22414/93; NJ 1997, 301 par. 105; HR 15 september 2006, ECLI:NL:HR:AV7387; NJ 2007, 277.

¹⁴ EHRM 17 januari 2012, *Othman t. VK*, nr. 8139/09, par. 186 en 187.

¹⁵ Rechtbank Den Haag 9 januari 2022, ECLI:NL:RBDHA:2022:11719; HR 6 juni 2023, ECLI:NL:HR:2023:864; NJ 2023, 316 m.n. N. Keijzer.

¹⁶ HR 21 maart 2017, ECLI:NL:HR:2017:463; NJ 2017, 276.

¹⁷ HR 11 juli 2014, ECLI:NL:HR:2014:1680; NJ 2016, 14 rov. 3.4.5. Ook ten aanzien van een flagrante schending van art. 6 EVRM is dit denkbaar, zie ECLI:NL:PHR:2014:369 par. 7.2.

¹⁸ Hof Den Haag 28 mei 2013, ECLI:NL:GHDHA:2013:CA0537 rov. 3.3.

¹⁹ Rechtbank Den Haag 9 januari 2022, ECLI:NL:RBDHA:2022:11719; HR 6 juni 2023, ECLI:NL:HR:2023:864; NJ 2023, 316 m.n. N. Keijzer.

²⁰ Productie 7 [appellant] .

²¹ Productie 9 [appellant] .

²² Productie 25 [appellant] .

²³ Productie 44 [appellant] .

²⁴ Productie 11 [appellant] .

²⁵ Productie 34 [appellant] .

²⁶ Productie 42 [appellant] .

²⁷ Productie 35 [appellant] .

²⁸ Productie 36 [appellant] .

²⁹ Productie 11 [appellant] .

³⁰ Vonnis voorzieningenrechter rov. 4.16; vonnis uitleveringsrechter rov. 3.7.

³¹ Rechtbank Den Haag 9 januari 2022, ECLI:NL:RBDHA:2022:11719; HR 6 juni 2023, ECLI:NL:HR:2023:864; NJ 2023, 316 m.n. N. Keijzer.

³² Productie 34 [appellant] .

³³ Productie 42 [appellant] .

³⁴ Prod. 5 bijlage 22 [appellant] .

³⁵ Productie 5 bijlage 21 [appellant] ; zie ook p. 4-5 van dit rapport.

³⁶ Zie Thematisch Ambtsbericht juni 2023 p. 28-29 (productie 34 [appellant]).

³⁷ *Mouvement Républicain National pour la Démocratie et le Développement*.

³⁸ Verklaring van 3 oktober 2021, productie 20 [appellant] .

³⁹ p. 9, onderdeel van het uitleveringsverzoek (productie 1 [appellant]).

⁴⁰ The New Times, 11 november 2019 (productie 35 [appellant]), The Express News 27 juni 2022 (productie 36 [appellant]) en e-presserwanda 6 mei 2010 (productie 38 [appellant]).

⁴¹ Thematisch ambtsbericht p. 28 (productie 34 [appellant]).

⁴² HR 17 juni 2014, ECLI:NL:HR:2014:1441 rov. 3.3.

⁴³ Prod. 34 [appellant] p. 14.

⁴⁴ US Rwanda 2021 Human Rights Report p. 1-2 (productie 5 bijlage 21 [appellant]).

- ⁴⁵ Aldus ook Thematisch ambtsbericht Rwanda, juni 2023 nr. 2.9.2 (productie 34 [appellant]); deskundige [deskundige] 5 september 2022 p. 6 (productie 7 [appellant]).
- ⁴⁶ [naam 7] v Rwanda (judgment) (2020) 4 AfCLR 834.
- ⁴⁷ Zie ook rapport [deskundige] nr. 9, productie 7 [appellant] .
- ⁴⁸ Thematisch ambtsbericht Rwanda, juni 2023 nr. 2.4.2 (productie 34 [appellant]).
- ⁴⁹ Thematisch ambtsbericht Rwanda juni 2023 p. 14 (productie 34 [appellant]).
- ⁵⁰ EHRM 17 januari 2012, *Othman t. VK*, nr. 8139/09.
- ⁵¹ Inleidende dagvaarding nr. 108-109; pleitnota mr. Temminck Tuinstra eerste aanlag nr. 24; de bewuste passage uit het monitoring rapport van december 2018-januari 2019 (nrs. 64-71) is niet overgelegd, maar het hof daarvan kennis genomen op de (openbare) website Monitoring Rwandese uitleveringszaken | Internationale vrede en veiligheid | Rijksoverheid.nl .
- ⁵² Productie 12 [appellant] .
- ⁵³ Productie 33 [appellant] ; uit dit document blijkt dat ook [naam 7] onder de Transfer Law zou worden berecht.
- ⁵⁴ EHRM 17 januari 2012, *Othman t. VK*, nr. 8139/09, par. 267.
- ⁵⁵ Uitleveringsverzoek 19 februari 2009 p. 21-22 (productie 1 [appellant]).
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ANNEX K

“No Safe Haven” and the Politics of Accountability: The Extradition and Exclusion of Rwandan Genocide Suspects

Maarten Bolhuis *

ABSTRACT

This article examines the complex interplay of criminal and immigration law, studying the case of Rwandan (former) asylum-seekers suspected of genocide. The Dutch Government actively pursued their extradition, forging a distinctive cooperation with Rwanda, tied to its “No Safe Haven” policy. The analysis considers how the Netherlands has navigated the legal and political complexities of cooperating with a country lauded for post-genocide judicial reforms but criticised for instrumentalising criminal justice to suppress dissent. The article shows that while early extraditions and deportations did not result in findings of rights violations by the Rwandan or Dutch Governments, more recent cases involving political opponents have altered the picture. For host States, including the Netherlands, persistent impunity for international crimes, the challenges of domestic universal jurisdiction prosecutions, and growing political pressure to restrict immigration have created incentives to fully leverage legal tools to deny residence and facilitate removal. In a context where extradition requests may serve political purposes, the lack of substantive case assessment, combined with the low thresholds and broad discretion that characterise 1F exclusion and citizenship revocation procedures, risks turning immigration law into a proxy for criminal justice and fostering a perception that host States contribute to politicised accountability efforts.

KEYWORDS: Rwanda, genocide, extradition, 1F exclusion, citizenship revocation

1. INTRODUCTION

Calls to end impunity for international crimes have led to a growing number of universal jurisdiction prosecutions targeting both citizen and non-citizen suspects who initially entered their new countries of residence as asylum-seekers.¹ In several of these host States, dedicated

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¹ International crimes are understood here as the core international crimes (genocide, crimes against humanity and war crimes) as defined in Arts. 5–8bis Rome Statute of the International Criminal Court, 2187 UNTS 38544, 17 July 1998 (entry into force: 1 July 2002). Universal jurisdiction applies to certain crimes, including international crimes, based on international

3. EXTRADITION AND EXCLUSION IN A POLITICISED CONTEXT: DUTCH COURTS' ASSESSMENTS OF FOUR CONTENTIOUS ISSUES

The previous sections demonstrated how criminal justice and immigration procedures inherently intersect, both in the Dutch No Safe Haven policy and in the cooperation between Rwanda and the Netherlands in the pursuit of genocide suspects. The immigration, citizenship, criminal, and extradition procedures against Rwandans residing in the Netherlands have led to quite some resistance and challenges in court, and criticism from observers. These criticisms cannot be seen as separate from allegations that the Rwandan Government uses criminal prosecution as a political tool to suppress opposition, as will be explained. But some of the challenges also relate to broader criticism of how 1F exclusion and citizenship revocation policies and procedures have been shaped in the Netherlands. How have Dutch courts navigated these challenges? The following sections explore four points of criticism: that (cooperation on) extradition by the Dutch Government facilitates the use of criminal trials and extradition requests to suppress political opposition by the Rwandan Government; that migration law is used by the Dutch Government to bypass extradition law (disguised extradition); that a too low threshold for citizenship revocation is used by the Dutch Government; and that unreliable and untransparent evidence is used by the Dutch Government to support exclusion, and by extension citizenship revocation, decisions.

3.1. Fair trial concerns and trust in the Rwandan criminal justice system

As previously noted, a key obstacle to the extradition of alleged *génocidaires* to Rwanda has been concern about fair trial guarantees – specifically, regarding the independence of the judiciary, the protection of witnesses, and the ability of the defence to operate effectively. Following positive rulings in *Uwinkindi* (ICTR) and *Ahorugeze* (ECtHR), and the first extradition from Norway, eight additional extraditions took place from Denmark, Germany, and the Netherlands.⁸⁰ However, several countries – most notably France and the United Kingdom – have maintained their refusal to extradite, despite the precedents set by *Uwinkindi* and *Ahorugeze*.⁸¹ Interestingly, the UK's denial of extradition for five individuals was partly based on submissions from a Dutch magistrate who had previously advised the National Public Prosecution Authority (NPPA) in the context of the Rwanda–Netherlands justice cooperation. While generally positive about Rwanda's criminal justice system in the cases transferred from the ICTR, the magistrate expressed concerns about the status and quality of defence attorneys.⁸²

The first two extraditions from the Netherlands – Iyamuremye and Mugimba (see Table 1) – were ultimately approved after additional fair trial guarantees were secured, including an agreement that the Kenyan section of the International Commission of Jurists (ICJ-Kenya) would monitor the trials.⁸³ Trial monitoring had also been required by the ICTR under its Rules of Procedure and Evidence, and the International Residual Mechanism for Criminal Tribunals (MICT) – which assumed ICTR functions after its closure – formalised a memorandum of understanding with ICJ-Kenya in January 2015 to conduct such monitoring.⁸⁴ The monitors were tasked to:

⁸⁰ *Ibid.*, 54.

⁸¹ Palmer, "International Criminal Law and Border Control".

⁸² M. Witteveen, *Additional Expert Report Prepared for Extradition Proceedings re: Government of Rwanda v Dr Vincent Bajinya and others*, 3 June 2015 (on file with author).

⁸³ Appeals Court of The Hague, 5 July 2016, ECLI:NL:GHDHA:2016:1924 and ECLI:NL:GHDHA:2016:1925.

⁸⁴ See e.g. MICT, *In the Matters of Jean Uwinkindi and Bernard Munyagishari, Order Appointing a Monitor*, MICT-12-20, 18 Feb. 2015, available at: https://www.irmct.org/sites/default/files/casedocuments/mict-12-20/registry-orders/en/150218_1.pdf (last visited 23 Sept. 2025).

[...] attend, observe, and report on all national court hearings, including pre-trial, High Court and Supreme Court proceedings, and review all relevant court files. The monitors further collect information deemed relevant to, inter alia, the progress of the proceedings, the fair trial rights and the conditions of detention of the accused. They conduct regular visits to the detention facility where the accused is held, and meet with the accused, his defence counsel, the prison authorities and other relevant parties on a regular basis.⁸⁵

Monitoring reports on the trials against the three individuals extradited from the Netherlands are publicly available on the Dutch Government’s website and are generally positive about the fairness of proceedings.⁸⁶ In the cases of Iyamuremye and Mugimba, the Committee Against Torture furthermore concluded that their extraditions to Rwanda did not violate Article 3 CAT.⁸⁷ In the third approved extradition (Rutunga, see Table 1), the Hague Appeals Court relied on the monitoring outcomes of the earlier cases to conclude that there was no real risk of a flagrant denial of justice under Article 6 ECHR.⁸⁸ ICJ-Kenya’s final report on Rutunga concluded that his fair trial rights had not been violated.⁸⁹ That an impartial trial under the Transfer Law is possible is also suggested by the acquittal in January 2024 of a Rwandan Danish national who had been extradited.⁹⁰

Remarkably, following the approvals of Iyamuremye, Mugimba, and Rutunga, three subsequent extradition requests to the Netherlands – for Karangwa, Mugenzi, and Nyabusore (see Table 1) – were ultimately denied. In Karangwa’s case, the Extradition Chamber found the request inadmissible due to concerns about the independence of Rwanda’s judiciary in cases involving prominent political opponents.⁹¹ The judgment cited reports from the UN and human rights organisations, as well as expert testimony, indicating that political opponents had recently been denied fair trials and were at risk of threats, disappearance, and persecution. One very prominent political opposition figure targeted through criminal prosecution is the former leader of the United Democratic Forces of Rwanda (FDU)-Inkingi opposition party – formed by Rwandans in exile and classified as a terrorist organisation by Rwandan authorities – Victoire Ingabire Umuhoya. She was arrested when she returned to Rwanda in 2010 to participate in presidential elections, after having resided in the Netherlands for 16 years, and was later convicted to 15 years in prison for conspiring against the State and minimizing the 1994 genocide.⁹² Her prosecution, as well as that of other opposition figures, has been widely condemned. Furthermore, the Rwandan authorities are believed to target Rwandans residing abroad through different repressive tactics.⁹³

Karangwa, a former senior officer in the Rwandan army but also a member of the FDU-Inkingi, was deemed at risk of such treatment. The Chamber accepted the defence’s

⁸⁵ MICT, “Resumé des Accords de Suivi” [Summary of Follow-Up Agreements], n.d., available at: <https://www.irmct.org/fr/le-mecanisme-en-bref/fonctions/r%C3%A9sum%C3%A9-des-accords-de-suivi> (last visited 23 Sept. 2025).

⁸⁶ Rijksoverheid, “Monitoring Rwandese uitleveringszaken” [Monitoring Rwandan Extradition Cases], n.d., available at: <https://www.rijksoverheid.nl/onderwerpen/internationale-vrede-en-veiligheid/monitoring-rwandese-uitleveringszaken> (last visited 17 Sept. 2025).

⁸⁷ Committee Against Torture, *J.I. v. Netherlands*, No. 768/2016, 12 Jun. 2019, available at: <https://docs.un.org/en/CAT/C/66/D/768/2016>; *J.M. v. Netherlands*, No. 771/2016, 11 June 2019 <https://docs.un.org/en/CAT/C/66/D/771/2016> (last visited 17 Sept. 2025).

⁸⁸ Appeals Court of The Hague, 4 May 2021, ECLI:NL:GHDHA:2021:763, paras. 5.17–5.27.

⁸⁹ ICJ-Kenya, *Judgment in Case No. RP/Gen 00011/2021/HC/HCCIC, The Prosecution v. Dr R., Special Report*, Feb. 2025, available at: <https://open.overheid.nl/documenten/dc7439e1-f158-42a1-8ee0-804879de7805/file> (last visited 17 Sept. 2025).

⁹⁰ AFP, “Court Acquits Teacher Accused of Participating in Rwandan Genocide”, *Voice of America Africa*, 11 Jan. 2024, available at: <https://www.voaafrica.com/a/7436471.html> (last visited 23 Sept. 2025).

⁹¹ District Court of The Hague, 9 Nov. 2022, ECLI:NL:RBDHA:2022:11719.

⁹² “Victoire Ingabire: Rwanda Leader’s Jail Term Raised”, *BBC*, 13 Dec. 2013, available at: <https://www.bbc.com/news/world-africa-25371874> (last visited 1 Oct. 2025).

⁹³ Human Rights Watch, *Join Us or Die*, 10 Oct. 2023, available at: <https://www.hrw.org/report/2023/10/10/join-us-or-die/rwandas-extraterritorial-repression> (last visited 1 Oct. 2025).

argument that extradition would expose him to a flagrant violation of his right to a fair hearing before an independent and impartial tribunal. The guarantees provided under Rwanda's Transfer Law were considered insufficient. Unlike Rutunga,⁹⁴ Karangwa was more clearly identified as a political opponent. The Court also emphasised that its conclusion was based on "more recent information on (the criminal prosecution of) political opponents in Rwanda",⁹⁵ not limiting itself to the previous adjudication of extradited individuals under the Transfer Law but also considering broader concerns about political interference and access to effective remedies. The Supreme Court upheld this interpretation.⁹⁶

The outcomes in the Mugenzi and Nyabusore cases appear consistent with the findings in the Karangwa case. Initially, both extradition requests were deemed admissible by the Extradition Chamber – in April and August 2021, respectively. However, in subsequent civil summary proceedings on appeal, the extraditions were halted. The Appeals Court cited new information, including the Karangwa decision and a critical thematic report on human rights and the rule of law in Rwanda published by the Dutch Ministry of Foreign Affairs in June 2023.⁹⁷ The Court concluded that political opponents face a real risk of unfair trials. Both Mugenzi and Nyabusore were known for their political activities with FDU-Inkingi, and Nyabusore also had family ties to former President Habyarimana.⁹⁸ The Court found that the general human rights situation in Rwanda did not provide a basis for confidence in fair trial guarantees, and that the Rwandan Government could not be expected to uphold the Transfer Law's assurances. Moreover, the monitoring process was deemed insufficient to prevent violations.⁹⁹ These conclusions were confirmed by the Supreme Court in April 2025.¹⁰⁰ Importantly, the outcomes in these three cases do not imply that all future extradition requests to Rwanda will be denied. The decisions were primarily based on the political profiles of the individuals concerned. This may also explain why Norway extradited François Gasana in August 2025 despite the outcomes in the most recent Dutch cases.¹⁰¹

These outcomes present the Dutch Government with a difficult dilemma: what should happen next to the three men whose extradition was refused, especially given that their residence status had been revoked in preparation for extradition? Karangwa, who had acquired Dutch citizenship through naturalisation, saw his citizenship revoked in 2013 – a decision he unsuccessfully appealed (see Section 3.4). In October 2023, he was arrested by Dutch police on suspicion of involvement in the Rwandan genocide. This suggests that the authorities had gathered sufficient evidence to justify pre-trial detention. However, as of September 2025, the case had not progressed to trial, and the status of his criminal case remains unclear.¹⁰² In the other two cases, no arrests have been reported. Mugenzi lost his asylum permit in 2013, while Nyabusore – also a naturalised citizen – unsuccessfully challenged both the revocation of his asylum permit and the Dutch Government's refusal to reconsider the revocation of his citizenship (see Section 3.4). Given the acknowledged risks they would

⁹⁴ Appeals Court of The Hague, 4 May 2021, ECLI:NL:GHDHA:2021:763, para. 5.26.

⁹⁵ District Court of The Hague, 9 Nov. 2022, ECLI:NL:RBDHA:2022:11719, para. 3.7.2.

⁹⁶ Supreme Court of the Netherlands, 6 June 2023, ECLI:NL:HR:2023:864, para. 2.4.4.

⁹⁷ Ministerie van Buitenlandse Zaken, *Thematisch Ambtsbericht met betrekking tot de Mensenrechten en de Rechtsstaat in Rwanda*.

⁹⁸ Appeals Court of The Hague, 19 Dec. 2023, ECLI:NL:GHDHA:2023:2469 and ECLI:NL:GHDHA:2023:2470, paras. 6.2, 7.9.

⁹⁹ *Ibid.*, paras. 8.11, 8.19, 8.21.

¹⁰⁰ Supreme Court of the Netherlands, 25 Apr. 2025, ECLI:NL:HR:2025:664 and ECLI:NL:HR:2025:592.

¹⁰¹ AFP, "Norway Extradites Rwanda Genocide Suspect".

¹⁰² 'Investigation Ardech' is reported by the District Court of The Hague to be in the investigation phase: De Rechtspraak, "International Crimes Cases: Ongoing and Prior Cases", n.d., available at: <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Den-Haag/Over-de-rechtbank/Organisatie/Paginas/International-crimes-cases.aspx#d3a11f50-982b-428e-8c90-c48b230cb1d5ea00eb0f-ff0b-4ab0-bce3-2b46bfc06c99> (last visited 23 Sept. 2025).

face upon return, it is unlikely that either Mugenzi or Nyabusore can be deported to Rwanda. This likely means they remain in a legal limbo in the Netherlands: their presence is unlawful, but they cannot leave. Many more host States are confronted with migrants who are undesirable because of (alleged) involvement in crime, but cannot be removed.¹⁰³ Since leave to remain or some other tolerated status does not exist in the Netherlands,¹⁰⁴ they are perhaps even more vulnerable compared to undesirable but unremovable migrants in other host States.

3.2. Deportation of persons sought for prosecution

Extradition and deportation have a complex interrelationship, governed by principles of international refugee law, international human rights law, and domestic extradition and criminal law.¹⁰⁵ In the absence of a (formal) extradition request, deportation could be an alternative way to realise the rendition of a suspect. Swart has argued that the relationship between immigration law and extradition law is problematic because immigration law easily takes over the function of extradition law and, in such cases, “forms a kind of parallel extradition law”.¹⁰⁶ When deportation under immigration law is used to bypass formal extradition proceedings, this practice is referred to as “disguised extradition”.¹⁰⁷ The obligation to extradite cannot, according to an analysis by the UN International Law Commission, be fulfilled “[...] by deportation, extraordinary rendition or other informal forms of dispatching the suspect to another State”, because “[f]ormal extradition requests entail important human rights protections which may be absent from informal forms of dispatching the suspect to another State”.¹⁰⁸ While the transfers and extraditions to Rwanda are subject to the Transfer Law, deportations as well as the voluntary return of alleged *génocidaires* are – in principle – not.¹⁰⁹ The legal safeguards for an individual are consequently more limited in a deportation than in an extradition procedure. This implies that when a State intends to prosecute someone located abroad, the host State bears a special responsibility towards that individual.¹¹⁰

The key question, then, is whether the deporting State is aware of the country of origin’s intention to prosecute. This issue arose in the deportation case of Jean de Dieu Munyaneza (see Table 1). Munyaneza applied for asylum in the Netherlands in 2000, which was granted in 2004. In 2011, his residence permit was revoked under Article 1F, based on a combination of an individual official notice from the Ministry of Foreign Affairs and a report by the NGO African Rights. Although his appeal was initially successful,¹¹¹ the Council of State ultimately upheld the revocation in 2014.¹¹²

¹⁰³ See the special issue on state practices regarding undesirable but unremovable migrants in Australia, Canada, France, Greece, India, the Netherlands, Turkey, and the UK in *Refugee Survey Quarterly*, 36(1), 2017.

¹⁰⁴ Bolhuis, Battjes & Van Wijk, “Undesirable but Unreturnable Migrants in the Netherlands”.

¹⁰⁵ Gilbert, “Undesirable but Unreturnable”, 56.

¹⁰⁶ A.H.J. Swart, “Het Eeuwige Leven van de Verkapte Uitlevering”, [The Eternal Life of Disguised Extradition] *Recht en Kritiek*, 1981, 334–356, 334, as cited in T. de Boer & H. Kappel, “Verkapte Uitlevering in Mensenrechtelijk Perspectief” [Disguised Extradition in a Human Rights Perspective], *Jaarboek Vreemdelingenrecht*, 2019(4), 34–43.

¹⁰⁷ M.C. Bassiouni, “Disguised Extradition: The Use of Immigration Laws as Alternatives to Extradition”, *International Extradition: United States Law and Practice: United States Law and Practice*, 6th Edition, 2014, <https://doi.org/10.1093/law/9780199917891.003.0004>.

¹⁰⁸ UN International Law Commission, “The Obligation to Extradite or Prosecute”, 98, para 22.

¹⁰⁹ Canada, by exception, stipulated in the case of Léon Mugesera at the time of his deportation in 2012, that he would be tried under the Transfer Law; see Ministerie van Buitenlandse Zaken, *Thematisch Ambtsbericht met betrekking tot de Mensenrechten en de Rechtsstaat in Rwanda*, 44.

¹¹⁰ More broadly, as noted, the host State may have a responsibility under the *non-refoulement* principle to prevent subjecting the person to torture, or to inhuman or degrading treatment. See also United Nations High Commissioner for Refugees (UNHCR), *Guidance Note on Extradition and International Refugee Protection*, Geneva, UNHCR, 2008, available at: <https://www.refworld.org/policy/legalguidance/unhcr/2008/en/57630> (last visited 12 Dec. 2025); Rikhof, *Exclusion and Refoulement*, 590–592.

¹¹¹ District Court of The Hague, 21 Dec. 2012, ECLI:NL:RBSGR:2012:CA1567.

¹¹² Council of State, 23 June 2014, ECLI:NL:RVS:2014:2382.

ANNEX L

THE COURT ORDERED that no one shall publish or reveal the names or addresses of AAA, HTN, RM, AS, SAA or ASM (the “Claimants”) or publish or reveal any information which would be likely to lead to the identification of the Claimants or of any member of their respective families in connection with these proceedings.



Michaelmas Term

[2023] UKSC 42

On appeal from: [2023] EWCA Civ 745

JUDGMENT

R (on the application of AAA (Syria) and others) (Respondents/Cross Appellants) v Secretary of State for the Home Department (Appellant/Cross Respondent);

R (on the application of HTN (Vietnam)) (Respondent/Cross Appellant) v Secretary of State for the Home Department (Appellant/Cross Respondent);

R (on the application of RM (Iran)) (Respondent) v Secretary of State for the Home Department (Appellant);

R (on the application of AS (Iran)) (Respondent/Cross Appellant) v Secretary of State for the Home Department (Appellant/Cross Respondent)

R (on the application of SAA (Sudan)) (Respondent) v Secretary of State for the Home Department (Appellant); and

R (on the application of ASM (Iraq)) (Appellant) v Secretary of State for the Home Department (Respondent)

before

**Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Briggs
Lord Sales**

**JUDGMENT GIVEN ON
15 November 2023**

Heard on 9, 10 and 11 October 2023

Secretary of State for the Home Department

Lord Pannick KC
 Sir James Eadie KC
 Neil Sheldon KC
 Edward Brown KC
 Mark Vinall
 Sian Reeves
 Jack Anderson
 Natasha Barnes

(Instructed by the Government Legal Department (Immigration))

AAA (Syria) and HTN (Vietnam)

Raza Husain KC
 Phillippa Kaufmann KC
 Christopher Knight
 Jason Pobjoy
 Anirudh Mathur
 Emmeline Plews
 Will Bordell
 Rayan Fakhoury

(Instructed by Duncan Lewis (City of London))

RM (Iran)

Phillippa Kaufmann KC
 Alasdair Mackenzie
 David Sellwood
 Rosa Polaschek

(Instructed by Wilsons Solicitors LLP)

AS (Iran)

Sonali Naik KC
 Adrian Berry
 Mark Symes
 Eva Doerr

Isaac Ricca-Richardson

(Instructed by Barnes Harrild & Dyer (Croydon London Road))

SAA (Sudan) and others

Manjit Gill KC
 Rambert Demello
 Tony Muman
 Professor Satvinder Juss
 Rashid Ahmed
 Harjot Singh [Solicitor Advocate]

Mohd Mosem [Solicitor Advocate]
(Instructed by Twinwood Law Practice, Birmingham)

ASM (Iraq) and others
Richard Drabble KC
Leonie Hirst
Sarah Dobbie
Angelina Nicolaou
(Instructed by Wilsons Solicitors LLP)

United Nations High Commissioner for Refugees (Intervener)
Angus McCullough KC
Laura Dubinsky KC
David Chirico
Jennifer MacLeod
Agata Patyna
George Molyneaux
Joshua Pemberton
(Instructed by Baker McKenzie LLP (London))

LORD REED AND LORD LLOYD-JONES (with whom Lord Hodge, Lord Briggs and Lord Sales agree):

1. Introduction

(1) The nature of the issue before the court

1. This appeal is concerned with the Secretary of State’s policy that certain people claiming asylum in the United Kingdom should not have their claims considered here, but should instead be sent to Rwanda in order to claim asylum there. Their claims will then be decided by the Rwandan authorities, with the result that if their claims are successful, they will be granted asylum in Rwanda.

2. In this appeal, the court is required to decide whether the Rwanda policy is lawful. That is a legal question which the court has to decide on the basis of the evidence and established legal principles. The court is not concerned with the political debate surrounding the policy, and nothing in this judgment should be regarded as supporting or opposing any political view of the issues.

(2) The legal framework of the policy

3. For asylum claims made on or before 27 June 2022, including those with which these proceedings are concerned, the policy is given effect under paragraphs 345A to 345D of the Immigration Rules (as then in force), made in accordance with section 3 of the Immigration Act 1971 (“the 1971 Act”). In broad terms, under those paragraphs an asylum claim can be ruled inadmissible, with the consequence that the merits of the claim need not be considered, where the asylum seeker had the opportunity to apply for asylum in a safe third country but did not do so. If it is decided that an asylum claim is inadmissible, the asylum seeker can be removed either to the safe third country where the opportunity to make the asylum claim arose, if that country is willing to accept the asylum seeker, or to any other safe third country which agrees to accept him or her. The policy proceeds on the basis that the asylum seekers who are to be removed to Rwanda had the opportunity to apply for asylum in a safe third country (in most cases, France) but did not do so, and that Rwanda is another safe third country which has agreed to accept them, and to which they can therefore be removed.

4. The criteria for designation as a safe third country are set out in paragraph 345B:

“A country is a safe third country for a particular applicant, if:

(i) the applicant’s life and liberty will not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion in that country;

(ii) the principle of non-refoulement will be respected in that country in accordance with the Refugee Convention;

(iii) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected in that country; and

(iv) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention in that country.”

5. The principle of non-refoulement, to which paragraph 345B(ii) refers, is guaranteed by the United Nations 1951 Convention relating to the Status of Refugees (Cmd 9171) and its 1967 Protocol (Cmnd 3906) (“the Refugee Convention”), to which the United Kingdom is a party. As explained below, it requires that refugees are not returned to a country where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. In order to qualify as a safe third country under paragraph 345B(ii), Rwanda must accordingly be a country in which the principle of non-refoulement will be respected, ie a country which will not return refugees to another country where their life or freedom would be threatened. As we shall explain, refoulement is also prohibited under a number of other international conventions which the United Kingdom has ratified. There are also several Acts of Parliament which protect refugees against refoulement.

6. The Immigration Rules are supplemented by guidance to Home Office case workers, known as Country Policy Information Notes (“CPINs”). A CPIN entitled “Inadmissibility - Safe Third Country Cases”, published by the Secretary of State on 9 May 2022, explains arrangements for the transfer and processing of asylum seekers which have been entered into by the governments of the United Kingdom and Rwanda, known as the Migration and Economic Development Partnership (“MEDP”), and advises that certain categories of asylum seeker can be removed to Rwanda in

accordance with paragraphs 345A and 345B of the Immigration Rules. Another CPIN published on the same date, entitled “Review of asylum processing – Rwanda: assessment”, considers the processing of claims for asylum in Rwanda, and advises that there are no substantial grounds for believing that a person, if relocated to Rwanda, would face a real risk of treatment that is likely to be contrary to article 3 of the European Convention on Human Rights (“the ECHR”) by virtue inter alia of refoulement or shortcomings in the asylum process. Article 3 prohibits torture and inhuman or degrading treatment or punishment. As we explain in para 28 below, by enacting the Human Rights Act 1998 (“the Human Rights Act”), Parliament has given the ECHR effect in domestic law.

7. At the time of the decisions with which these proceedings are concerned, it was also necessary, in order for an asylum seeker to be removed to another country while an asylum claim was pending, for the Secretary of State to certify, under paragraph 17 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (“the 2004 Act”), that the country in question was a place where the asylum seeker’s life and liberty would not be threatened by reason of race, religion, nationality, membership of a particular social group or political opinion, and from which the asylum seeker would not be sent to another state otherwise than in accordance with the Refugee Convention.

(3) The MEDP

8. The MEDP comprises a Memorandum of Understanding (“MOU”) between the governments of the United Kingdom and Rwanda, entered into on 13 April 2022, and two diplomatic Notes Verbales regarding “the asylum process of transferred individuals” and “the reception and accommodation of transferred individuals”, executed by the government of Rwanda on the same date. As we shall explain, these documents are critical to the Secretary of State’s assessment that Rwanda is a safe third country for the purposes of paragraph 345B of the Immigration Rules. It is unnecessary to set out their terms in full, but we should draw attention to certain provisions.

9. Under paragraph 9 of the MOU, Rwanda undertakes that “it will treat each Relocated Individual, and process their claim for asylum, in accordance with the Refugee Convention, Rwandan immigration laws and international and Rwandan standards, including under international and Rwandan human rights law, and including, but not limited to ensuring their protection from inhuman and degrading treatment and refoulement”. Paragraph 9 also sets out a number of procedural guarantees, including access to an interpreter and to procedural or legal assistance, and to an independent and impartial process of appeal. Paragraph 10 makes provision for persons whose asylum claims are refused. Unless they are found to have another humanitarian protection need,

or are granted permission to remain in Rwanda under its domestic immigration law, they are to be treated in accordance with paragraph 10.4:

“10.4 For those Relocated Individuals who are neither recognised as refugees nor to have a protection need or other basis upon which to remain in Rwanda, Rwanda will only remove such a person to a country in which they have a right to reside.”

10. Under paragraph 15 of the MOU, the United Kingdom and Rwandan governments agree to establish a monitoring committee which will report on the implementation of the arrangement, including the processing of asylum claims by the Rwandan authorities. Under paragraph 16, the United Kingdom has agreed that “a portion of Rwanda’s most vulnerable refugees” will be settled in the United Kingdom. Under paragraph 21, a joint committee of representatives of the two governments is to be formed, which will meet at least once every six months. Its remit will include monitoring the implementation of the arrangement. Financial arrangements have also been made between the two governments, which are referred to in paragraph 19. It appears from the evidence that the United Kingdom paid £20 million to Rwanda in April 2022. A further £120 million was paid by the United Kingdom during that month as a contribution to a fund intended to promote economic development in Rwanda. Further payments to the fund are conditional on Rwanda’s compliance with the terms of the MEDP.

11. It is also relevant to note that the Note Verbale concerning the asylum process of transferred individuals contains provisions concerning the procedures to be followed by the Rwandan authorities in dealing with asylum claims. They include provisions designed to address certain deficiencies in Rwandan practice which were identified by Home Office officials, such as failures to provide written decisions. Accordingly, paragraph 4.8 provides that relocated individuals will be notified in writing of the decision that has been taken on their asylum claim. Paragraph 5.1 provides that a relocated individual can appeal to the responsible minister in the Rwandan government against a decision refusing their claim. Paragraph 5.3 provides that a person whose appeal to the minister is refused can appeal to the High Court of Rwanda.

12. The MOU provides that it is not binding in international law (paragraph 1.6), that it does not create or confer any right on any individual, and that compliance with it is not justiciable in any court of law (paragraph 2.2). The Notes Verbales contain similar provisions.

(4) The legal proceedings

13. In these proceedings, a number of asylum seekers challenged inadmissibility and removal decisions made by the Secretary of State under paragraphs 345A to 345D of the Immigration Rules between May and July 2022. The effect of the decisions was that their claims should not be determined in the United Kingdom and that they should instead be removed to Rwanda in order for their claims to be decided by the Rwandan authorities, with asylum being provided in Rwanda to any claimants who were successful. The decisions proceeded on the basis that Rwanda was a safe third country, and the Secretary of State issued certificates to that effect under paragraph 17 of Schedule 3 to the 2004 Act, which were also the subject of challenge. A number of interested organisations took part in the proceedings before the courts below, and the United Nations High Commissioner for Refugees (“UNHCR”), the United Nations Refugee Agency, was permitted to intervene.

14. The Divisional Court (Lewis LJ and Swift J) held that certain of the inadmissibility and removal decisions should be quashed on the ground that the way in which the Secretary of State went about the implementation of the policy in those cases was procedurally flawed: [2022] EWHC 3230 (Admin); [2023] HRLR 4. It rejected a wider challenge on the ground that the Secretary of State’s policy was unlawful.

15. On appeal, the Court of Appeal, by a majority (Sir Geoffrey Vos MR and Underhill LJ, Lord Burnett of Maldon CJ dissenting), upheld the claimants’ challenge to the lawfulness of the policy, and held that on the evidence before the Divisional Court there were substantial grounds for believing, notwithstanding the guarantees and assurances given, that (a) there were real risks that asylum claims would not be properly determined by the Rwandan authorities, and (b) that in consequence there were real risks of refoulement, and that so long as such grounds existed any removals under the MEDP would contravene section 6 of the Human Rights Act: [2023] EWCA Civ 745; [2023] 1 WLR 3103, particularly at paras 109-110 and 273-286. The court also concluded (unanimously) that the Secretary of State should not have certified the claims under paragraph 17 of Schedule 3 to the 2004 Act: paras 117, 302 and 480.

16. The Court of Appeal granted the Secretary of State permission to appeal to this court against its decision. It also granted one of the claimants permission to cross-appeal against its rejection of an argument that the policy was in violation of retained EU law, maintained in force by the European Union (Withdrawal) Act 2018 (“the 2018 Act”), namely Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status (“the Procedures Directive”). That directive requires that the removal of asylum seekers to a safe third country must be in accordance with “rules laid down in national legislation,

including: (a) rules requiring a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country” (article 27(2)). (No question has been raised in these proceedings as to whether the removal of asylum seekers to a state with which they have no connection is compatible with the ECHR.)

17. This court subsequently granted some of the claimants permission to cross-appeal in respect of two other grounds which had been rejected by the Divisional Court and the Court of Appeal. The first was that the removal of asylum seekers to Rwanda was unlawful under section 6 of the Human Rights Act because they were at risk of ill-treatment in that country, contrary to article 3 of the ECHR. The second was that the Secretary of State had failed to consider the risk of refoulement with the degree of care required under the common law or under the Human Rights Act. In the event, as we shall explain, those grounds of appeal did not feature prominently at the hearing of the appeal, and it is unnecessary for us to express a concluded view about them. We shall accordingly focus primarily on the grounds concerning (1) refoulement and (2) retained EU law.

18. The factual background is fully set out in the judgments below and need not be repeated at length, although it will be necessary for us to consider aspects of the evidence in some detail.

2. *Refoulement*

(1) The legal background

(i) International law

19. Under international law, states have the right to control the entry, residence and expulsion of aliens, and to counter attempts to circumvent immigration restrictions, subject to their treaty obligations and to any relevant principles of customary international law. One limitation of the right to expel aliens is the principle of non-refoulement, which is enshrined in several international treaties which the United Kingdom has ratified. As will appear, the term bears slightly different meanings in different contexts.

20. The Refugee Convention, which has 146 states parties including the United Kingdom, provides in article 33(1):

“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

Article 33(1) has long been interpreted by the courts of this country as prohibiting not only the direct return of refugees to the country where they fear persecution, but also their indirect return via a third country: *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514, 532.

21. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (“UNCAT”), which has 173 states parties including the United Kingdom, provides in article 3(1):

“No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

22. The United Nations International Covenant on Civil and Political Rights of 1966 (“ICCPR”), also with 173 states parties including the United Kingdom, is interpreted by the United Nations Human Rights Committee, which monitors implementation of the Covenant, as imposing a similar obligation:

“[T]he article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.”

(General Comment 31 (2004), para 12). Article 6 of the Covenant protects the right to life, and article 7 prohibits torture or cruel, inhuman or degrading treatment or punishment.

23. The ECHR, with 46 states parties including the United Kingdom, is interpreted in the same way. It has been understood since the 1989 judgment of the European Court of Human Rights (“the European Court”) in *Soering v United Kingdom* (1989) 11 EHRR 439 (“*Soering*”) that the duty of the contracting parties under article 3 not to subject persons to torture or to inhuman or degrading treatment also imports an obligation not to remove persons to other states where there are substantial grounds for believing that they would be at real risk of such ill-treatment. This is essentially the same approach as is adopted under the UNCAT test (para 21 above) and in relation to the ICCPR (para 22 above). It is also similar to the “real risk” test long adopted by domestic courts in relation to the “safe third country” provisions of our domestic law, as explained at para 32 below. *Soering* was a case concerned with extradition, but the principle was soon applied to removal cases generally.

24. As a consequence, article 3 prohibits the expulsion of asylum seekers to countries where they face the risk of refoulement (direct or indirect) to their country of origin: see *MSS v Belgium and Greece* (2011) 53 EHRR 2 (a case concerned with the removal of an asylum seeker to a country through which he had transited). In relation to that risk, the European Court observed in *Ilias v Hungary* (2019) 71 EHRR 6 (another case concerned with the removal of asylum seekers to a country through which they had transited) at para 131 that “the main issue ... is whether or not the individual will have access to an adequate asylum procedure in the receiving third country”. That issue is important in cases of this kind because if asylum seekers do not have access to such a procedure there will be a real risk of genuine refugees being refouled, either because their claims are not considered at all or because they are not determined properly. Whether asylum seekers removed to Rwanda would have access to an adequate asylum procedure is therefore one of the principal issues in the present proceedings.

25. It may be that the principle of non-refoulement also forms part of customary international law. The United Kingdom has subscribed to this view, along with the other states parties to the Refugee Convention, in the 2001 Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (UN Doc HCR/MMSP/2001/09). The fourth recital to the preamble to the declaration acknowledged the continuing relevance and resilience of the international regime of rights and principles established for the protection of refugees, “including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law”. The significance of non-refoulement being a principle of customary international law is that it is consequently binding upon all states in international law, regardless of whether they are party to any treaties which give it effect. However, as we have not been addressed on this matter, we do not rely on it in our reasoning.

26. The principle of non-refoulement is therefore given effect not only by the ECHR but also by other international conventions to which the United Kingdom is party. It is a

core principle of international law, to which the United Kingdom government has repeatedly committed itself on the international stage, consistently with this country's reputation for developing and upholding the rule of law.

(ii) Domestic law

27. The principle of non-refoulement has also been given effect in our domestic law by a number of statutes enacted by Parliament. First, section 2 of the Asylum and Immigration Appeals Act 1993 ("the 1993 Act") provides:

"Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention."

In that context, "the Convention" is defined in section 1 as meaning the Refugee Convention. The Immigration Rules are the rules laid down by the Secretary of State as to the practice to be followed in the administration of the 1971 Act for regulating the entry into and stay in the United Kingdom of persons required to have leave to enter: section 3 of the 1971 Act (quoted in para 122 below). Asylum claims fall within the scope of that provision, since they are claims for leave to remain in the United Kingdom, made by persons who require leave to enter. It is therefore unlawful, under section 2 of the 1993 Act, for the Secretary of State to lay down a rule as to practice in relation to asylum claims which would be contrary to the principle of non-refoulement laid down in article 33(1) of the Refugee Convention. In the event, as we have explained, paragraph 345B of the Immigration Rules fulfils that requirement by providing that a country is a safe third country only if, inter alia, "the principle of non-refoulement will be respected in that country in accordance with the Refugee Convention".

28. Secondly, the Human Rights Act gives domestic effect to the ECHR. Under section 6, it is unlawful for a public authority to act in a way which is incompatible with a Convention right, such as the right guaranteed by article 3 of the ECHR. The Secretary of State is a public authority for this purpose. Section 2 requires domestic courts to take into account the judgments of the European Court when determining a question which has arisen in connection with a right guaranteed by the ECHR. Domestic courts, including this court and its predecessor, the Appellate Committee of the House of Lords, have long applied the Human Rights Act in relation to the removal of persons from the United Kingdom to other countries in accordance with the principles laid down by the European Court in cases such as *Soering* and *MSS v Belgium and Greece*. Those principles are not questioned by any party to this appeal. It is therefore unlawful, under

section 6 of the Human Rights Act, for the Secretary of State to remove asylum seekers to countries where there are substantial grounds to believe that they would be at real risk of ill-treatment by reason of refoulement.

29. Thirdly, section 82(1) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”), read together with section 84(1) of that Act, confers a right of appeal against the refusal of a protection claim (defined by section 82(2) as including a claim that the removal of a person from the United Kingdom would breach the United Kingdom’s obligations under the Refugee Convention) on the ground that removal of the person from the United Kingdom would breach the United Kingdom’s obligations under that Convention. Section 82(1), read together with section 84(2), also confers a right of appeal against the refusal of a human rights claim (defined by section 113(1) as a claim that to remove the person from the United Kingdom would be unlawful under the Human Rights Act) on the ground that removal of the person from the United Kingdom would be unlawful under section 6 of that Act. The principle of non-refoulement is therefore given effect by sections 82 and 84 of the 2002 Act, both as it is set out in the Refugee Convention and as it applies under the Human Rights Act.

30. It is also relevant to note section 94(7) of the 2002 Act, under which, read with section 94(1), the Secretary of State may certify a protection claim or human rights claim as clearly unfounded, and thereby remove the claimant’s rights of appeal, if:

“(a) it is proposed to remove the person to a country of which he is not a national or citizen, and

(b) there is no reason to believe that the person’s rights under the Human Rights Convention [ie the ECHR] will be breached in that country.”

Section 94(8) provides:

“In determining whether a person in relation to whom a certificate has been issued under subsection (7) may be removed from the United Kingdom, the country specified in the certificate is to be regarded as—

(a) a place where a person’s life and liberty is not threatened by reason of his race, religion, nationality,

membership of a particular social group, or political opinion, and

(b) a place from which a person will not be sent to another country otherwise than in accordance with the Refugee Convention or with the United Kingdom’s obligations in relation to persons eligible for a grant of humanitarian protection.”

The premise of these provisions appears to be that if there is no reason to believe that a person’s rights under the ECHR will be breached in the country to which he is proposed to be removed, then it follows that the person will not be removed from that country to another country otherwise than in accordance with the Refugee Convention. That is consistent with the view that the ECHR protects against refoulement, as the European Court and domestic courts have held.

31. Fourthly, as we have explained, paragraph 17 of Schedule 3 to the 2004 Act enables the Secretary of State to certify, where it is proposed to remove an asylum seeker to a country (“a specified state”) of which he is not a national or citizen, that:

“(c) in the Secretary of State’s opinion the specified State is a place –

(i) where the person’s life and liberty will not be threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion, and

(ii) from which the person will not be sent to another State otherwise than in accordance with the Refugee Convention.”

32. Paragraph 17(c)(ii) reflects the principle of non-refoulement as set out in article 33(1) of the Refugee Convention. At the time of the decisions with which these proceedings are concerned, such a certificate had the effect, under paragraph 18, of disapplying section 77 of the 2002 Act, which prohibits the removal of an asylum seeker from the United Kingdom while his or her claim for asylum is pending (paragraph 18 has since been repealed and replaced by corresponding provisions in Schedule 4 to the Nationality and Borders Act 2022, which amend section 77 of the

2002 Act; but paragraph 18 continues to apply to the decisions with which these proceedings are concerned). The Divisional Court accordingly considered that certification under paragraph 17 was an integral part of the Secretary of State's decisions to remove asylum claimants to Rwanda: para 12. It has long been held that a certificate of the kind for which paragraph 17(c)(ii) provides can be issued only where there is no real risk that the asylum seeker will be sent to another country otherwise than in accordance with the Refugee Convention: see, for example, *R v Secretary of State for the Home Department, Ex p Canbolat* [1997] 1 WLR 1569.

33. Asylum seekers are thus protected against refoulement not only by the Human Rights Act but also by provisions in the 1993 Act, the 2002 Act and the 2004 Act, under which Parliament has given effect to the Refugee Convention as well as the ECHR.

(2) The issues arising in relation to refoulement in this appeal

34. As we have explained, the Divisional Court held that the Secretary of State's policy was lawful. The Court of Appeal reversed that decision, by a majority. They did so on the basis, first, that the Divisional Court had applied the wrong legal test when considering the refoulement issue. The correct test, derived from *Soering*, requires the court to decide for itself whether there are substantial grounds for believing that the removal of asylum seekers to Rwanda would expose them to a real risk of ill treatment, as a consequence of refoulement to another country. The assessment is one which must be made by the court. The majority of the Court of Appeal considered that the Divisional Court had mistakenly dealt with the issue on the basis that the court's role was confined to deciding whether the Secretary of State had been entitled to form the view that there was no such risk. The Lord Chief Justice considered that the Divisional Court had not made that mistake.

35. The majority of the Court of Appeal also considered that the Divisional Court had erred in its assessment of aspects of the evidence, most notably by failing to address the evidence of UNHCR in relation to (i) defects in the processing of asylum claims by the Rwandan authorities, (ii) prior examples of refoulement of asylum seekers from Rwanda to other countries, and (iii) the Rwandan government's failure to abide by assurances (including an assurance of non-refoulement) set out in an earlier arrangement of a similar kind which it had entered into with Israel. Again, the Lord Chief Justice disagreed.

36. On the basis that the Divisional Court had applied the wrong legal test, or in any event had erred in its approach to the evidence, the majority of the Court of Appeal carried out their own assessment of the evidence. They concluded that there were

substantial grounds for believing that there was a real risk that asylum seekers removed to Rwanda would be subject to refoulement, as a consequence of the Rwandan authorities' failure to determine their claims for asylum accurately and fairly. The Secretary of State's policy was accordingly held to be unlawful.

37. Against that background, the issues raised by the Secretary of State in the appeal against the Court of Appeal's decision in relation to refoulement are as follows:

- (i) (1) Whether the majority of the Court of Appeal was correct to conclude that the Divisional Court had applied the incorrect legal test.
- (ii) (2) If the Divisional Court did apply the correct test, whether the Court of Appeal was entitled to interfere with its conclusion.
- (iii) (3) If the Divisional Court did not apply the correct test, or there was another basis for interfering with its conclusion, so that the Court of Appeal was permitted to answer the question afresh for itself, whether the Court of Appeal was wrong to conclude that, on the evidence before the Divisional Court, there were substantial grounds for thinking that asylum seekers would face a real risk of ill-treatment (in the form of refoulement) following removal to Rwanda due to the inadequacy of the Rwandan system for refugee status determination (as the majority found) or not (as the Lord Chief Justice concluded), including by giving insufficient weight to HM Government's assessment of the likelihood of the government of Rwanda abiding by its assurances.

We shall address each of these issues in turn.

(3) Issue 1 – whether the Divisional Court applied the correct test

38. The test to be applied by the court in relation to the issue of refoulement is, as we have explained, whether there are substantial grounds for believing that the removal of asylum seekers to Rwanda would expose them to a real risk of ill treatment, as a consequence of refoulement to another country. As we shall explain, there was evidence before the Divisional Court which supported the existence of such a risk, including evidence from UNHCR. On the other hand, the Secretary of State relied on the Rwandan government's assurances that asylum seekers would have their claims determined in accordance with the arrangements set out in the MEDP. In those circumstances, the Divisional Court had to consider whether in the light of all the

evidence, including the assurances given by the Rwandan government, there were substantial grounds for believing that there was a real risk of refoulement.

39. Several passages in the judgment of the Divisional Court suggest that the members of the court misunderstood their function. For example, they began their consideration of the adequacy of Rwanda's asylum system, at para 62 of their judgment, by stating:

“Next we consider whether the Home Secretary was entitled to conclude that there were sufficient guarantees to ensure that asylum-seekers relocated to Rwanda would have their asylum claims properly determined there and did not run a risk of refoulement ...”.

That statement seems to suggest that the court saw its function as reviewing the Secretary of State's assessment and deciding whether it was a tenable view, rather than making its own assessment of the grounds for apprehending a risk of refoulement in the light of the evidence as a whole. Similarly, at para 70, the Divisional Court defined “the question we must address” as “whether, notwithstanding the opinion the UNHCR has now expressed, the Home Secretary was entitled to hold the contrary opinion”. Many other passages containing similar statements could be cited. These are not accurate ways of expressing the test which the court was required to apply. The question whether the Secretary of State was entitled to reach a particular conclusion is a different question from whether the court assesses that there are in fact substantial grounds for thinking that there is a real risk of refoulement.

40. On the other hand, the court recognised at para 63 of its judgment that it had to carry out the necessary assessment itself. In that context, the court's references to the question whether the Secretary of State was entitled to conclude that Rwanda's assurances provided a sufficient guarantee might be interpreted as a way, albeit one which was misleadingly expressed, of approaching the critical question of whether there were, in the opinion of the court, substantial grounds for believing that there was a real risk of refoulement. In a situation where the absence of such a risk depended on the reliability of the assurances, the latter issue (as assessed by the court rather than by the Secretary of State) was a very important factor in the application of the *Soering* test. As the divergent interpretations in the Court of Appeal would suggest, it is possible to read the Divisional Court's judgment in more than one way.

41. In these circumstances, we do not find it easy to determine what test the Divisional Court applied. However, it is not necessary for this court to reach a

concluded view as to which interpretation of the judgment should be preferred. For the reasons which we shall explain when we come to issue 2, we are satisfied that the Court of Appeal was entitled in any event to interfere with the Divisional Court's conclusion and to consider the question for itself.

(4) Issue 2 - whether the Court of Appeal was entitled to interfere with the Divisional Court's conclusion

42. We are in no doubt that, regardless of whether the Divisional Court applied the correct legal test, the Court of Appeal was in any event entitled to interfere with its conclusion. That is because the Divisional Court erred in its treatment of the evidence bearing on the risk of refoulement, essentially by failing to engage with the evidence of UNHCR concerning problems affecting the processing of asylum claims in Rwanda. As we have explained, an assessment of whether there is a risk of refoulement of asylum seekers removed to Rwanda requires an examination of how the asylum procedure operates there, in order to ensure that it affords sufficient guarantees that asylum seekers are not at risk of being removed to their country of origin without a proper evaluation of their claims.

43. In fairness to the Divisional Court, we should point out that it had to deal with a greater number and range of issues than either the Court of Appeal or this court, and that it produced its judgment at commendable speed, reflecting the public importance of the questions raised. Inevitably, this appeal has focused on the issue on which the Divisional Court is alleged to have erred, rather than on the many more issues on which its decision is unchallenged.

(i) The correct legal approach to the evidence

44. There are a number of decisions of the European Court and of domestic courts which bear on the correct approach to adopt to the evidence in a case of the present kind. First, the judgment of the European Court in *Ilias v Hungary* makes it clear that a state party cannot remove asylum seekers to a third country without determining their asylum status unless it has established that there are adequate procedures in place in that country to ensure that their asylum claims are properly determined and that they do not face a risk of refoulement to their country of origin. The court stated in that case (para 134):

“... in all cases of removal of an asylum seeker from a contracting state to a third intermediary country without

examination of the asylum requests on the merits ... it is the duty of the removing state to examine thoroughly the question whether or not there is a real risk of the asylum-seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against refoulement. If it is established that the existing guarantees in this regard are insufficient, article 3 [of the ECHR] implies a duty that the asylum-seekers should not be removed to the third country concerned.”

45. The European Court made it clear that this requires an assessment of how the asylum system in the receiving state operates in practice, having regard to deficiencies identified by bodies such as UNHCR. In that regard it stated (para 141):

“... the national authorities ... must carry out of their own motion an up-to-date assessment, notably, of the accessibility and functioning of the receiving country’s asylum system and the safeguards it affords in practice. The assessment must be conducted primarily with reference to the facts which were known to the national authorities at the time of expulsion but it is the duty of those authorities to seek all relevant generally available information to that effect. General deficiencies well documented in authoritative reports, notably of the UNHCR, Council of Europe and EU bodies are in principle considered to have been known. The expelling state cannot merely assume that the asylum-seeker will be treated in the receiving third country in conformity with the Convention standards but, on the contrary, must first verify how the authorities of that country apply their legislation on asylum in practice.”

46. The Secretary of State relies on the assurances provided by the Rwandan government in the MEDP as meeting any concerns arising from the evidence about the past and present operation of the Rwandan asylum system. In essence, the Secretary of State submits that, notwithstanding any problems that there may have been in the past or that may remain at present, the MEDP sets out arrangements for the future which provide adequate safeguards against refoulement, and the Rwandan government can be relied on to fulfil its undertaking to process the claims in accordance with those arrangements. It is therefore necessary to refer to authorities concerned with the approach to be adopted where the safety of a third country depends on assurances given by its government about the treatment which individuals who are sent there will receive.

47. The approach to be adopted in circumstances of that kind was considered by the European Court in *Othman v United Kingdom* (2012) 55 EHRR 1 (“*Othman*”). The case concerned the sufficiency of assurances given by the Kingdom of Jordan to the United Kingdom in the context of a contention that deporting the applicant to Jordan would put him at real risk of ill-treatment. The court observed at para 187 that assurances are not in themselves sufficient to ensure adequate protection against the risk of ill treatment:

“There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving state depends, in each case, on the circumstances prevailing at the material time.”

48. In that regard, the court listed at para 189 a number of factors which were relevant. The list was not intended to be exhaustive, and in some respects reflected the particular circumstances of the case before the court. What is more important, in the context of the present case, is the European Court’s emphasis on the need to carry out a fact-sensitive examination of how assurances will operate in practice, in the circumstances prevailing at the material time. Several of the factors mentioned are, however, relevant to the present case: for example, the disclosure of the terms of the assurances to the court, the general human rights situation in the receiving state, the receiving state’s laws and practices, its record in abiding by similar assurances, the existence of monitoring mechanisms, and the examination of the reliability of the assurances by the domestic courts of the sending state.

49. The approach to be adopted where diplomatic assurances are relied on was discussed by this court more recently in *Zabolotnyi v Mateszalka District Court, Hungary* [2021] UKSC 14; [2021] 1 WLR 2569. There, the court considered the sufficiency of assurances given by the government of Hungary to the United Kingdom in the context of a contention that extraditing Mr Zabolotnyi to Hungary would put him at real risk of ill-treatment. It was held that the court was required to undertake a free evaluation of the assurance, which required the court to examine and assess all relevant evidence (para 50). In particular, past breaches of similar assurances by the requesting state, whether provided to the United Kingdom or to a third state, were relevant to the question whether the requesting state could be relied upon to comply with its assurance on the present occasion (ibid). In that regard, Lord Lloyd-Jones stated, in a judgment with which the other members of the court agreed (paras 46-47):

“46. ... In deciding whether an assurance can be relied upon, evidence of past compliance or non-compliance with an

earlier assurance will obviously be relevant. A state's failure to fulfil assurances in the past may be a powerful reason to disbelieve that they will be fulfilled in the future

47. I am unable to accept that a sound distinction can be drawn in this regard between breach of a prior assurance given to the United Kingdom and breach of a prior assurance given to a third state. On the contrary, the fact of a prior breach of such an assurance, if established, is clearly relevant regardless of the identity of the state to which it was provided. As Mr Hall submits on behalf of the appellant, such a distinction would be illogical and unprincipled. The same requesting state is acting in the same context and there is no material distinction between a willingness to breach assurances given to state A and assurances given to state B."

(ii) The approach adopted by the Divisional Court

50. The Divisional Court did not follow this approach in its consideration of the evidence. As we shall explain when we discuss Issue 3, the Divisional Court had before it evidence that there were serious and systemic defects in Rwanda's procedures and institutions for processing asylum claims; that it had a history of acting in breach of the principle of non-refoulement, which had continued during the negotiation of the MEDP and following its execution; and that it had, in the recent past, failed to abide by similar assurances which it had given to another foreign government. The Divisional Court did not engage with this evidence, and consequently failed to examine the reliability of the assurances given by Rwanda in the light of that evidence.

51. Instead, the Divisional Court began its consideration of the issue by stating that its approach "will rest on a recognition of the expertise that resides in the executive to evaluate the worth of promises made by a friendly foreign state" (para 63). It gave three reasons why the Secretary of State was entitled to rely on the assurances. First, the United Kingdom and Rwanda had a well-established relationship (para 64). Secondly, the terms of the MEDP were specific and detailed (para 65). Thirdly, a senior official at the Foreign, Commonwealth and Development Office ("the FCDO") stated in a witness statement that the government was confident that Rwanda would honour its obligations under the MEDP (para 66). The last of these reasons was crucial. The court said that it could go behind that opinion "only if there were compelling evidence to the contrary".

52. We consider that that was a mistaken approach. As authorities such as *Othman* and *Zabolotnyi* make clear, the court has to make its own assessment of whether there are substantial grounds for believing that there is a real risk of refoulement. It is not required to accept the government's evaluation of assurances unless there is compelling evidence to the contrary. Of course, the court will attach weight to the government's view as to the value of assurances given by another country, particularly where its view reflects the advice of officials with relevant experience and expertise. The FCDO in particular has long experience of diplomatic relations with other countries, and the advice of its officials can assist ministers to reach an informed view as to the likelihood of the country in question complying with assurances. Other departments may also have officials who are well-qualified to give such advice. Ministers do not, however, necessarily act on the advice of their officials.

53. In the present case, following the initial stage of identifying potential partner countries (when FCDO officials advised that Rwanda should not be prioritised), advice came primarily from Home Office officials. They prepared the CPINs mentioned in para 6 above, on the basis of desk-based research into the Rwandan asylum system, and on what they were told during two short visits to Rwanda in January and March 2022. Further work was also done after the MEDP had been concluded. According to the evidence of Home Office officials, the CPINs underpinned the government's decision to enter into the MEDP. However, possibly because of the pressures under which they had to work, the officials who prepared the CPINs relied heavily on assurances by the Rwandan government, without close examination of supporting evidence, or consideration of publicly available material which placed some of those assurances in question.

54. Those shortcomings were highlighted when a review of the CPINs was undertaken in July 2022 for the Independent Advisory Group on Country Information ("IAGCI"), which provides advice to the Chief Inspector of Borders and Immigration in order to allow him to discharge his duty under section 48(2)(j) of the UK Borders Act 2007. The researcher responsible for the review criticised aspects of the way in which the CPINs were prepared, including "very limited critical information on the Rwandan asylum system" and "fundamental gaps of information and unanswered questions with regards to procedural practicalities and implications".

55. As that evidence indicates, the government is not necessarily the only or the most reliable source of evidence about matters which may affect the risk of refoulement: such as, to mention some of the factors referred to in *Othman* and *Zabolotnyi*, the general human rights situation in the receiving state, the receiving state's practices, and its record in abiding by similar assurances, whether given to the United Kingdom or to other states. Where evidence bearing on factors such as these is adduced from sources other than the government, the court has to consider it along with the government's

assessment of any assurances given. The court does not necessarily have to resolve conflicts in the evidence: the question it has to decide is not whether asylum seekers removed to the country in question would in fact be subjected to refoulement, but whether there are substantial grounds for believing that they would be at risk of refoulement. In deciding that question, the court has to form its own view in the light of the evidence as a whole. In doing so, the court brings to bear its own expertise and experience: weighing competing bodies of evidence, and assessing whether there are grounds for apprehending a risk, are familiar judicial functions.

56. We are therefore unable to accept the suggestion, made on behalf of the Secretary of State, that assessing the value of assurances given by another country, in the present context, is analogous to assessing whether a particular course of action is in the interests of national security, and that the role of the court is correspondingly limited, as explained in cases such as *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 920 (“*Rehman*”) and *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] AC 765 (“*Begum*”). In *Rehman* itself, the House of Lords made it clear that, even in the context of questions of national security, an appeal to the courts may turn upon issues which at no point lie within the exclusive province of the executive. As Lord Hoffmann stated (para 54):

“A good example is the question ... as to whether deporting someone would infringe his rights under article 3 of the Convention because there was a substantial risk that he would suffer torture or inhuman or degrading treatment. The European jurisprudence makes it clear that whether deportation is in the interests of national security is irrelevant to rights under article 3. If there is a danger of torture, the Government must find some other way of dealing with a threat to national security. *Whether a sufficient risk exists is a question of evaluation and prediction based on evidence. In answering such a question, the executive enjoys no constitutional prerogative.*” (emphasis added)

Similarly, in *Begum* Lord Reed (with whose judgment the other members of the court agreed) stated (para 69) that “if a question arises as to whether the Secretary of State has acted incompatibly with the appellant’s Convention rights, contrary to section 6 of the Human Rights Act, [the court] has to determine that matter objectively on the basis of its own assessment”.

57. The present case raises an issue precisely of the kind contemplated in those citations. As we have explained, the court is itself required by law to form a view as to

whether there are substantial grounds for believing that asylum seekers who are removed to Rwanda are at risk of refoulement, in the light of all the evidence bearing on that issue. The government's assessment of whether there is such a risk is an important element of that evidence, but the court is bound to consider the question in the light of the evidence as a whole and to reach its own conclusion.

58. Furthermore, as the Lord Chief Justice pointed out in the present case (para 471), even if the court is not institutionally as well equipped as the government to carry out an evaluation of a diplomatic assurance, the position is different "where the assessment of future conduct engages practical considerations which arise from past conduct". As he observed (*ibid*):

"In this case there is very detailed evidence of the way in which the Rwandan asylum system has operated when considering individual claims before the summer of 2022. There were undoubted deficiencies. Whether they are capable of being made good is not an issue on which the government has special institutional expertise."

59. As we have explained, however, the Divisional Court decided that it could go behind the government's opinion only if there were compelling evidence to the contrary. Following that approach, the Divisional Court did not consider that such evidence existed (para 66). In that regard, it referred to two matters which had been raised by UNHCR.

60. The first was evidence that Rwanda had failed to abide by assurances which it had given to the government of Israel under an agreement for the removal of asylum seekers from Israel to Rwanda. In that regard, the Divisional Court stated (para 68):

"There is no evidence that during its negotiations with the Rwandan government, the United Kingdom government sought to investigate either the terms of the Rwanda/Israel agreement or the way it had worked in practice. It is also apparent from [a FCDO official's] statement that the merits of the MOU and Notes Verbales have been assessed on their own terms, not by way of comparison with the Rwanda/Israel agreement. This was a permissible approach; we do not consider it discloses any error of law."

61. This was an inadequate treatment of the evidence in question, which we shall discuss when dealing with Issue 3 below. Evidence of a failure to abide by earlier assurances, given to another country in a similar context, was relevant to the assessment of risk, as was noted in *Zabolotnyi* at para 46 (cited at para 49 above). The government's failure to consider it did not mean that it could or should be ignored by the court.

62. The second matter raised by UNHCR was evidence of Rwanda's history of refoulement, and of defects in its asylum system, in the light of which UNHCR concluded that Rwanda could not be relied upon to comply with its obligations under the Refugee Convention (or, therefore, with the obligations it had assumed under the MEDP). The Divisional Court was dismissive of this evidence, and did not attempt to engage with it. It stated at para 71 that the evidence of UNHCR "carries no special weight". It went on to state that the government's conclusion that Rwanda would act in accordance with the terms of the MOU and the Notes Verbales "rests on HM Government's experience of bilateral relations extending over almost 25 years, and the specific experience of negotiating the MOU over a number of months in 2022". It stated that it had to decide whether, on the totality of the evidence, the Secretary of State's opinion was undermined to the extent that it could be said to be legally flawed, and concluded that it was not.

63. This again was an inadequate treatment of the evidence in question, which we shall discuss when dealing with Issue 3. Evidence that Rwanda had a history of refoulement, and of defects in Rwanda's asylum system, was relevant to an assessment of whether persons removed to Rwanda in order for their claims to asylum to be decided by the Rwandan authorities were at risk of refoulement. As the European Court stated in *Ilias v Hungary* (para 134, cited at para 44 above), it is the duty of the removing state to examine thoroughly the question whether or not there is a real risk of the asylum-seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against refoulement. It is clear from the evidence that government officials made serious efforts to comply with that duty, although they were hampered by circumstances, including restrictions on their ability to hold discussions with UNHCR and other non-governmental organisations. The same duty also applies to the courts, as an organ of the state, when the issue is raised before them.

64. The Divisional Court's view that the evidence of UNHCR carried no special weight was a further error. Of course, the weight to be attached to evidence is always a matter for the court, and will depend on the circumstances. However, a number of factors combined in the present case to render the evidence of UNHCR of particular significance.

65. The first relevant factor is the status and role of UNHCR. It is entrusted by the United Nations General Assembly with supervision of the interpretation and application of the Refugee Convention: see the Statute of the Office of the United Nations High Commissioner for Refugees, annexed to UN General Assembly Resolution 428(V), 14 December 1950. Under article 35 of the Refugee Convention, states parties undertake to co-operate with UNHCR in the exercise of its functions, and to facilitate its duty of supervising the application of the provisions of the Convention. Reflecting those circumstances, it is well established that UNHCR’s guidance concerning the interpretation and application of the Refugee Convention “should be accorded considerable weight”: *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54; [2013] 1 AC 745, para 36. In *IA (Iran) v Secretary of State for the Home Department* [2014] UKSC 6; [2014] 1 WLR 384, para 44, this court stated that “the accumulated and unrivalled expertise of this organisation, its experience in working with governments throughout the world, the development, promotion and enforcement of procedures of high standard and consistent decision-making in the field of refugee status determinations must invest its decisions with considerable authority”.

66. The second factor, mentioned in that dictum, is UNHCR’s expertise and experience. That factor was also emphasised by this court in *R (EM (Eritrea)) v Secretary of State for the Home Department* [2014] UKSC 12; [2014] AC 1321, when considering the approach which should be adopted to evidence provided by UNHCR in relation to the risks involved in removing asylum seekers to another country. Lord Kerr of Tonaghmore, with whose judgment the other members of the court agreed, referred (para 72) to “the unique and unrivalled expertise of UNHCR in the field of asylum and refugee law”, and expressed agreement with the observations of Sir Stephen Sedley in the court below [2013] 1 WLR 576, para 41, which he quoted at para 71:

“It seems to us that there was a reason for [the European Court in *MSS v Belgium and Greece*] according the UNHCR a special status in this context. The finding of facts by a court of law on the scale involved here is necessarily a problematical exercise, prone to influence by accidental factors such as the date of a report, or its sources, or the quality of its authorship, and conducted in a single intensive session. The High Commissioner for Refugees, by contrast, is today the holder of an internationally respected office with an expert staff (numbering 7,190 in 120 different states, according to its website), able to assemble and monitor information from year to year and to apply to it standards of knowledge and judgment which are ordinarily beyond the reach of a court. In doing this, and in reaching his conclusions, he has the authority of the General Assembly of the United Nations, by

whom he is appointed and to whom he reports. It is intelligible in this situation that a supranational court should pay special regard both to the facts which the High Commissioner reports and to the value judgments he arrives at within his remit.”

67. As was mentioned in that passage, considerable weight is given to the evidence of UNHCR by the European Court. In *MSS v Belgium and Greece*, for example, the court attached “critical importance” (para 349) to UNHCR’s concerns about the treatment of asylum seekers in Greece. In *Ilias v Hungary*, UNHCR’s reports were described as “authoritative” (para 141, quoted at para 45 above). For the reasons we have explained, it is unsurprising that that should be so; and it is a factor which is relevant to the approach of domestic courts when considering asylum questions under the ECHR.

68. UNHCR’s evidence will naturally be of greatest weight when it relates to matters within its particular remit or where it has special expertise in the subject matter. Its evidence in the present case concerns matters falling within its remit and about which it has undoubted expertise. As the Lord Chief Justice observed in the present case, UNHCR “has unrivalled practical experience of the working of the asylum system in Rwanda through long years of engagement” (para 467). It has been operating permanently in Rwanda since 1993, and had 332 staff there at the time of its evidence in these proceedings. Its role in Rwanda includes assisting asylum seekers and refugees, funding and training non-governmental organisations working with the Rwandan asylum system, dealing with officials responsible for asylum decision-making, and engaging with the relevant department of the Rwandan government over the management of refugee camps. Although UNHCR has no official role in Rwanda’s asylum system, the Rwandan authorities have, albeit intermittently, sent it copies of asylum decisions, and UNHCR receives information from asylum-seekers and NGOs, and through communications with relevant officials. UNHCR is therefore able to collate data and gain insight into the practical realities of Rwanda’s asylum system. Its experience was recognised by Home Office officials. They reported that the Rwandan government depended heavily on UNHCR and other non-governmental organisations for delivering its asylum and refugee processes, and that UNHCR had undoubted expertise and experience of managing part of the refugee process, as well as knowledge of the Rwandan system more generally.

69. As the Lord Chief Justice noted at para 467, UNHCR can be said to have an institutional interest in the outcome of these proceedings, since it has adopted the position (set out in its Guidance Note on bilateral and/or multilateral arrangements of asylum-seekers) that asylum seekers and refugees should ordinarily be processed in the territory of the state where they arrive or which otherwise has jurisdiction over them.

The fact that UNHCR has adopted that position is a factor to be taken into account when assessing its evidence. However, its evidence and submissions were presented with moderation, and did not appear to reflect a partisan assessment. It has also to be borne in mind that, as a responsible United Nations agency accountable to the General Assembly, UNHCR will not lightly make statements critical of any state in which it operates.

70. Drawing these threads together, it is apparent from the factors which we have mentioned and the authorities which we have cited that particular importance should have been attached to the evidence of UNHCR in the present case. That is not to say that its evidence should necessarily be decisive or pre-eminent. In the circumstances of the present case, however, its evidence on significant matters of fact is essentially uncontradicted by any cogent evidence to the contrary, as the Court of Appeal explained (eg at para 136). It should not have been treated as dismissively as it was by the Divisional Court.

71. Finally, in relation to this matter, we note that the Divisional Court considered that it had to decide whether, on the totality of the evidence, the Secretary of State's opinion was undermined to the extent that it could be said to be legally flawed (para 71). As we have mentioned, it is difficult to be certain what the court meant. However, the focus of the *Soering* test, which the Divisional Court had to apply, is not on whether there were legal flaws in the Secretary of State's decision, but on whether there were, as a matter of fact, substantial grounds for believing that the removal of asylum seekers to Rwanda would expose them to a real risk of ill-treatment by reason of refoulement. That was an issue on which UNHCR's evidence about defects in Rwanda's asylum procedures had a material bearing.

(iii) Conclusion in relation to Issue 2

72. For all these reasons, we conclude that the Divisional Court erred in its approach to the evaluation of the evidence, and that the Court of Appeal was accordingly entitled to interfere with its conclusion.

(5) Issue 3 – whether the Court of Appeal was entitled to conclude that there were substantial grounds for thinking that asylum seekers would face a real risk of ill-treatment by reason of refoulement following removal to Rwanda

73. We have come to the conclusion that the Court of Appeal was entitled, on the evidence before it, to consider that there were substantial grounds for believing that

asylum seekers would face a real risk of ill-treatment by reason of refoulement in the event that they were removed to Rwanda. Indeed, having been taken through the evidence, we agree with the conclusion of the Court of Appeal.

74. We will not repeat the exercise of going through the entirety of the evidence, which is described at length in the judgments of the Court of Appeal (particularly in the impressive judgment of Underhill LJ). It will be sufficient for present purposes for us to summarise briefly the principal aspects which led the Court of Appeal to its conclusion. They concern the general human rights situation in Rwanda; the adequacy of Rwanda's asylum system, including its history of refoulement; and Rwanda's non-compliance with assurances given under the arrangement which it entered into with Israel. It should again be borne in mind that it is not essential for the court to resolve conflicts in the evidence: its task is to consider whether there are substantial grounds for believing that there is a real risk of refoulement.

(i) The general human rights situation in Rwanda

75. Rwanda is a country which has emerged from one of the most appalling periods of violence in modern history. Ethnic rivalry led to genocide in 1994, when over 500,000 Tutsi were killed by Hutu. Many Hutu were also killed, and estimates of the total number of deaths are much higher. There was protracted violence subsequently, until stability was restored. Under the government which then emerged, Rwanda has made great progress economically and socially. It has become a valued member of the Commonwealth, and an important partner of the United Kingdom. However, its record in relation to human rights has been much criticised.

76. In 2017, in proceedings to which the Secretary of State was party, the Divisional Court found that Rwanda was "a state which, in very recent times, has instigated political killings, and has led British police to warn Rwandan nationals living in Britain of credible plans to kill them on the part of that state": *Government of Rwanda v Nteziryayo* [2017] EWHC 1912 (Admin), para 370. At the United Nations Human Rights Council's Universal Periodic Review of Rwanda in Geneva in January 2021, the United Kingdom government criticised Rwanda for "extrajudicial killings, deaths in custody, enforced disappearances and torture". Advice provided by officials to ministers later in 2021, during the process of selecting a partner country for the removal of asylum seekers, advised that Rwanda had a poor human rights record. Most human rights violations were said to be linked to criticism of the Rwandan government. There were also said to be constraints on media freedom and political activities. Refugees had not been generally ill-treated, but there had been exceptions when they had expressed criticism of the government. The most serious incident occurred in 2018, when the Rwandan police fired live ammunition at refugees protesting over cuts to food rations,

killing at least 12 people. As the Lord Chief Justice noted in the present case (para 511), there remain “profound human rights concerns”. Since Rwanda has ratified many international human rights conventions, including UNCAT and the ICCPR, this raises serious questions as to its compliance with its international obligations.

(ii) The adequacy of Rwanda’s asylum system

77. Rwanda maintains an open door policy for refugees fleeing conflicts in neighbouring countries, particularly the Democratic Republic of Congo and the Republic of Burundi. Refugees from these countries have been permitted to remain in Rwanda without going through any formal asylum determination process. They are accommodated in camps where UNHCR has an active role. Rwanda has also supported the UNHCR emergency transport mechanism for asylum seekers from Libya. Once in Rwanda, their claims are processed by UNHCR, and the claimants have been resettled by UNHCR in third countries. By contrast, the Rwandan authorities have handled only a small number of individual claims for asylum. The Rwandan government indicated that a total of 152 cases had been decided between 2019 and June 2022. The great majority of the claimants came from Rwanda’s neighbours and other African countries. The Rwandan authorities have had little or no experience of considering asylum applications from most of the countries from which asylum claimants in the United Kingdom commonly come, such as Albania, Iran, Iraq, Pakistan, Syria and Vietnam.

78. UNHCR has expressed a number of concerns about Rwanda’s asylum system. The Secretary of State observes that Rwanda’s principal legislation concerning refugees, Law No 13/2014 relating to Refugees, has been described by UNHCR as fully compliant with international standards. However, the concerns expressed by UNHCR in these proceedings relate not to the text of the legislation but to how the system operates in practice.

79. First, there are concerns which relate to the asylum process itself. The initial stage in the process is the responsibility of the Directorate General of Immigration and Emigration in Rwanda (“the DGIE”), which is an entity within the National Intelligence and Security Service. Under Rwandan law, its role is to undertake the necessary preparation of asylum claims for determination by another body, the Refugee Status Determination Committee (“the RSDC”). The main function of the DGIE under the law is to conduct interviews with asylum claimants. However, although it is not authorised by law to reject asylum claims, it is said that the DGIE summarily rejected 8% of the asylum claims of which UNHCR was aware between 2020 and June 2022. UNHCR’s evidence is that the true number of rejections by the DGIE is likely to be higher. Where this has occurred, no written reasons have been provided, and there is no right of appeal (since the law makes provision for appeals only against decisions taken by the RSDC).

RSDC has the power to consider a claim which the DGIE has failed to refer to it, but UNHCR has no experience of this ever occurring.

80. The next stage in the process is the consideration of claims by the RSDC. That committee comprises senior representatives of the principal government departments and agencies, including the Prime Minister’s Office and the National Intelligence and Security Service. They sit part-time on the RSDC and are non-specialist. Where the RSDC provides written reasons for its decisions, they are often perfunctory: the evidence includes RSDC decision letters, including several issued after the conclusion of the MEDP, which rejected asylum claims either without reasons, or with reasons which were merely formulaic. For example, a standard response from the RSDC in July 2022 was that “Refugee Status requested was not granted because you don’t meet the eligibility criteria, and the reasons you provided during the interview were not pertinent”.

81. The next stage in the process is the possibility of an internal administrative appeal to the responsible minister. There have been comparatively few such appeals (there appear to have been five in 2021). In practice, the absence of reasoned decisions makes it difficult to address the basis on which the claim was rejected. No reasons are given for the minister’s decision on the appeal.

82. The final stage in the process, as laid down in law, is a right of appeal to the High Court (with the possibility of a further appeal to appellate courts). The reliability of the safeguards in the Rwandan asylum system ultimately depends on this right of appeal: it is the only stage in the process at which claims can be considered by anyone other than government officials or ministers. Although a right of appeal has existed since 2018, there has never been such an appeal in practice. The system is therefore untested, and there is no evidence as to how the right of appeal would work in practice. There are, however, concerns about the willingness of the judiciary to find against the Rwandan government. In *Government of Rwanda v. Nteziryayo* (para 76 above), the Divisional Court considered the independence of the Rwandan judiciary in the context of an application for the extradition of a number of individuals to face charges arising out of the 1994 genocide. It concluded at para 374 that “the evidence points to some risk, depending on the evidence before them and the safeguards in play, that judges might yield to pressure from the Rwandan authorities”. It is apparent from the evidence that that view is essentially accepted by the FCDO, as the Lord Chief Justice noted (para 515).

83. The risk of a lack of independence in politically sensitive cases is not confined to the judiciary. In its comments on the draft CPIN report on asylum processing in Rwanda, mentioned in para 6 above, the FCDO commented, in relation to a statement

that “independent legal support and advice is available”, that legal support was likely to be independent unless the matter became political. This issue is relevant because, in an appeal, the High Court would be asked to overturn the decision of a minister and, indirectly, the decision of a committee of senior representatives of the principal government bodies. The implication of the evidence is that the legal profession and the courts might not operate independently in such cases.

84. It appears that the process before the DGIE (which, as explained, conducts an interview of the asylum seeker), the RSDC (which considers the file prepared by the DGIE and may conduct a further interview), and the responsible minister (to whom an appeal lies against the decision of the RSDC) is marked by an absence of legal representation. The MEDP seeks to address this. However, during the negotiation of the MEDP, representatives of the Rwandan government indicated that the contemplated arrangements might not be straightforward to implement in practice. That seems to us to be a realistic view. The introduction of such a significant change of practice is liable to raise a number of issues, for example as to the role of the claimant’s lawyer at each stage of the process, which may require time to resolve.

85. A second concern relates to the outcome of the asylum process, ie the decisions themselves. UNHCR’s evidence shows 100% rejection rates at RSDC level during 2020-2022 for nationals of Afghanistan, Syria and Yemen, from which asylum seekers removed from the United Kingdom may well emanate. This is a surprisingly high rejection rate for claimants from known conflict zones. By comparison, Home Office statistics for the same period show that asylum claims in the United Kingdom were granted in 74% of cases from Afghanistan, 98% of cases from Syria, and 40% of cases from Yemen. UNHCR attributes the refusal of such claims by the Rwandan authorities to a view that persons from the Middle East and Afghanistan should claim asylum in their own region.

86. UNHCR has also produced evidence that a number of recent asylum seekers from a non-African country with close bilateral relations with Rwanda were denied access by the DGIE to the Rwandan asylum system. Three were peremptorily rejected by the DGIE, three were forcibly expelled to the Tanzanian border, two were instructed to leave Rwanda within days, and another two were threatened with refoulement to their country of origin. This evidence is not addressed in the responses of the Rwandan or United Kingdom governments. It raises a concern not simply that the DGIE has failed to comply with obligations imposed under the Refugee Convention, but that it has done so in the interests of the Rwandan government’s foreign relations.

87. A third concern, related to the last point, is Rwanda’s practice of refoulement. In addition to the cases of threatened refoulement mentioned in the previous paragraph,

UNHCR reported six recent cases of expulsion of persons who claimed asylum on arrival at Kigali airport, some of which resulted in refoulement or would have done so if UNHCR had not intervened. Two Libyans were removed from the airport in February 2021 and sent to Egypt; a person from Yemen was removed from the airport in September 2021 and sent to Ethiopia, where UNHCR intervened to prevent his onward refoulement to Yemen; two Afghans were refouled to Afghanistan (via Dubai) on 24 March 2022, while the MEDP was being negotiated; and a Syrian was refouled to Syria (via Turkey) on 19 April 2022, after the MEDP had been concluded. There may be other cases: UNHCR does not maintain a presence at the airport, and only learns of such occurrences if they are contacted. This evidence is uncontested, although the Rwandan government disputes the description of these cases as constituting refoulement, as explained below.

88. The cases of airport refoulement do not establish that there would be a risk of similar refoulement under the MEDP, since asylum seekers arriving in Rwanda under the MEDP would have been pre-approved by the government of Rwanda and would arrive on planned flights. Nevertheless, these instances illustrate what Underhill LJ described at para 156 as “a culture of, at best, insufficient appreciation by DGIE officials of Rwanda’s obligations under the Refugee Convention, and at worst a deliberate disregard for those obligations”. This evidence is also another of the matters which are said by UNHCR to demonstrate a prejudice against asylum seekers from the Middle East and Afghanistan.

89. The Divisional Court was provided with a table of instances of at least 100 allegations of refoulement and threatened refoulement cited in UNHCR’s evidence and in notes of meetings with Home Office officials. We also refer below to refoulement in the context of the Israel/Rwanda agreement.

90. The review of the CPIN on asylum processing in Rwanda carried out on behalf of the IAGCI found that Home Office officials had failed to engage with Rwanda’s return practices, and with documented instances of refoulement. It listed sources of information which were available in the public domain and which it considered that it was important for the Home Office to consider. It commented:

“Very limited critical information has been included on the current shortcomings of the Rwandan asylum system and/or its proposed practical application in the context of the UK-Rwanda Memorandum of Understanding. For example, there is no information included on how possible challenges will be overcome in relation to lack of resources in terms of decision-makers (especially in light of there only being one Eligibility

Officer); lack of reasons or transcripts provided to asylum seekers to base their appeal on; delays in decisions; protection assurances against refoulement including indirect or chain refoulement leading to denial of access to the Rwandan territory let alone to the asylum process; lack of information regarding provisions for asylum seekers, and access to interpretation services to mention just a few.

Moreover, fundamental gaps of information remain, leaving unanswered questions with regards to procedural practicalities and implications.”

91. A fourth concern is the apparent inadequacy of the Rwandan government’s understanding of the requirements of refugee law. For example, its response to UNHCR’s evidence demonstrates a misunderstanding of the meaning of the concept of refoulement. It maintains, first, that asylum seekers must apply for asylum immediately upon arrival in Rwanda, and that claimants who apply for asylum only after failing to satisfy immigration requirements can properly be expelled. Secondly, it maintains that asylum seekers who use forged documents (as bona fide refugees not uncommonly do) do not meet immigration requirements, and their expulsion does not constitute refoulement. These contentions reveal an imperfect understanding of the requirements of the Refugee Convention. UNHCR also reported that the Rwandan officials who participated in training which it had organised had very limited or no understanding of how to assess refugee status. Although Home Office officials were told by the Rwandan government that their officials had received training from the International Organization for Migration, UNHCR produced written evidence from that organisation which expressly denied having provided any such training.

92. All the members of the Court of Appeal were impressed by the cogency of UNHCR’s evidence. The Lord Chief Justice, for example, stated that he shared the concerns identified by UNHCR about whether those involved in the RSDC have sufficient training and expertise to deal appropriately with asylum claims, and also whether what are reported to be ingrained attitudes of scepticism towards claims made by Middle Eastern nationals will be influential. He added that there is certainly evidence of poor practice (para 502).

93. The defects in past and current practice which we have discussed are important factors in assessing future risk, particularly because the MEDP does not establish a new asylum process, but is based on the continuation of the existing system operated by the DGIE, the RSDC and the minister, subject to some modifications. Having regard also to the Rwandan government’s misunderstanding of its obligations under the Refugee

Convention, there is reason to apprehend that there is a real risk that the practices described above will not change, at least in the short term. The Secretary of State points out that resources are provided under the MEDP. However, the provision of resources does not mean that the problems which we have described can be resolved in the short term. The Secretary of State points to the monitoring arrangements under the MEDP as a safeguard. Such arrangements may be capable of detecting failures in the asylum system, and over time may result in the introduction of improvements, but that will come too late to eliminate the risk of refoulement currently faced by asylum seekers removed to Rwanda. Furthermore, the suppression of criticism of the government by lawyers and others is liable to discourage the reporting of problems, and so undermine the effectiveness of monitoring. It is also unclear whether the monitoring arrangements could provide a solution to problems emanating from the Rwandan government's interpretation of its obligations under the Refugee Convention, or from a lack of independence in the legal system in politically sensitive cases.

94. The Secretary of State advances a somewhat surprising argument to the effect that it does not matter if asylum claims are not processed correctly, because asylum seekers will not be subject to refoulement in any event. In relation to that argument, we note that if an asylum claim is wrongly rejected, and the asylum seeker does not have some other entitlement to remain in Rwanda, the government of Rwanda undertakes under paragraph 10.4 of the MOU (set out at para 9 above) to remove the person only "to a country in which they have a right to reside". That country will normally be the country of which the asylum seeker is a national or citizen: that is to say, the country which he has fled, and in which (ex hypothesi) he faces persecution. It is said in response that Rwanda does not have agreements with other countries under which unsuccessful asylum seekers could be removed. However, it would not be necessary for Rwanda to have such agreements in place before being able to return individuals to countries in which they have a right to reside. The absence of such agreements has not prevented refoulement, direct or indirect, from occurring in practice, as we have explained.

(iii) The Israel/Rwanda arrangements

95. Israel entered into an agreement with Rwanda at the end of 2013, under which persons from Eritrea and Sudan who sought asylum in Israel were removed to Rwanda in order for their claims to be processed there. The agreement continued in operation until 2018. It was considered by the Supreme Court of Israel, sitting as the Court of Appeals for Administrative Affairs, in *Sagitta v Minister of Interior* Administrative Appeal 8101/15, heard on 9 October 2016. It is said in para 87 of the judgment (of which we were provided with an unofficial translation) that the agreement "includes an explicit undertaking of [Rwanda] according to which the deportees will enjoy human rights and freedoms and that the principle of non-refoulement shall be complied with. In

addition, the agreement refers to the ability of the deportee to file a request for asylum”. It also appears from paras 7 and 92 that there were mechanisms for supervising and monitoring its implementation.

96. There is no dispute that persons who were relocated under the agreement suffered serious breaches of their rights under the Refugee Convention. UNHCR found that asylum seekers who arrived in Rwanda under the arrangement were routinely moved clandestinely to Uganda. It provided evidence relating to more than 100 nationals of Eritrea and Sudan who had arrived in Rwanda under the agreement during 2015 and 2016 and had then been taken to the Ugandan border or put on flights to Uganda. In three cases, refoulement to Eritrea (via Kenya) had only been prevented by UNHCR’s intervention. The Rwandan government’s response to this evidence lacked substance. It merely said that Rwanda had entered into other transfer arrangements for the international protection of refugees that differed from the Israel/Rwanda scheme.

97. FCDO officials mentioned the Israel/Rwanda agreement in a submission to ministers in April 2021. They explained that Rwanda had participated in a programme with Israel from 2013 to 2018 under which asylum seekers were given cash incentives to leave Israel voluntarily and the option to settle in Uganda and Rwanda. They also explained that it emerged that those who were transferred to Rwanda were not given the right to settle and were at risk of refoulement, and that the Israeli Supreme Court ruled the programme unlawful in April 2018.

98. Although ministers and officials were aware of the Israel/Rwanda agreement and the problems which arose under it, they do not appear to have investigated why it had failed, or attempted to obtain information about the terms of the agreement or the assurances which the Rwandan government had given. The subject was not mentioned in the CPIN on asylum processing in Rwanda. This omission was the subject of criticism in the review carried out on behalf of the IAGCI. It stated (citing Wilbourn and Kloos “A Commentary on the UK Home Office *Country Policy and Information Note: Rwanda, asylum system*, and the related *Country Policy and Information Note: Rwanda, assessment*”:

“... ‘the risk of deportation of asylum seekers back to their country of origin was not adequately addressed in the Home Office publications. Under a bilateral deal between the Israeli and Rwandan governments to relocate asylum seekers from Israel to Rwanda, the majority of asylum seekers were not able to access asylum in Rwanda, and were therefore forced to travel onward from Rwanda, in what may amount to a situation of indirect refoulement. By failing to consider such

information, important issues and risks are minimised and the state of the Rwandan asylum system is presented in a way that is incoherent with the available information' ... Although slightly different in nature than the UK-Rwanda Memorandum of Understanding, [the Israel-Rwanda agreement] provides a useful comparator and has been the subject of critical literature documenting its challenges, shortcomings, and ultimately its closure."

The review noted that concern about the treatment of asylum seekers under the Israel/Rwanda agreement, and other reported expulsions by the Rwandan government, had been expressed by the United Nations Committee Against Torture. It listed numerous publicly available sources of information.

99. In the decisions challenged in these proceedings, the Secretary of State asserted that the Israel/Rwanda agreement was irrelevant. The Secretary of State has not sought in these proceedings to adduce evidence contradicting or qualifying UNHCR's account, which is consistent with the information that ministers had received from FCDO officials and with the review carried out on behalf of the IAGCI. However, it was submitted on behalf of the Secretary of State that the Israel/Rwanda agreement was a different arrangement from the MEDP, entered into some years earlier, and could shed no light on whether the government of Rwanda could be relied on to comply with its assurances under the MEDP.

100. We do not agree that it is irrelevant. Although the terms of the agreement may well have been different from the MEDP, and it ceased to operate five years ago, it is nonetheless a recent agreement for the transfer of asylum seekers for processing in Rwanda, under which the Rwandan government undertook to comply with the principle of non-refoulement. Its apparent failure to fulfil that undertaking is relevant to an assessment of the risk of refoulement under the arrangements entered into with the government of the United Kingdom.

(iv) The overall assessment

101. The Secretary of State's submission, in effect, is that the evidence of current inadequacies in Rwanda's asylum system, and of its past history of refoulement and of failing to comply with assurances given to the government of another country, is not a reliable guide to how asylum seekers removed to Rwanda under the MEDP will be treated. A predictive evaluation is required, and the MEDP provides assurances that the necessary improvements to the system will be implemented. No-one has questioned the

good faith of the Rwandan government in giving those assurances, and it has financial and reputational incentives to honour them. The monitoring arrangements under the MEDP will deter non-compliance and ensure that any failures come to light.

102. There is no dispute that the government of Rwanda entered into the MEDP in good faith. We accept that Rwanda has a strong reputational incentive to ensure that the MEDP is adhered to. The financial arrangement may provide a further incentive. In addition, the monitoring arrangements, and the degree of attention which would be likely to be paid to the operation of the MEDP by organisations such as UNHCR, provide further incentives and safeguards. Nevertheless, intentions and aspirations do not necessarily correspond to reality: the question is whether they are achievable in practice. That is illustrated by the history of Rwanda's agreement with Israel: we have no reason to doubt that Rwanda gave its undertakings to Israel in good faith, and that the government of Israel believed that they would be fulfilled. The central issue in the present case is therefore not the good faith of the government of Rwanda at the political level, but its practical ability to fulfil its assurances, at least in the short term, in the light of the present deficiencies of the Rwandan asylum system, the past and continuing practice of refoulement (including in the context of an analogous arrangement with Israel), and the scale of the changes in procedure, understanding and culture which are required.

103. In agreement with the Court of Appeal, we consider that the past and the present cannot be effectively ignored or sidelined as the Secretary of State suggests. Of course, since the application of the *Soering* test requires a consideration of risk, it therefore involves prediction. But risk is judged in the light of what has happened in the past, and in the light of the situation as it currently exists, as well as in the light of what may be promised for the future.

104. The matters which we have discussed are evidence of a culture within Rwanda of, at best, inadequate understanding of Rwanda's obligations under the Refugee Convention. The evidence also goes some way to support the suggestion of a dismissive attitude towards asylum seekers from the Middle East and Afghanistan. It is also apparent from the evidence that significant changes need to be made to Rwanda's asylum procedures, as they operate in practice, before there can be confidence that it will deal with asylum seekers sent to it by the United Kingdom in accordance with the principle of non-refoulement. The necessary changes may not be straightforward, as they require an appreciation that the current approach is inadequate, a change of attitudes, and effective training and monitoring.

105. As matters stand, the evidence establishes substantial grounds for believing that there is a real risk that asylum claims will not be determined properly, and that asylum

seekers will in consequence be at risk of being returned directly or indirectly to their country of origin. In that event, genuine refugees will face a real risk of ill-treatment in circumstances where they should not have been returned at all. The right of appeal to the High Court is completely untested, and there are grounds for concern as to its likely effectiveness. The detection of failures in the asylum system by means of monitoring, however effective it may be, will not prevent those failures from occurring in the first place. We accept the Secretary of State's submission that the capacity of the Rwandan system (in the sense of its ability to produce accurate and fair decisions) can and will be built up. Nevertheless, asking ourselves whether there were substantial grounds for believing that a real risk of refoulement existed at the relevant time, we have concluded that there were. The structural changes and capacity-building needed to eliminate that risk may be delivered in the future, but they were not shown to be in place at the time when the lawfulness of the policy had to be considered in these proceedings.

3. *The other issues arising in relation to article 3 of the ECHR*

106. As we have explained, this court granted permission to some of the claimants to cross-appeal in respect of two other grounds which had been rejected by the Divisional Court and the Court of Appeal. The first was that the removal of asylum seekers to Rwanda was unlawful because they were at risk of ill-treatment in that country, contrary to article 3 of the ECHR. The second was that the Secretary of State had failed to consider the risk of refoulement with the degree of care required either under the common law or under article 3 of the ECHR. Neither of these issues was the subject of detailed argument at the hearing of the appeal, and in the light of our conclusion on the issue of refoulement it is unnecessary for us to determine them.

4. *Retained EU law*

(1) Introduction

107. As we explained at para 16 above, one of the claimants, referred to as ASM, cross-appeals with the permission of the Court of Appeal on an issue concerning retained EU law. ASM maintains that the MEDP scheme as implemented in paragraphs 345A-345D of the Immigration Rules, under which asylum claimants may be removed from the United Kingdom to a third country with which they have no prior connection, without substantive consideration of their asylum claims and without an in-country right of appeal, is incompatible with articles 25 and 27 of the Procedures Directive. ASM maintains that articles 25 and 27 continue to have effect in domestic law as retained EU law.

108. It is ASM’s case that the MEDP scheme is incompatible with articles 25 and 27 of the Procedures Directive because it is an application of the “safe third country” concept which is not set out in national legislation and which does not require a prior connection between the asylum claimant and the third country concerned on the basis of which it would be reasonable to remove him to that country. The Secretary of State does not dispute that if the Procedures Directive remains in force in United Kingdom domestic law as retained EU law, the MEDP scheme as relevant to these appeals is not compatible with articles 25 and 27 of the Directive.

109. It is common ground between ASM and the Secretary of State that the effect of section 4 of the 2018 Act was to preserve the relevant provisions of the Procedures Directive as retained EU law. However, the Secretary of State maintains that the effect of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (“the 2020 Act”) is that those provisions no longer form part of domestic law within the United Kingdom. On behalf of ASM, Mr Drabble KC submits that on a proper interpretation of the 2020 Act, having regard to the purpose of the Act as a whole, its internal structure and content, and permissible external aids to construction, it is clear that the legislative intention behind the Act was only to address the consequences of ending EU free movement and did not extend to ending EU-derived asylum rights. On behalf of the Secretary of State, Lord Pannick KC submits that on the plain meaning of the provisions of the 2020 Act the relevant provisions of the Procedures Directive have ceased to have effect in domestic law.

110. In the present proceedings, both the Divisional Court (paragraphs 106-118) and the Court of Appeal (paragraphs 340-367) rejected ASM’s submission that articles 25 and 27 of the Procedures Directive continue to have effect in domestic law within the United Kingdom.

(2) Legislative provisions

(i) The Procedures Directive

111. The Procedures Directive establishes certain minimum standards on procedures for granting and withdrawing refugee status which are required to be met by EU Member States as part of a common EU policy on asylum. Articles 25 and 27 provide in relevant part:

“Article 25 Inadmissible applications

1 In addition to cases in which an application is not examined in accordance with Regulation (EC) No 343/2003, Member States are not required to examine whether the applicant qualifies as a refugee in accordance with Directive 2004/83/EC where an application is considered inadmissible pursuant to this Article.

2 Member States may consider an application for asylum as inadmissible pursuant to this Article if: ...

(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 27; ...

Article 27 The safe third country concept

... 2 The application of the safe third country concept shall be subject to rules laid down in national legislation, including:

rules requiring a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country; ...”

The Procedures Directive came into effect on 2 January 2006 and Member States were required to implement the relevant provisions of the Directive by 1 December 2007. (Certain aspects of substantive EU asylum law are addressed in Council Directive 2004/83/EU of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (“the Qualification Directive”) which came into effect on 20 October 2004. Member States were required to implement its provisions before 10 October 2006.)

112. The Procedures Directive and the Qualification Directive were implemented in the United Kingdom in a piecemeal fashion. Existing legislation and rules were already compliant in many respects. Some necessary changes to the Immigration Rules were made for both Directives by the September 2006 Statement of Changes to the Immigration Rules (CM 6918) (September 2006). Further required changes were made by the Refugee or Person in need of International Protection (Qualification) Regulations 2006 (SI 2006/2525) and the Asylum (Procedures) Regulations 2007 (SI 2007/3187).

However, an express requirement that there be a sufficient degree of connection between an asylum seeker and a third country on the basis of which it would be reasonable for that person to go to that country was introduced only on 24 November 2016 by the insertion into the Immigration Rules of paragraphs 345A-345D (Statement of Change HC 667).

(ii) European Union (Withdrawal) Act 2018

113. Section 4 of the 2018 Act (as amended by the European Union (Withdrawal Agreement) Act 2020) provides in relevant part:

“4 Saving for rights etc under section 2(1) of the ECA

(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP completion day –

(a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and

(b) are enforced, allowed and followed accordingly,

continue on and after IP completion day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).

(2) Subsection (1) does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they –

... (b) arise under an EU directive ... and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before IP completion day (whether or not as an essential part of the decision in the case). ...”

114. It is common ground on this appeal that the relevant provisions of the Procedures Directive were retained EU law within section 4 of the 2018 Act. Section 4 (as amended by the European Union (Withdrawal Agreement) Act 2020 to provide for the implementation period) came into force at 11 pm on 31 December 2020, IP completion day, ie the end of the post-Brexit implementation period (“IP Completion Day”).

(iii) Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020

115. The long title of the 2020 Act is:

“An Act to make provision to end rights to free movement of persons under retained EU law and to repeal other retained EU law relating to immigration; to confer power to modify retained direct EU legislation relating to social security co-ordination; and for connected purposes.”

116. The Act has two substantive Parts. Part 1 is headed “Measures relating to ending free movement”. Part 2 is headed “Social security co-ordination”. This appeal concerns provisions in Part 1, in particular section 1 and Schedule 1.

117. Within Part 1, section 1 gives effect to Schedule 1. Section 1 provides:

“1 Repeal of the main retained EU law relating to free movement etc

Schedule 1 makes provision to –

(a) end rights to free movement of persons under retained EU law, including by repealing the main provisions of retained EU law relating to free movement, and

(b) end other EU-derived rights, and repeal other retained EU law, relating to immigration.”

Sections 2 and 3 are concerned with specific aspects of the ending of the right of free movement. Section 2 relates to the entitlement of Irish citizens to enter or remain

without leave. Section 3 relates to legal routes from the EU and family reunion in the case of protection claimants.

118. Schedule 1 is headed:

“Repeal of the main retained EU law relating to free movement etc”

Part 1 of Schedule 1 is headed “EU-derived domestic legislation” and revokes, omits or modifies specified provisions of primary and secondary domestic legislation. Part 2 of Schedule 1 is headed “Retained direct EU legislation” and it repeals Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (“the Workers Regulation”).

119. Part 3 of Schedule 1 is headed “EU-derived rights etc” and comprises paragraphs 5 and 6. Paragraph 5 is concerned with rights derived from the EU agreement with Switzerland on freedom of movement. Paragraph 6 provides:

“6 (1) Any other EU-derived rights, powers, liabilities, obligations, restrictions, remedies and procedures cease to be recognised and available in domestic law so far as –

(a) they are inconsistent with, or are otherwise capable of affecting the interpretation, application or operation of, any provision made by or under the Immigration Acts (including, and as amended by, this Act), or

(b) they are otherwise capable of affecting the exercise of functions in connection with immigration.

(2) The reference in sub-paragraph (1) to any other EU-derived rights, powers, liabilities, obligations, restrictions, remedies and procedures is a reference to any rights, powers, liabilities, obligations, restrictions, remedies and procedures which –

- (a) continue to be recognised and available in domestic law by virtue of section 4 of the European Union (Withdrawal) Act 2018 (including as they are modified by domestic law from time to time), and
- (b) are not those described in paragraph 5 of this Schedule.
- (3) The reference in sub-paragraph (1) to provision made by or under the Immigration Acts includes provision made after that sub-paragraph comes into force.”

120. The effect of paragraph 6(1)(a) is to disapply EU-derived rights so far as they are inconsistent with, or are otherwise capable of affecting the interpretation, application or operation of, any provision made by or under “the Immigration Acts”. This is to be taken as a reference to the statutes listed in section 61(2) of the UK Borders Act 2007 (as adopted and amended, inter alia, by section 4(1) of the 2020 Act). (See Schedule 1 to the Interpretation Act 1978.) It was common ground before us that at the relevant time when the decisions relevant to this appeal were made, these statutes were:

- “(a) the Immigration Act 1971 ...,
- (b) the Immigration Act 1988 ...,
- (c) the Asylum and Immigration Appeals Act 1993 ...,
- (d) the Asylum and Immigration Act 1996 ...,
- (e) the Immigration and Asylum Act 1999 ...,
- (f) the Nationality, Immigration and Asylum Act 2002 ...,
- (g) the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 ...,
- (h) the Immigration, Asylum and Nationality Act 2006 ...,

(i) this Act ..., [ie UK Borders Act 2007]

(j) the Immigration Act 2014 ...,

(k) the Immigration Act 2016 ...,

(l) Part 1 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (and Part 3 so far as relating to that Part), and

(m) the Nationality and Borders Act 2022.”

121. Section 1 and Schedule 1 of the 2020 Act took effect on IP Completion Day, ie the end of the post-Brexit implementation period.

(iv) The Immigration Rules

122. The Immigration Rules are made under the 1971 Act, section 3(2) of which provides:

“The Secretary of State shall from time to time ... lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter...”

123. Paragraphs 345A to 345D of the Immigration Rules in an amended form were introduced by Statement of Changes HC 1043, dated 10 December 2020, to take effect on IP Completion Day. Paragraph 345C in this amended form, which is said on behalf of ASM to be incompatible with retained EU law, provides:

“When an application is treated as inadmissible, the Secretary of State will attempt to remove the applicant to the safe third country in which they were previously present or to which

they have a connection, or to any other safe third country which may agree to their entry.”

(3) The submissions of the parties

124. On behalf of ASM, Mr Drabble submits that articles 25 and 27 of the Procedures Directive have effect in domestic law as retained EU law under the 2018 Act and that the 2020 Act did not have the effect of disapplying them. He submits that, in seeking to ascertain the intention of Parliament, statutory language must always be read in the context of the legislative purpose and scheme, in particular where general words are used since their colour and content are derived from their context. He submits that when the 2020 Act is read in its context it is clear that section 1 and paragraph 6 of Schedule 1 are directed to the repeal only of retained EU law relating to free movement and not to asylum provisions such as those in articles 25 and 27 of the Procedures Directive. References in the statute to “immigration”, he submits, must be read as limited to immigration in this narrow sense which excludes asylum. This conclusion, he submits, follows from the wording of the 2020 Act and from external aids to interpretation.

125. With regard to the wording of the 2020 Act, Mr Drabble submits that the absence of any reference to asylum in the long title is significant because in each of the 13 other “Immigration Acts” as defined in section 61(2) of the UK Borders Act 2007, “asylum” is expressly referred to in the long title if the Act addresses asylum-related rights. The heading to section 1 in the 2020 Act refers only to free movement and not to asylum. Section 1 itself introduces Schedule 1 as making provision to end rights to free movement under retained EU law and to end other EU-derived rights and repeal other retained EU law “relating to immigration”. Furthermore, Schedule 1 does not refer to asylum. Part 1 of the Schedule makes changes to domestic legislation which reflect the ending of free movement rights. Part 2 revokes the Workers Regulation, again reflecting the ending of free movement rights. In Part 3, paragraph 5 revokes rights relating to the Swiss free movement agreement. Paragraph 6 does not make any reference to asylum, simply referring to “any provision made by or under the Immigration Acts” and to “functions in connection with immigration”.

126. While Mr Drabble accepts that the statutory language refers to a secondary legislative purpose other than repealing legislation relating to free movement, his case is that this does not encompass the ending of EU-derived rights in relation to asylum. Rather, he maintains, the 2020 Act’s secondary purpose is to modify retained EU legislation relating to social security co-ordination and a broader class of EU-derived third country national immigration rights contingent on free movement, derived from rights of EU citizenship and freedom of establishment in the EU Treaties. (See, for example, *Ruiz Zambrano v Office national de l’emploi* (Case C-34/09) [2012] QB 265;

Chen v Secretary of State for the Home Department (Case C-200/02) [2005] QB 325; *Ibrahim v Harrow London Borough Council* (Case C-130/08) and *Teixeira v Lambeth London Borough Council* (Case C-480/08) [2010] ICR 1118.) These are matters relating to immigration in the narrow sense for which he contends.

127. On behalf of the Secretary of State, Lord Pannick submits that the argument that the MEDP scheme, paragraphs 345A-345D of the Immigration Rules and decisions giving effect to them are in breach of articles 25 and 27 of the Procedures Directive is unsustainable because those provisions of the Procedures Directive are not retained EU law. He submits that the combined effect of the 2018 Act (as amended by the European Union (Withdrawal Agreement) Act 2020) and the 2020 Act is that on IP Completion Day, the provisions to which Schedule 1 of the 2020 Act applies became, but then immediately ceased to be, retained EU law. At the same time the amendments to paragraphs 345A to 345D of the Immigration Rules, referred to in paragraph 123 above, came into effect.

128. Lord Pannick submits that section 1 of the 2020 Act not only addresses free movement rights but, as the long title and section 1(b) state, is designed to “repeal other retained EU law relating to immigration”. The word “other” means other than rights to free movement which are the subject of section 1(a). Paragraph 6(1) of Schedule 1 makes clear that Parliament intended the phrase “relating to immigration” in section 1(b) to have a very broad meaning which covers asylum decisions. The EU-derived rights to asylum on which ASM relies are plainly within paragraph 6(1)(a) because they are inconsistent with, or are otherwise capable of affecting the interpretation, application or operation of, provisions made by or under the Immigration Acts. In the alternative, it is submitted, they are within paragraph 6(1)(b) because they are otherwise capable of affecting the exercise of functions in connection with immigration. As a result, they ceased, by virtue of paragraph 6, to be recognised and available in domestic law and paragraphs 345A to 345D of the Immigration Rules cannot be impugned on the ground that they fail to give effect to the requirement in the Procedures Directive that there be a connection between the person seeking asylum and the proposed third country on the basis of which it would be reasonable for that person to go to that country.

(4) The interpretation of the 2020 Act

129. The process of statutory interpretation seeks to establish the meaning of the words used by Parliament in their particular context (*Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, per Lord Reid at 613; *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, per Lord Nicholls at 396). In *R (Project for the Registration of*

Children as British Citizens) v Secretary of State for the Home Department [2022] UKSC 3; [2023] AC 255 Lord Hodge explained (at para 29):

“Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained.”

Lord Hodge endorsed Lord Nicholls’s observation in *Spath Holme* at p397 that citizens, with the assistance of their advisers, are intended to be able to understand Parliamentary enactments so that they can regulate their conduct accordingly and that they should, therefore, be able to rely upon what they read in an Act of Parliament. Lord Hodge then went on to state (at para 30):

“External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity.”

130. On a literal reading of the 2020 Act, references to “immigration” in section 1 and Schedule 6 are wide enough to include asylum. However, Mr Drabble’s case is founded on ascribing a more limited meaning to “immigration” which is said to be required by the legislative context. Section 1(b), he submits, is limited to free movement and matters

connected with free movement and this limitation is carried through, in turn, to Schedule 1. References to immigration are to be read in a narrower sense as excluding asylum.

131. In support of this submission he relies on usage, submitting that in many legislative schemes a distinction is drawn between immigration and asylum. In this regard, he is able to point to the Immigration, Nationality and Asylum (EU Exit) Regulations 2019 (SI 2019/745), (“the 2019 Regulations”), made pursuant to section 8 of the 2018 Act, which provide for revocations of retained direct EU legislation. Part 1 of Schedule 1 to the 2019 Regulations provides for “revocations related to immigration and nationality” and Part 2 provides for “revocations related to asylum”. To the extent that this may reflect a usage in EU legislation, it cannot be assumed that the 2020 Act similarly reflects such a usage. Moreover, the point can be made that the scheme of the 2019 Regulations differs fundamentally in this regard from that of the 2020 Act, which unlike the 2019 Regulations does not list those EU laws to be excluded from retained EU law but describes them by their characteristics. This matter is considered further below.

132. More generally, we are not persuaded that there exists any consistent usage or settled practice in domestic legislation which distinguishes in the manner suggested between immigration and asylum. Even if Mr Drabble is correct in his submission that the long titles of the Immigration Acts as defined in section 61(2) of the UK Borders Act 2007 expressly refer to asylum where that is part of the subject matter, that is not true of their short titles. Thus, for example, the Immigration Act 2016 addresses both immigration in the narrower sense and asylum. Similarly, the Immigration Rules, Part 11 of which governs the determination of asylum claims, do not draw any such distinction and, as we have explained at para 27 above, are themselves made under the 1971 Act.

133. The rigid distinction between immigration in the narrow sense and asylum for which ASM contends, is furthermore inconsistent with the close relationship between asylum and immigration. As we have explained, the Immigration Rules which govern asylum are made under section 3(2) of the 1971 Act which empowers the Secretary of State to make rules “as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter”. The grant of asylum status in the United Kingdom generally leads under paragraphs 330 and 335 of the Immigration Rules to the grant of limited leave to remain in the United Kingdom despite the lack of any other right to remain. In the present appeal, ASM seeks to limit the power of the Secretary of State to remove him to Rwanda. Asylum and immigration in the narrower sense are closely integrated subject matters. As Underhill LJ observed in the Court of Appeal in the present proceedings (at para 361), the broader use of the term “immigration” to include asylum

is not loose or illogical. On the contrary, asylum can perfectly naturally be regarded as an aspect of immigration law.

134. For these reasons, there is no justification for reading references to “immigration” in section 1(b) and Schedule 1 of the 2020 Act as excluding matters relating to asylum.

135. In any event, the language and structure of the 2020 Act make its subject matter entirely clear. Section 1(b) states that Schedule 1 makes provision to “end other EU-derived rights, and repeal other retained EU law, relating to immigration”. Here, the word “other” can only refer to matters other than the rights to free movement of persons which are the subject of section 1(a). In this instance, section 1(b) does not define the content of Schedule 1; on the contrary, the meaning of section 1(b) is explained by Schedule 1. It does so in very broad terms. In particular, paragraph 6(1)(a) makes clear that “any other EU-derived rights” are to cease to be available in domestic law so far as they are inconsistent with, or are otherwise capable of affecting the interpretation, application or operation of, any provision made by or under the Immigration Acts. As we have explained, the Immigration Rules, Part 11 of which governs asylum applications, are made under the 1971 Act, which falls within the statutory definition of “the Immigration Acts”. Paragraph 6(1)(b) explains that “any other EU-derived rights” are to cease to be available in domestic law so far as they are otherwise capable of affecting the exercise of functions in connection with immigration. EU-derived rights and other retained EU-law relating to asylum are clearly capable of falling within these two categories.

136. Furthermore, the breadth of the categories established by sub-paragraphs 6(1)(a) and 6(1)(b) of Schedule 1 is inconsistent with Mr Drabble’s submission that the “other EU-derived rights relating to immigration” and the “other retained EU law relating to immigration”, the end and repeal of which are contemplated by section 1(b), are limited to social security co-ordination and a broader class of EU-derived third-country national immigration rights contingent on free movement, derived from rights of EU citizenship and freedom of establishment in the EU Treaties. Those categories clearly extend to EU-derived rights relating to asylum.

137. The EU-derived rights as to asylum on which ASM seeks to rely in this appeal fall within paragraph 6(1)(a) of Schedule 1. ASM seeks to rely on EU-derived rights to impose obligations on the Secretary of State as to how his asylum claim is dealt with and in particular as to whether the Secretary of State exercises powers of removal available under the 1971 Act, the 2004 Act (Schedule 3 of which confers powers to remove claimants for asylum to a safe third country, as explained at paras 7 and 31-32 above) and the Immigration Rules. In the alternative, should this not be correct, the EU-

derived rights as to asylum on which ASM seeks to rely would fall within paragraph 6(1)(b) of Schedule 1. ASM seeks to rely on EU-derived rights as restricting the function of the Secretary of State in deciding whether to remove him to a third country. That function is “in connection with immigration” because it involves a decision whether to grant him leave to enter or remain in the United Kingdom.

138. In support of the more limited reading of the provisions of the 2020 Act for which he contends, Mr Drabble also relies upon external aids to interpretation. First, he relies upon the Explanatory Notes to the Bill which became the 2020 Act. He points out that they make no express or implied reference to asylum, nor do they identify repeal of any retained EU law relating to asylum. He draws attention to the following features in particular.

(1) The overview section identifies the purpose of the Act as ending free movement of EU, EEA and Swiss citizens, protecting the status of Irish citizens once free movement ends, and making provision to amend retained direct EU legislation relating to social security co-ordination.

(2) The sections addressing the policy background and legal background to the Bill make no reference to asylum but set out the legal consequences of the ending of free movement at the end of the post-Brexit implementation period.

(3) The paragraphs addressing “EU-derived rights etc” under Part 3 of Schedule 1 (paragraphs 66-69) state that the Bill “disapplies other retained EU law relating to free movement of persons” (para 67). In particular, they make reference to the residence rights that are derived from articles 20 and 21 of the Treaty on the Functioning of the European Union (rights of citizenship and free movement).

(4) They include (at para 69) a table of directly effective rights relevant to paragraph 6 but the table includes no reference to asylum rights.

(Corresponding points are made in relation to the similar passages which appear in the Explanatory Notes to the 2020 Act.)

139. Secondly, Mr Drabble relies upon Parliamentary Committee reports and materials produced during the passage of the 2020 Act which, he submits, indicate clearly that the legislative intention behind the Act was only to end free movement and co-ordinate social security measures. In particular, he relies on the following matters.

(1) The House of Lords Delegated Powers and Regulatory Reform Committee report (22nd Report of Session 2019-21, HL Paper 118, 25 August 2020) refers to the Bill having two principal parts: Part 1 ending free movement of persons and Part 2 conferring powers to co-ordinate access to social security. The report makes no reference to asylum, the Procedures Directive or the Qualification Directive.

(2) The Delegated Powers Memorandum dated 24 July 2020, supplied to the Committee by the Home Office during the preparation of its report on the Bill, provided a detailed outline of the Bill and the powers contained in it. It refers to the law relating to free movement but makes no reference to asylum, the Procedures Directive or the Qualification Directive.

(3) The Committee's subsequent report (25th Report of Session 2019–21, HL Paper 141, 14 October 2020) refers to the ending of free movement and makes no reference to asylum.

(4) The report of the House of Lords Select Committee on the Constitution (11th Report of Session 2019–21, HL Paper 120, 2 September 2020) refers to the purposes of the Bill as “to end free movement of persons under EU law and to provide for the amendment of retained EU law governing social security co-ordination”.

140. In the process of seeking the meaning of the words which Parliament has used, external sources necessarily play a secondary role. In the present case, none of the extraneous aids relied upon gives rise to an ambiguity capable of displacing the clear and unambiguous meaning of the statute. The statements in the Explanatory Notes relied on do not assist ASM because they are not exhaustive. The Explanatory Notes state that “they are not, and are not intended to be, a comprehensive description of the Bill [or Act]”. The table of directly effective rights relevant to paragraph 6 of Schedule 1 to the 2020 Act (at para 69 of the Explanatory Notes to the Bill) expressly states that it is a non-exhaustive list. Similarly, the statements in the Parliamentary Committee reports and materials are not exhaustive. Furthermore, there is no absurdity in the Secretary of State's reading of the statute. While it is a curious feature of the external aids to interpretation on which ASM relies that they contain no reference to EU-derived asylum law, one possible explanation may be that provided by Underhill LJ in the Court of Appeal (at para 366): that is that it is not clear that there was any reason at the time the Bill was going through Parliament for the Government to have considered the question of its impact on asylum rights one way or the other. An inconsistency did arise from the new paragraph 345C of the Immigration Rules, but the statement of changes which introduced this change was only laid before Parliament on 10 December 2020 ie

after the 2020 Act received Royal Assent (on 11 November 2020). In any event, this fact cannot displace the plain meaning of the words of the statute itself.

(5) The principle of legality

141. ASM submits that the conclusion that the legislative intention behind the 2020 Act did not extend to removing asylum rights is further supported by the principle of legality as a special rule of construction. The principle was stated in the following terms by Lord Browne-Wilkinson in *R v Secretary of State for the Home Department Ex p Pierson* [1998] AC 539, 575:

“A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.”

Mr Drabble submits that in the present case the principle of legality operates to preserve the rights conferred by articles 25 and 27 of the Procedures Directive because of the absence of clear and unambiguous wording in the 2020 Act demonstrating that Parliament intended to remove them.

142. The principle of legality does not assist ASM. First, the principle is concerned essentially with an interference by statute with a common law constitutional right or with a statutory provision which declares such a fundamental or constitutional right. (See *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* per Lord Hodge at paras 33, 43.) In that case, which concerned a statutory procedure for registration by which a person can acquire British citizenship, Lord Hodge considered that, notwithstanding the importance to an individual of the possession of British citizenship, the court was not dealing with an interference with a fundamental or constitutional right. As a result, the normal canons of statutory construction applied. In the same way, in the present case the relevant protection afforded by articles 25 and 27(2)(a) of the Procedures Directive, despite its importance, does not bring the principle of legality into play.

143. Secondly, the purpose of the 2020 Act is to end the application within domestic law in the United Kingdom of parts of retained EU law. As Lord Pannick observed in his written case, such an Act of Parliament should be construed fairly in accordance

with its terms, and not by reference to a presumption that it applies to as little retained EU law as possible.

144. Thirdly, in any event, the principle of legality does not permit a court to disregard an unambiguous expression of Parliament’s intention such as that with which we are concerned in the present case.

(6) *G v G*

145. Finally, it is necessary to say something about the reliance placed by Mr Drabble on the decision of the Supreme Court in *G v G* [2021] UKSC 9; [2022] AC 544. In that case, a mother and father had lived in South Africa with their young child. Following their divorce, the mother wrongfully brought the child to England where she applied for asylum and named the child as a dependant in her application. The father applied in England for an order returning the child to South Africa, pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980. The appeal concerned the relationship between the asylum proceedings and the Hague Convention proceedings.

146. In the Supreme Court, the only judgment was that of Lord Stephens (with whom Lord Lloyd-Jones, Lord Hamblen, Lord Leggatt and Lord Burrows agreed). Lord Stephens recorded (at para 84):

“The Secretary of State accepts, for the purposes of this appeal, and I agree, that the relevant provisions of the [Procedures Directive and the Qualification Directive] are directly effective and remain extant in domestic law as “retained EU law” after the United Kingdom’s withdrawal from the EU.”

Lord Stephens also noted (at para 107) that the Secretary of State’s procedures governing the approach to processing and determining claims for asylum had as their objective ensuring that the United Kingdom’s obligations under the Refugee Convention, the Qualification Directive and the Procedures Directive were in practice met. (In this regard, Mr Drabble also referred us to *Secretary of State for the Home Department v Ainte (material deprivation – Art 3 – AM (Zimbabwe))* [2021] UKUT 203 (IAC), at paras 63-65 and *NM (Art 15(b) – Intention Requirement (Iraq)) v Secretary of State for the Home Department* [2021] UKUT 259 (IAC) at paras 13-15. In both cases,

following *G v G*, it was common ground between the parties and the Upper Tribunal accepted that the Qualification Directive was retained EU law.)

147. Argument in the appeal of *G v G* proceeded on the basis of a concession by the Secretary of State for the purposes of that appeal that the relevant provisions of the Procedures Directive remained in force in the domestic law of the United Kingdom as retained EU law. The Supreme Court heard no argument on the point and no reference was made to the effect of the 2020 Act in this regard. The fact that Lord Stephens had heard argument in *Robinson (Jamaica) v Secretary of State for the Home Department* [2020] UKSC 53; [2022] AC 659 some two months earlier as to the effect of the 2020 Act on the law of free movement is irrelevant for present purposes. The earlier case was not concerned with the law of asylum but solely with the law of free movement. A likely explanation of what occurred during the appeal in *G v G* is provided by the Divisional Court in the present case (at para 117): since the 2020 Act came into force (on 31 December 2020) between the judgment of the Court of Appeal in *G v G* (on 15 September 2020) and the hearing of the appeal in the Supreme Court (25-27 January 2021), the parties may simply not have turned their minds to the matter.

148. In circumstances where the point was not argued in *G v G*, the Practice Statement (Judicial Precedent) [1966] 1 WLR 1234, concerning the departure of the Supreme Court from its earlier decisions, has no application. On the present appeal, the Supreme Court, having heard full argument on the point, has come to the clear conclusion that the effect of the 2020 Act is that articles 25 and 27 of the Procedures Directive do not have effect in the domestic law of the United Kingdom as retained EU law.

5. Conclusion

149. For the reasons we have explained in our discussion of Issues 2 and 3, at paras 42-105 above, we conclude that the Court of Appeal was correct to reverse the decision of the Divisional Court, and was entitled to find that there are substantial grounds for believing that the removal of the claimants to Rwanda would expose them to a real risk of ill-treatment by reason of refoulement. It was accordingly correct to hold that the Secretary of State's policy is unlawful. The Secretary of State's appeal is therefore dismissed. For the reasons explained in our discussion of Issue 4, at paras 107-148 above, the cross-appeal by ASM is also dismissed.

ANNEX M

AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA
AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES		

IN THE MATTER OF

INGABIRE VICTOIRE UMUHOZA

V.

REPUBLIC OF RWANDA

APPLICATION 003/2014

JUDGMENT



24 NOVEMBER 2017

The Court composed of: Sylvain ORÉ, President, Ben KIOKO, Vice-President; Gérard NIYUNGEKO, Augustino S. L. RAMADHANI, Duncan TAMBALA, El Hadji GUISSÉ, Rafâa Ben ACHOUR, Solomy B. BOSSA: Judges; and Robert ENO, Registrar.

In the Matter of:

INGABIRE VICTOIRE UMUHOZA

Represented by:

a) Advocate Gatera GASHABANA	-	Counsel
b) Dr. Caroline BUISMAN	-	Counsel

v.

REPUBLIC OF RWANDA

Represented by:

Mr. Rubango Kayihura EPIMAUQUE	-	Senior State Attorney

After deliberation,

delivers the following Judgment:

I. THE PARTIES

1. The Application is filed by Ingabire Victoire Umuhoza (hereinafter referred to as "the Applicant"), pursuant to Articles 5 (3) and 34 (6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol").
2. The Application is filed against the Republic of Rwanda (hereinafter referred to as "the Respondent State"). The latter became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October, 1986, to the Protocol on 25 May, 2004, and to the International Covenant

on Civil and Political Rights (hereinafter referred to as "the ICCPR") on 23 March, 1976. It filed the Declaration under Article 34 (6) of the Protocol on 22 January, 2013, and on 29 February, 2016, notified the African Union Commission of its intention to withdraw the said Declaration¹.

II. SUBJECT OF THE APPLICATION

3. The instant Application emanates from the Judgment of the High Court of Kigali in Criminal Case No. RP 0081-0110/10/HC/KIG delivered on 30 October, 2012, and the Judgment of the Supreme Court of Rwanda in Criminal Appeal No. RPA 0255/12, delivered on 13 December, 2013. The Application relates to the arrest, detention and trial of the Applicant, on the basis of which she alleges violation of her human rights and fundamental freedoms.

A. The Facts of the Matter

4. On 3 October, 2014, the Applicant seized the Court with the Application stating that when the genocide in Rwanda started in April 1994, she was in The Netherlands in furtherance of her university education in Economics and Business Administration.
5. The Applicant submits that in 2000, she became the leader of a political party known as the *Rassemblement Républicain pour la Démocratie au Rwanda* (RDR) (the Republican Movement for Democracy in Rwanda). She states that a merger of this party and two other opposition parties (the *ADR* and the *FRD*) led to the creation of a new political party known as *Forces Démocratiques Unifiées* (FDU Inkingi), which she leads to date.
6. The Applicant avers that in 2010, after spending nearly seventeen (17) years abroad, she decided to return to Rwanda, according to her, to contribute in nation building. Her priorities included the registration of the political party - FDU Inkingi,

¹ See the Court's Ruling in this matter of 3/6/ 2016 of the Respondent's withdrawal of its Declaration made pursuant to Article 34(6) of the Protocol.

in compliance with Rwandan law on political parties, which would have enabled her to popularise the political party at the national level with a view to future elections.

7. The Applicant contends that she did not attain this objective because from 10 February, 2010, charges were brought against her by the judicial police, the prosecutor and the tribunals of the Respondent State.
8. The Applicant further maintains that on 21 April, 2010, she was remanded in custody by the police, charged with complicity in terrorism and the ideology of genocide. Later, before the High Court, she alleges that she was charged with having committed the following:

"a. The crime of [propagation of] ideology of genocide, an offence punishable under Law No. 18/2008 of 23 July, 2008, on the punishment of the ideology of genocide;

b. Aiding and abetting terrorism, an offence punishable under Law No. 45/2008 of 9 September, 2008, on the punishment of the offence of terrorism;

c. Sectarianism and divisionism, an offence punishable under Law No. 47/2001 of 18 December, 2001; sectarianism and divisionism;

d. Undermining the internal security of the State, spreading of rumours likely to incite the population against political authorities and mount citizens against one another, punishable under Law No. 21/77 of 18 August, 1997, instituting the Penal Code;

e. Establishing an armed branch of a rebel movement, an offence punishable under Article 163 of Law No. 21/77 of 18 August, 1997, instituting the Penal Code; and

f. Attempted recourse to terrorism, force of arms and such other forms of violence to destabilize established authority and violate constitutional principles, all offences punishable under Articles 21, 22, 24 and 164 of Law No. 21/77 of 18 August, 1997, instituting the Penal Code".

B. Alleged Violations

9. On the basis of the foregoing, in the proceedings and the trial of her case before domestic Courts, the Applicant alleges violation of some provisions of the following instruments:

"a. Articles 1, 7, 10, 11, 18 and 19 of the Universal Declaration of Human Rights;

b. Articles 3, 7 and 9 of the Charter; and

c. Articles 7, 14, 15, 18 and 19 of the ICCPR".

III. PROCEDURE AT NATIONAL LEVEL AS PRESENTED BY THE APPLICANT

i. Pre-trial investigations

10. The Applicant avers that on 10 February, 2010, she received a summons requiring her to appear before a judicial police officer at the Criminal Investigation Department (CID). According to her, she was accused of committing the offence of aiding and abetting terrorism, punishable under Article 12 of Law No. 45/2008 of 9 September, 2008, on the punishment of the offence of terrorism. She states that the allegations were "exclusively based on contacts she is said to have had with some defectors of the *Forces Démocratiques de Libération du Rwanda* (FDLR), with a view to establishing an armed branch of the political party called *Forces Démocratiques Unifiées*, of which she is President". She further submits that she was also charged with "spreading the ideology of genocide, sectarianism and divisionism".

11. According to the Applicant, she was arrested on 21 April, 2010, and remanded in custody, and then brought before a Judge at the Gasabo High Court

"to adduce the means of her defence following a complaint filed by the legal body attached to that Court, in which the said legal department demanded her remand in custody, on the grounds of alleged serious, grave and consistent indications of guilt, which could mean that the Applicant committed the offence of aiding and abetting terrorism and the ideology of genocide as outlined above".

12. The Applicant further indicates that during the Public Hearing on 22 April, 2010, the Gasabo High Court issued a judicial interim release order with certain conditions, such as withholding of her passport, prohibition from leaving the city of Kigali without authorisation, reporting two times a month obligatorily to the *Organe Nationale des Poursuites Judiciaires* - National Prosecution Department (ONPJ). However, on 14 October, 2010, she was re-arrested, taken to the CID Headquarters and was again charged with terrorist acts, an offence punishable under Article 12 of Law No. 45/2008 of 9 September, 2008.

13. The Respondent did not contest the facts presented by the Applicant.

ii. Proceedings before the High Court

14. According to the Applicant, she was arraigned before the High Court on the charges enumerated in paragraph 8 above, adding that “by an order of the President of the High Court, the matter was set down to be heard on 16 May 2011. On the day of the hearing, the matter was joined with the case *‘the State of Rwanda v. Nditurende Tharcisse, Karuta JM Vinney and Habiyaemye Noel*, and the new matter adjourned for 20 June, 2011”.

15. The Applicant submits that on 20 June, 2011, the matter was again adjourned to 5 September, 2011, and on the same day, she deplored the “various acts of violation perpetrated against her, such as systematic body search, by the security services”. According to her,

“this situation was vehemently protested before the High Court which, through a pre-trial order, deemed that the said security services had the latitude to carry out body search operations on anyone found in the courtroom, including the Counsel for the defence.”

16. The Applicant claims that this decision of the High Court was appealed against, however, “in accordance with relevant Rwandese law, the appeal could be considered only after a final ruling on the merits of the main matter”.

17. The Applicant avers that on 26 September, 2011, *in limine litis*, she raised “many objections to admitting that decision based on the fact that the indictment order was issued in violation of certain principles, such as the legality of crimes and penalties, non-retroactivity, lack of jurisdiction, etc.” The Applicant claims that on 27 September, 2011, she sent a letter to the President of the High Court, with copies to the President of the Supreme Court, the Attorney General and the President of the Bar Association, to inform “all these institutions on how serious the situation was”.

18. According to the Applicant, “by a pre-trial order issued on 13 October, 2011, the High Court systematically threw out all the objections and petitions”. She avers that

"from that moment, the bench went ahead to examine the merits of the matter, taking into account only the submissions of the prosecution and those of the accused persons who had opted to plead guilty. Each time the defence attempted to question the accused persons to prove that their statements were contrary to the truth and condemn their collusion with the Office of the State Prosecutor and security services, the defence was called to order by the presiding judge, who in actual fact was acting not as a judge but rather as a prosecution body. It is in this climate of mistrust and suspicion that Habimana Michel, a prosecution witness, was heard".

19. Still according to the Applicant, "through a direct summons to a witness introduced at the behest of the Registrar-in-Chief of the High Court, a certain Habimana Michel was requested to appear before the Court sitting to examine a criminal matter at the public hearing of 11 April, 2012, as prosecution witness". Counsel for the Applicant were able to put questions to the witness to obtain clarification, and according to the Applicant

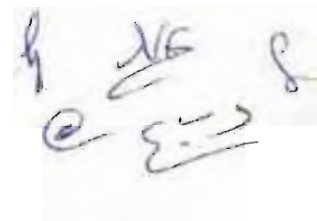
"to all these questions, the witness provided clear, concise and precise answers, thus putting into question the very basis of the charges, showing in broad daylight all the farce and scenario that had been orchestrated based on false statements by the accused, Uwumuremyi Vital, working in connivance with the Office of the State Prosecutor and various services".

20. The Applicant claims that realising that its strategy hitherto based on statements made by the accused persons, Uwumuremyi Vital, Nditurende Tharcisse and Karuta J M Vianney, had been undermined by the witness, the prosecutor seized by panic, "started intimidating the witness by using subterfuge and intimidation manoeuvres". She alleges that

"without the knowledge of the bench and the defence, the State prosecutor ordered prison services to carry out a search on all the personal effects of the witness in his absence. In the evening of 11 April, 2012, he was interrogated on the testimony he made in Court".

21. According to the Applicant, during the public hearing of 12 April, 2012

"the prosecution used such clearly illegal investigation to claim to have discovered reportedly compromising documents against the defence... Upon analysing the content of the report, it was found that (i) the interrogation was held outside applicable legal



hours, (ii) the witness was not assisted by a counsel of his choice; (iii) the interrogation dwelt on statements made by the witness in the morning before the Court”.

22. Still according to the Applicant

“ the defence tried in vain to protest before the High Court against such practices, but was each time insulted and rudely interrupted by the presiding judge. Such acts have considerably undermined the fair trial nature of the trial and contributed to the Applicant’s decision to quit the trial”.

23. The Applicant stated that on 30 October, 2012, the High Court delivered a judgment on the matter in which it

“ (i) admits the case submitted by the *Organe Nationale des Poursuites Judiciaires* and rules it partially founded ... (ii) rules in law that Ingabire Victoire Umuhoza is guilty of the offences of conspiracy to undermine established authority and violate constitutional principles by resorting to terrorism and armed force which are punishable under Law No. 21/1977 instituting the Penal Code. It further rules that Ms. Ingabire Victoire Umuhoza is guilty of the offence of minimization of the genocide, an offence punishable under Article 4 of Law No. 6/09/2003 on the punishment of genocide, crime against humanity and war crimes; (iii) sentences her on this count to 8 years of imprisonment with hard labour”.

24. The Applicant asserts that in its judgment, the High Court indicated that the appeal “must be done in a period of 30 days following the sentencing”.

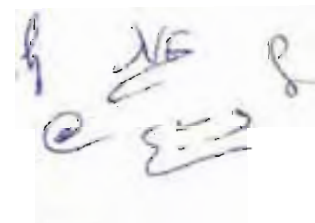
25. The Court notes that the Respondent State did not contest the facts presented by the Applicant.

C. Petition on unconstitutionality before the Supreme Court

26. While the matter was still pending before the High Court, the Applicant on 16 May, 2012, filed an application before the Supreme Court sitting in Constitutional Matters, seeking annulment of Articles 2 to 9 of Law No. 18/2008 of 23 July, 2008, repressing the crime of genocide ideology and Article 4 of Law No. 33 bis/2003 of 6 September, 2003, punishing the crime of genocide, crimes against humanity and war crimes, on grounds of incompatibility with Articles 20, 33 and 34 of the Constitution of the Republic of Rwanda of 4 June, 2003, as amended and updated.

27. According to the Applicant,

“the aforementioned legal provisions have been formulated in unintelligible and ambiguous terms likely to generate confusion and arbitrary decision, to the point of immensely infringing the fundamental human rights of individuals as enshrined in the Constitution, especially with regard to freedom of expression in relation to the genocide which took place



in Rwanda. Furthermore, the said legal provisions lend themselves to several interpretations".

28. In its Judgment of 18 October, 2012, the Supreme Court

(i) "declares inadmissible the application filed by Ingabire Victoire seeking annulment of Article 4 of Law No. 33 bis/2003 of 6 September, 2003, punishing the crime of genocide ideology, crimes against humanity and war crimes, as unfounded; (ii) declares inadmissible the request filed by Ingabire Victoire seeking annulment of Articles 4 to 9 of Law No. 18/2008 of 23 July, 2008, repressing the crime of genocide ideology, as groundless; and (iii) however, declares admissible the application filed by Ingabire Victoire seeking annulment of Articles 2 and 3 of Law No. 18/2008 of July, 2008, suppressing the crime of genocide ideology, but declares the application groundless".

D. Appeal before the Supreme Court

29. Following the High Court judgment of 30 October, 2012, both the Prosecution and the Applicant appealed before the Supreme Court of Rwanda.

30. The Prosecution argued on appeal, *inter alia*, that (i) it was not satisfied with the fact that the Applicant was not convicted of the crime of creating an armed group with the intent to carry out an armed attack, (ii) that the Applicant was acquitted of the offence of intentionally spreading rumours with the intent to incite the population against the existing authorities by disregarding the legislation in force at the time; and (iii) that the sentence the Applicant received on the crimes of which she was convicted was extremely reduced given the gravity of the crimes at issue.

31. For her part, the Applicant submitted on appeal that the High Court had disregarded the preliminary issues raised by her counsel, that the trial proceedings had not respected the basic principles of fair trial and that she was even convicted for crimes she had not committed.

32. According to Applicant, in its judgment of 13 December, 2013, the Supreme Court ruled that she "has been found guilty of conspiracy to undermine the Government and the Constitution, through acts of terrorism, war or other violent means, of downplaying genocide, and of spreading rumours with the intent to incite the population against the existing authorities". She was sentenced to 15 years imprisonment by the Supreme Court.

33. The Court notes that the Respondent State did not contest the facts presented by the Applicant.

IV. PROCEDURE BEFORE THE COURT

34. By a letter dated 3 October, 2014, the Applicant seized the Court with the present Application through her Counsel, and the Application was served on the Respondent State by letter dated 19 November, 2014, given 60 days within which to file its Response.
35. By a letter dated 6 February, 2015, the Registry, pursuant to Rule 35(2) and (3) of the Rules of Court (hereinafter referred to as "the Rules"), transmitted the Application to the Chairperson of the African Union Commission (AUC) and, through her, to the Executive Council of the African Union, as well as to all the other States Parties to the Protocol.
36. By a letter dated 23 January, 2015, the Respondent State forwarded to the Court its Response to the Application.
37. By a letter dated 9 June, 2015, the National Commission for the Fight against Genocide of Rwanda applied to the Court for leave to appear as *amicus curiae* in the Application, and on 10 July, 2015, the Court granted the request.
38. By a letter dated 6 April, 2015, the Applicant filed her Reply to the Respondent's Response.
39. On 7 October, 2015, at its 38th Ordinary Session, the Court ordered the Respondent State to furnish some relevant documentation. The Respondent did not do so.
40. By a letter dated 4 January, 2016, the Registry notified the Parties of the Public Hearing set down for 4 March, 2016.
41. By a letter dated 1 March, 2016, the Respondent State notified the Court of its deposit of an instrument of withdrawal of its Declaration made pursuant to Article 34(6) of the Protocol. The Respondent State in its letter contended that after

deposition of the same, the Court should suspend hearings involving the Republic of Rwanda until review is made to the Declaration and the Court is notified in due course.

42. By a letter dated 3 March, 2016, the Legal Counsel of the AUC notified the Court of the submission of the Respondent State's instrument of withdrawal of its Declaration made under Article 34(6) of the Protocol, which was received at the AUC on 29 February, 2016.

43. At the Public Hearing of 4 March, 2016, the Applicant was represented by Advocate Gatera Gashabana and Dr. Caroline Buisman. The Respondent State did not appear. The Court heard the representatives of the Applicant on procedural matters in which they requested the Court to:

- "a. Reject the *amicus curiae* brief submitted by the National Commission for the Fight against Genocide;
- b. Order the Respondent State to facilitate access to the Applicant by her representatives;
- c. Order the Respondent State to facilitate access to video conferencing technology for the Applicant to follow the proceedings of the Court; and
- d. Order the Respondent State to comply with the Court's order of 7 October, 2015, to file pertinent documents".

44. In an order issued on 18 March, 2016, the Court decided as follows:

- "a. That Parties file written submissions on the effect of the Respondent's withdrawal of its Declaration made under Article 34(6) of the Court Protocol, within fifteen (15) days of receipt of this Order.
- b. That its ruling on the effect of the Respondent's withdrawal of its Declaration under Article 34(6) of the Court Protocol shall be handed down at a date to be duly notified to the Parties.
- c. That the Applicant file written submissions on the procedural matters stated in paragraph 14 above, within fifteen (15) days of receipt of this Order."

45. On 3 June, 2016, the Court delivered a Ruling on the Respondent State's withdrawal of its Declaration made pursuant to Article 34(6) of the Protocol. In that

Ruling, as amended on 5 September 2016, the Court decided, among other things, that "the withdrawal of its declaration by the Respondent State has no effect on the instant Application and that the Court has jurisdiction to continue hearing the Application".

46. On 22 March, 2017, a Public Hearing was held to receive arguments on jurisdiction, admissibility and the merits. The Applicant was represented by Advocate Gatera Gashabana and Dr. Caroline Buisman. The Respondent State did not appear.

47. During the public hearing, the Judges posed questions to the Applicant's representatives to which the latter provided answers.

V. PRAYERS OF THE PARTIES

48. The Applicant prays the Court to:

- "a. Repeal, with retroactive effect, sections 116 and 463 of Organic Law N° 01/2012 of 2 May, 2012, relating to the Penal Code as well as that of Law N° 84/2013 of 28 October, 2013, relating to the punishment of the crime of ideology of the Genocide;
- b. Order the review of the Case;
- c. Annulment of all the decisions that had been taken since the preliminary investigation up till the pronouncement of the last judgment;
- d. Order the Applicant's release on parole; and
- e. Payment of costs and reparations".

49. The Applicant reiterated these prayers during the Public Hearing of 22 March, 2017.

50. In its Response to the application, the Respondent State prays the Court to:

- "a. Declare the Application vexatious, frivolous and without merit; and
- b. Dismiss the Application with cost".

VI. JURISDICTION

51. In accordance with Rule 39(1) of its Rules, the Court shall conduct a preliminary examination of its jurisdiction, before dealing with the merits of the Application.

A. Objection to the Material jurisdiction of the Court

52. The Respondent State contends that the Applicant has seized this Court as an appellate Court by requesting the latter to reverse or quash the decisions of the Respondent State's courts, and to replace the Respondent State's legislative and judicial institutions. According to the Respondent, "...the African Court is neither a Court of Appeal nor a legislative body which can nullify or reform court decisions and make national legislation in lieu of national legislative Assemblies". The Respondent State submits in this regard that an "application requesting the Court to take such action should be dismissed".

53. In her Reply to the Respondent State's Response, the Applicant submits that the Respondent State's argument is at variance with all evidence and cannot resist the slightest bit of serious analysis. She substantiates by indicating that the Application mentions "the legal instruments of human rights duly ratified by the State of Rwanda which have suffered various violations in the course of proceedings or simply ignored". She reiterates that

"it is clear that this Court was not seized as an appellate jurisdiction as wrongly claimed by the Respondent, but rather as a court responsible for adjudicating disputes resulting from multiple human rights violations that considerably undermine the case between the Applicant and the National Public Prosecution Authority before the High Court and Supreme Court, respectively".

54. This Court reiterates its position as affirmed in *Ernest Francis Mtingwi v. Republic of Malawi*², that it is not an appeal court with respect to decisions rendered by national courts. However, as it underscored in its Judgment of 20 November, 2015, in *Alex Thomas v. United Republic of Tanzania*, and confirmed in its Judgment of 3 June, 2016, in *Mohamed Abubakari v. United Republic of Tanzania*, this situation does not preclude it from examining whether the procedures before national courts

² Application No. 001/2013. Decision on Jurisdiction 15/3/2013, Ernest Francis Mtingwi v Republic of Malawi, paragraph 14.

are in accordance with international standards set out in the Charter or other applicable human rights instruments to which the Respondent State is a Party.³

55. Consequently, the Court rejects the Respondent State's objection that the Court is acting in the instant matter as an appellate Court and finds that it has material jurisdiction to hear the matter.

56. Furthermore, regarding its material jurisdiction, the Court notes that since the Applicant alleges violations of provisions of some of the international instruments to which the Respondent State is a party, it has material jurisdiction in accordance with Article 3(1) of the Protocol, which provides that the jurisdiction of the Court "shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned".

B. Other aspects of jurisdiction

57. The Court notes that its personal, temporal and territorial jurisdictions have not been contested by the Respondent State, and nothing in the pleadings indicate that the Court does not have jurisdiction. The Court thus holds that:

(i) it has jurisdiction *ratione personae* given that the Respondent State is a party to the Protocol and deposited the declaration required under Article 34 (6) thereof, which enabled the Applicant to access the Court in terms of Article 5(3) of the Protocol;

(ii) it has jurisdiction *ratione temporis* in terms of the fact that the alleged violations are continuous in nature since the Applicant remains convicted on the basis of what she considers as unfair process;

(iii) it has jurisdiction *ratione loci* given that the facts of the matter occurred in the territory of a State Party to the Protocol, that is, the Respondent State.

58. From the foregoing, the Court finds that it has jurisdiction to hear the instant case.

2. Ernest Francis Mtingwi v. The Republic of Malawi, judgment of 15 March 2013, para. 14.³ Alex Thomas v. The United Republic of Tanzania, judgment of 20 November 2015, para. 130; Application, Mohamed Abubakari v. United Republic of Tanzania, judgment of 3 June 2016, paragraph 29.

VII. ADMISSIBILITY

59. Pursuant to Rule 39(1) of the Rules, "the Court shall conduct a preliminary examination of ... admissibility of the Application in accordance with Articles 50 and 56 of the Charter and Rule 40 of these Rules".

60. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

"Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, Applications to the Court shall comply with the following conditions:

1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. Comply with the Constitutive Act of the Union and the Charter;
3. Not contain any disparaging or insulting language;
4. Not be based exclusively on news disseminated through the mass media;
5. Be filed after exhausting local remedies, if any, unless it is obvious that the procedure is unduly prolonged;
6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
7. Not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

61. While some of the above conditions are not in dispute between the Parties, the Respondent State raises an objection relating to the alleged failure by the Applicant to exhaust local remedies, pursuant to Article 56 (5) of the Charter and Rule 40 (5) of the Rules.

A. Objection relating to non-compliance with Article 56 (5) of the Charter and Rule 40 (5) of the Rules.

62. The Respondent State contends that the Applicant failed to seize the Supreme Court sitting in constitutional matters to challenge the provisions of Rwandan laws that she alleges to be inconsistent with the Charter and other relevant international instruments. The Respondent State contends that the Applicant is challenging the conformity of Law No. 33 *bis* of 6 September, 2003, on the punishment of genocide,

crimes against humanity and war crimes and that the Constitution of the Respondent State empowers the Supreme Court to hear petitions aimed at reviewing laws that are inconsistent with the Constitution.

63. The Respondent State further contends that in terms of Article 145(3) of the Constitution of Rwanda of 3 June, 2003, "the Supreme Court has jurisdiction and the responsibility to hear petitions aimed at reviewing adopted laws that are inconsistent with the Constitution", and Article 53 of Organic Law N° 03/2012/OL of 13 June, 2012, determining the organization, functioning and jurisdiction of the Supreme Court, gives the Court, upon petition by any applicant, jurisdiction to "partially or completely repeal any Organic Law or Decree-Law for reasons of non-conformity with the Constitution".
64. The Respondent State further submits that since the Applicant alleges that Law No. 33 *bis* of 6 September, 2003, is inconsistent with the Constitution, "she must therefore exhaust the local remedies available for that purpose: this, by filing an application before the Supreme Court sitting in Constitutional Matters..." The Respondent State adds that "having failed to do so, makes the application inadmissible due to non-compliance with Article 56(5) [of the Charter] and Rule 40 of the Rules of Court".
65. The Respondent State avers further that the Applicant failed to seize competent courts to apply for judicial review of the decisions against her. According to the Respondent State, Article 78 of the Organic Law No. 03/2012/OL of 13/06/2012, provides that the Supreme Court shall have exclusive jurisdiction over applications for review of final decisions due to injustice, and Article 81(2) provides that the grounds for an application for review due to injustice, which include, notably, the review of a Court decision in disfavour of anyone for injustice, especially when there are provisions in this regard and irrefutable evidence that the judge ignored in rendering the judgment. The Respondent State submits that "by failing to make an application for the Supreme Court to review the decision that she considers unjust, the Applicant has failed to satisfy the requirement set forth in Article 56 of the Charter and Rule 40 of the Rules", and invites the Court to declare the application inadmissible.

66. The Applicant submits that the Respondent State's courts are not empowered to hear disputes concerning interpretation and application of the Charter, the Protocol and other human rights instruments. According to the Applicant, "Rwandan positive law has never put in place special courts or tribunals competent to adjudicate human rights issues". The Applicant concludes in this regard that "in the absence of Rwandan courts and tribunals competent to hear cases and disputes concerning the interpretation and implementation of the Charter, the Protocol and any other human rights instrument", the submission regarding the Applicant's breach of Article 56(5) of the Charter and Rule 40(5) of the Rules are devoid of any legal basis, and the objection must therefore be found "groundless".
67. On the Respondent State's submission that the Applicant failed to challenge the constitutionality of Law No. 33 *bis* of 6 September, 2003, before the Supreme Court, the Applicant's Counsel contends that "she filed before the Supreme Court a Motion to challenge the constitutionality of Law No. 33 bis of 6 September, 2003, punishing the crime of genocide, crime against humanity and war crimes". To corroborate her argument, she adds that "the case was entered on the cause list as No. RINST/PEN/002/12/CS, examined and pleaded before the Supreme Court for a ruling on the merits of the said Motion in open court on 19 July, 2012". The Applicant concludes that "in its open court hearing of 10 October, 2012, the Supreme Court dismissed the Motion, having found it groundless", and according to the Supreme Court, "Law No. 33 bis of 6 September 2003...is clearly consistent with the Constitution".
68. On the submission that the Applicant failed to avail herself of the of judicial review remedy, the Applicant contents that "the action instituted for review of a final judicial decision on grounds of injustice does not respect the criteria of effectiveness, accessibility, efficiency and other criteria as required by international jurisprudence". According to the Applicant, pursuant to Article 79 of the Organic Law 03/2012 of June, 2012, only the Office of the Ombudsman can petition the Supreme Court over applications for review, adding that the remedy of judicial review is subject to the discretion of the Office of the Ombudsman, the General

Inspectorate of Courts and the President of the Supreme Court, and that the remedy may be subject to undue prolongation.

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69. Regarding the appeal on unconstitutionality, this Court notes from the records before it that the Applicant did approach the Supreme Court of Rwanda, which is the highest court in the Respondent State, to challenge the constitutionality of Law No. 33 *bis* of 6 September, 2003, on the punishment of genocide, crimes against humanity and war crimes, and the Supreme Court handed down its decision on 18 October, 2012, finding the motion groundless.

70. In relation to the application for review, this Court notes that under Article 81 of Organic Law 03/2012 of June 2012, on the Organization, Functioning and Jurisdiction of the Supreme Court, applications for review may be heard only on the following grounds:

"1° when there is an unquestionable evidence of corruption, favouritism or nepotism that were relied upon in the judgment and that were unknown to the losing party during the course of the proceedings;

2° when there are provisions and irrefutable evidence that the judge ignored in rendering the judgment;

3° when the judgment cannot be executed due to the drafting of its content."

71. An examination of these grounds shows that the review remedy would not have been sufficient to redress the Applicant's complaints which concerned alleged substantive violation of the Applicant's human rights and not only allegations of bias or technical and procedural errors. Moreover, under Article 79 of Organic Law 03/2012 of June, 2012, which governs the Procedure for petitioning the Supreme Court over applications for review of a final decision due to injustice:

"The Office of the Ombudsman shall be the competent organ to petition the Supreme Court over application for review of a final decision due to injustice. When, the final decision is made and there is evidence of injustice referred to under Article 81 of this Organic Law, parties to the case shall inform the Office of the Ombudsman of the matter. When the Office of the Ombudsman finds that there is no injustice in handing down the decision, it shall inform the

applicant. When the Office of the Ombudsman finds that the decision handed down is unjust, it shall send to the President of the Supreme Court a letter accompanied by a report on the issue and evidence of such injustice and request to re-adjudicate the case".

72. It emerges from the above provisions that the capacity to exercise the review remedy lies exclusively with the Ombudsman which, in this regard, uses its discretionary power. The assessment on whether there has or has not been injustice rest with the Ombudsman.

73. Furthermore, in view of the circumstances of this case, an application for review under the Rwandan legal system is an extraordinary remedy which would not constitute an effective and efficient remedy, and which the Applicant did not have to exhaust.⁴

74. In light of the foregoing, the Court dismisses the Respondent State's objection and finds that this Application fulfils the admissibility requirement under Article 56 (5) of the Charter and Rule 40 (5) of the Rules.

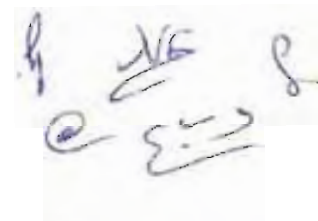
B. Compliance with Rule 40(1), (2), (3), (4), (6) and (7) of the Rules

75. The Court notes that the issue of compliance with sub-rules 40(1), (2), (3), (4), (6) and (7) is not in contention, and nothing in the Parties' submissions indicates that they have not been complied with. The Court therefore holds that the requirements under those provisions have been met.

76. In light of the foregoing, the Court finds that the instant Application fulfils all admissibility requirements in terms of Article 56 of the Charter and Rule 40 of the Rules, and accordingly declares the same admissible.

VIII. ON THE MERITS

⁴ See Alex Thomas v. The United Republic of Tanzania, Judgment of 29 November 2015, paragraph 63.



77. The Applicant alleges violation of Articles 3, 7, 9 of the Charter, Articles 7, 14, 15, 18 and 19 of the ICCPR. It emerges from the case file that the Applicant's allegation focuses on the rights to a fair trial, equality before the law and freedom of opinion and expression.

78. It should be noted here that although in her Application, the Applicant alleges violation of Articles 3 of the Charter, and Articles 7 and 18 of the ICCPR, she did not pursue these allegations in the course of the proceedings, and the Court will accordingly not adjudicate on them.

A. Right to a fair trial

79. The elements of the right to a fair trial as raised in the instant case are as follows:

- a) the right to presumption of innocence;
- b) the right to defence;
- c) the right to be tried by a neutral and impartial court;
- d) the principle of legality of crimes and penalties and non-retroactivity of criminal law.

1. The right to presumption of innocence

80. The Applicant submits that the Respondent State's allegations linked to the terrorist attacks that occurred in the city of Kigali were a pretext orchestrated by the prosecution to impute to the Applicant the offence of complicity in the terrorism on the basis of the confessions unlawfully obtained from her co-defendants. According to the Applicant, the co-defendants were allegedly forced to testify against themselves and to plead guilty; and it is on the basis of these irregularities that the prosecution justified remanding her in custody. The Applicant submits in conclusion that this act constitutes a violation of the principle of presumption of innocence.

81. According to the Respondent State, the Applicant's accusations are unfounded because her trial was conducted with all the guarantees provided by law and in

accordance with international standards. It avers that the Applicant was given the opportunity to appear in court, to be assisted by Counsel and in the end was lawfully convicted. The Respondent State concludes that the Applicant's right to presumption of innocence and therefore, her right to a fair trial, has not been violated.

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82. The Court notes that presumption of innocence is a fundamental human right. This right is enshrined in international instruments, notably, in Article 7(1) (b) of the Charter, which provides that:

"Every individual shall have the right to have his cause heard. This comprises: b) the right to be presumed innocent until proved guilty by a competent court or tribunal".

83. Article 14 (2) of the ICCPR also provides for the same right in the following terms:
"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".

84. The essence of the right to presumption of innocence lies in its prescription that any suspect in a criminal trial is considered innocent throughout all the phases of the proceedings, from preliminary investigation to the delivery of judgment, and until his guilt is legally established.

85. The Court finds, on the basis of the pleadings, that the Applicant has not adduced evidence to the effect that her right to presumption of innocence has been violated. It therefore dismisses this allegation.

2. The right to defence

86. The Applicant submits that the Prosecution harassed the defence witness, Mr. Habimana Michel, employing subterfuge and intimidation manoeuvres. She alleges that, unknown to the Judge and the defence, the Public Prosecutor ordered

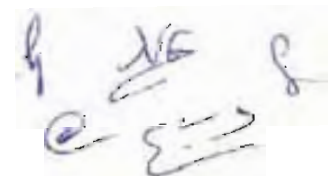
the prison services to search all the personal effects of the witness in his absence in the evening of 11 April, 2012. She alleges further that the witness was questioned over his testimony in court earlier that day.

87. The Applicant further submits that at the public hearing on 12 April, 2012, the prosecuting authorities used material obtained from the search to allege the discovery of compromising documents against her. She avers that the documents seized included a letter referenced 165/PR/2012 dated 11 April, 2012, sent by the Remera Prison Superintendent, together with a report on the hearing of the witness.

88. The Applicant further contends that analysis of the report indicated that the questioning took place outside the applicable legal hours; that the witness was not assisted by Counsel of her choice and that the interrogation focused on the statements made in court by the witness in the morning of that day. According to the Applicant, this was an attempt to intimidate the witness; and that through her counsel, she sought to protest such a practice during the trial but to no avail; on the contrary, they were each time thoroughly insulted and rudely interrupted by the President of the Court.

89. The Applicant also avers that there were "various abuses" characterised by systematic searches of the Defence team by the security services. According to her, this security measure was not applied to the prosecution team, thus creating an unequal treatment. She contends that the judges of the High Court "systematically" prevented her team of counsel from speaking. She claims that the written and oral protests of the Defence at both the High Court and the Supreme Court were not heeded. According to the Applicant, all these facts, inter alia, constitute a violation of the right to fair trial.

90. According to the Applicant, the acts of intimidation and the threats to which the Defence witness was subjected undermines the right to defence. She avers that one of the Judges instead stated that the Counsel should not have intervened in favour of a person who was not his client. She added that, following that incident, the President of the Supreme Court terminated the examination of the defence witness followed by the withdrawal of Ingabire's trial. For the Applicant, this is a



flagrant violation of her right to a fair trial, contrary to Article 7 of the Charter; Article 14 (1) of the ICCPR and Article 10 of the Universal Declaration.

91. The Respondent State submits that the search of the Defence witness was conducted after the witness gave his oral and written testimony in Court. It avers that it is a common practice for prison guards to search prisoners from time to time; and that the search of members of the Defence team was conducted as part of security measures, as there had been grenade attacks in Kigali before the trial.

92. The Respondent State also submits that the Applicant was assisted by a team of two lawyers of her choice, one of whom was an international lawyer, throughout the proceedings, and that they had full latitude to organise her defence without hindrance. It further submits that the trial lasted two years and, therefore, all the parties had the time needed for them to defend their cause. According to the Respondent State, the allegations of violation of the right to defence are unfounded.

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93. The Court notes that Article 7 (1) (c) of the Charter provides that:

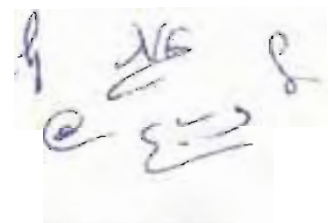
"Every individual shall have the right to have his cause heard. This comprises:

[.....]

c) the right to defence, including the right to be defended by Counsel of his choice".

94. An essential aspect of the right to defence includes the right to call witnesses in one's defence. Witnesses in turn deserve protection from intimidation and reprisals to ensure that they can assist the accused persons and the authorities to reach a just decision.

95. In the instant case, the Court notes that the Applicant submits two main allegations relating to her right to defence: searches conducted on her Defence Counsel at the entrance of the High Court and secondly, the search of the Defence witness at the prison. Based on the records, at the High Court after the Defence Counsel

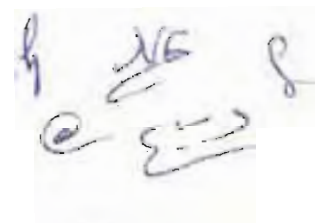


complained, the High Court ordered that the searches have to be done on all parties, including the public for security reasons.

96. Regarding the search of prisoners and detainees, the Court notes that, this is a normal practice in prisons. Regarding the search to which Defence Counsel and the public were subjected to, it was part of security measures taken by the Court, given that grenade attacks had happened in Kigali before the Applicant's trial. In both cases, consequently, the Court is of the view that the right to defence of the Applicant was not contravened.

97. The Court however notes from the pleadings that the search conducted in prison resulted in the seizure of certain documents, without the knowledge of the Defence, documents which were allegedly later used against the Applicant before the High Court. Furthermore, the Applicant complained about the Judges' refusal to allow her Counsel to put questions to the co-accused; the questioning and the threats to which the Defence witness was subjected to on account of his deposition upon return to prison; the difficulties faced by the Counsel in visiting their client; the use of the co-accused's statements obtained in suspicious conditions after the latter's stay in a military camp. The Respondent did not refute each of these allegations but made a general denial that the allegations of violation of the right to defence are unfounded.

98. The Court further observes that the right to defence is not limited to the choice of Counsel. This right also includes principles such as access to witnesses, and opportunity for Counsel to express themselves, consult with their clients and to examine and cross-examine witnesses. The right to defence further includes the right to know and examine documents used against one's trial. In the instant case, the difficulty encountered by the Applicant's Defence Counsel in putting questions to the co-accused, the threats and environment of intimidation faced by the defence witness and the use of documents seized during what the Applicant considers an illegal search, that was later used against her, without giving her the chance to examine it, are incompatible with international standards pertaining to the right to defence. The Court therefore holds that the Applicant's right to defence in this regard was violated, contrary to Article 7 (1) (c) of the Charter.



99. As regards the questioning of a witness by prison authorities over the testimony he/she has given in the High court, the Court notes that this is not a conduct consistent with standards that aim to promote a fair trial. Such actions may have an intimidating effect on witnesses' willingness and disposition to cooperate and adduce evidence against the Respondent State. This is especially so for witnesses in detention or already serving prison sentences. However, as the questioning happened after the witness had given testimony in Court, the Court concludes that in the circumstances of the case, this did not violate the right to defence of the Applicant.

3. The right to be tried by a neutral and impartial tribunal

100. The Applicant contends that the fact that the Judges of the Supreme Court and the High Court did not react to the national prosecution authorities' intimidation of a Defence witness, in the person of one Habimana Michel, and also that the Court considers the said acts of intimidation as having had no impact on the content of the witness's testimony, is proof of their partiality. The Applicant further argues that, at the Supreme Court, her counsel mounted a strong protest denouncing the abuses and excesses of the prosecution authorities vis-à-vis a defence witness.

101. The Respondent submits that this allegation is unfounded, since according to the latter, all the guarantees provided by law have been observed.

*

102. The Court notes that the Charter in its Article 7 (1) (d) provides that: "Every individual shall have the right to have his cause heard. This comprises (...) (d) the right to be tried ... by an impartial court or tribunal".⁵

103. According to the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, "the impartiality of a judicial body could be determined on the basis of [the following] three relevant facts:

⁵ See also: Article 14 (1) of the ICCPR: "...All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law..." Article 10 of the Universal Declaration of Human Rights: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him"

1. that the position of the judicial officer allows him or her to play a crucial role in the proceedings;
2. the judicial officer may have expressed an opinion which would influence the decision-making ;
3. the judicial official would have to rule on an action taken in a prior capacity".⁶

104. The aforementioned Guidelines provide that the impartiality of a judicial body would be compromised when:

- "1. a former public prosecutor or legal representative sits as a judicial officer in a case in which he or she prosecuted or represented a party;
2. a judicial official secretly participated in the investigation of a case;
- 3a judicial official has some connection with the case or a party to the case; or
4. a judicial official sits as member of an appeal tribunal in a case which he or she decided or participated in a lower judicial body".⁷

105. In the instant case, the evidence adduced by the Applicant does not sufficiently demonstrate that any of the above factors existed in the course of her trial. In the circumstances, the Court dismisses this allegation.

4. The principle of legality of crimes and punishment and non-retroactivity of criminal law

106. The Applicant submits that she was first charged and convicted for the crime of propagating the ideology of genocide under Law No. 18/2008 of 23 July, 2008. Subsequently, the Supreme Court found her guilty of minimising genocide, re-qualifying the acts under a new law, that is, Law No. 84/2013 on the repression of the ideology of the crime of genocide, which entered into force on 28 October, 2013. According to her, the reference to this new law by the Supreme Court violates the principle of non-retroactivity of the law and the non-retroactive application of the criminal punishment.

107. The Respondent contends that the principle of legality of crimes and penalties as provided under Article 7 (2) of the Charter was fully respected during the trial.

⁷. *Ibidem*

For the Respondent, any Judge both at the High Court and the Supreme Court has the last word in terms of re-characterising an offence and applying the appropriate law, and this does not amount to a violation of the principle of legality and non-retroactivity of the law.

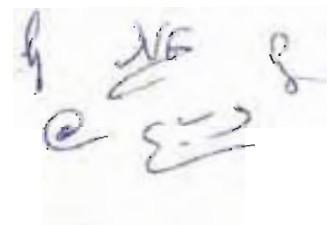
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108. The Court notes that the relevant provision for the issue at hand is Article 7 (2) of the Charter, which states that:

"No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed..."

109. The non-retroactivity of criminal law is an important rule intrinsic to the principle of legality, which stipulates, among others, that criminal responsibility and punishment must be based only on the prior promulgation of laws which prohibit a particular conduct. The principle of legality requires that society is informed of prohibited behaviour before the law prohibiting or criminalising such behaviour comes into force. In other words, the prohibited conduct must be clear and verifiable and the punishment that an infringement entails should be specified before individuals are held accountable for the same.
110. The rule of non-retroactivity forbids the retrospective application of a criminal law to acts committed before the enactment of the law when such law makes previous lawful acts reprehensible or attaches new punishment to the existing criminal acts. The only exception where a criminal law may apply retroactively is when its application favours an individual by decriminalising a previous criminal conduct which he/she is accused of or provides lighter penalty than the law which was in force during the commission of the conduct.⁸
111. In the instant case, the Court observes that crimes for which the Applicant was convicted were said to have been committed between 2003 and 2010. During

⁸ See Article 15 (1) of the ICCPR.



this time, there were four criminal laws in the Respondent State governing the offences she was charged with: the 1977 law instituting the Penal Code, Law No. 33/2003 of 6 September, 2003, on the Repression of Crimes of Genocide and Crimes against Humanity of 2003, Law No. 18/2008 of the 23 July, 2008, on the Repression of the Crime of Ideology of Genocide and Law No.45/2008 on Counter-terrorism of 9 September, 2008. Law No. 18/ 2008 repealed the Law No. 33/2003 to the extent the latter contradicts the provisions of the former.

112. The Court notes that Article 4 of Law No. 33/2003 of 2003 contains a provision criminalising minimisation of genocide while Law No. 18/ 2008 of 2008 on the Crime of the Ideology of Genocide does not have a similar provision. In other words, as far as the crime of minimisation of genocide is concerned; Law No. 33/2003 of 2003 continued to apply. However, in 2013, both Law No. 33/2003 of 2003 and Law No. 18/2008 of 2008 were repealed by Law No. 84/2013 of 2013 on the Crime of Genocide and Other related offences. Similarly, the 1977 Law Instituting the Penal Code was replaced by the 2012 Law Instituting the Penal Code.

113. Under its Article 6, Law No. 84/2013 of 2013 provides for provisions on minimisation of genocide. In comparison to Law No. 33/2003 of 2003, which provides for 10-20 years imprisonment for the crime of minimisation of genocide, Law No. 84/2013 provides for five (5) to nine (9) years imprisonment for the same crime.⁹ On the other hand, for crimes of conspiracy and threatening State security and the Constitution, and crimes of spreading rumours with intent to incite the population against the existing authorities, the 1977 Penal Code provides a criminal punishment extending up to life imprisonment while the 2012 Penal Code provides a maximum penalty ranging from 20- 25 years for these same crimes.

114. The Court notes that the Applicant was initially charged with propagating the ideology of genocide before the High Court on the basis of Law No 18/2008 of 2008. However, the High Court re-qualified the charge and convicted her for

⁹ Article 12 (3) Law No. 84/2013 "cum" article 116 of the 2012 Organic Law Instituting the Penal Code.

the crime of revisionism of genocide on the basis of Article 4 of Law No. 33/2003 of 2003 and crime of treason to threaten state security and the Constitution under the 1977 Penal Code, and sentenced her to 8 years imprisonment. On appeal, the Supreme Court sustained the conviction but rejected the mitigating circumstances invoked by Applicant and crimes of which she was acquitted at the High Court. The Supreme Court, citing the existence of concurrence of crimes, imposed a punishment of 15 years imprisonment on the basis of Law No. 84/2013 of 2013 and the 2012 Penal Code for the crime of minimising genocide and crimes of conspiracy and threatening State security.

115. The Court is of the view that the rule of non-retroactivity of the law does not preclude the requalification of a criminal charge in the course of a criminal trial resulting from the same facts. What is rather prohibited is the application of new criminal laws, in the instant case, Law No. 84/2013 of 2013 and the 2012 Penal Code, to crimes alleged to have been committed before the coming into force of such law.
116. However, as indicated above, the punishments for the crime of threatening State security and the Constitution in the 1977 Penal Code may extend to life imprisonment and for the crime of minimisation of genocide in the Law No. 33/2003 of 2003 ranges from 10-20 years as opposed to 15 years' imprisonment in the 2012 Penal Code and 5-9 years imprisonment prescribed in the Law No. 84/2013, respectively.
117. It is therefore evident that the application of the 2012 Penal Code and Law No. 84/2013 on the Applicant was in general favourable and is congruent with the exception to the rule of non-retroactivity, that new criminal laws may be applied to acts committed before their commission when these laws provide lighter punishment. The fact that the punishment imposed on the Applicant by the Supreme Court was higher than the penalty that was initially imposed by the High Court was not because of the retroactive application of the new laws. As the records before this Court reveal, this was rather because the Supreme Court had rejected the mitigating circumstances considered by the High Court,

and convicted the Applicant for an offense (spreading of rumours) for which she had been acquitted by the High Court. This in itself is not a violation of the principle of non-retroactivity of criminal law.

118. The Court therefore, finds that there was no violation of Article 7 (2) of the Charter.

119. For the avoidance of doubt, the Court wishes to state that this finding of the Court relates only to the allegation of violation of the principle of non-retroactivity, and is without prejudice to its position with respect to the right to freedom of expression and opinion below.

B. Freedom of Opinion and expression

120. The Applicant contends that she was convicted for minimisation of genocide whereas the opinion she expressed in the course of her speech at the Kigali Genocide Memorial concerned the management of power, the sharing of resources, the administration of justice, the history of the country and the attack that led to the demise of the former President of the Republic. The Applicant submits that she had no intention to minimise and trivialise genocide or to practice the ideology of genocide and that the right to express her opinion was protected by the Constitution of Rwanda and other international instruments.

121. The Applicant maintains that the laws of Rwanda which criminalise the negation of genocide are vague and unclear, and do not comply with the requirement that restrictions on the rights of individuals must be necessary. She added that the Respondent State had admitted that there were defects in the laws penalising the minimisation of genocide.

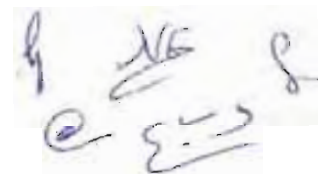
122. The Applicant further contends that she was found guilty of spreading rumours likely or seeking to cause a revolt among the population against established authority. She also contends that in convicting her for propagating rumours, the local courts failed to prove or to substantiate their arguments through specific and corroborative evidence showing that her positions were likely to establish her criminal liability.

123. During the Public Hearing before this Court on 22 March 2017, Counsel for the Applicant, in reference to a letter from the Applicant, said:

"We are not against a law to punish those who minimize the genocide committed against Tutsis in Rwanda, as is the case for other genocides committed elsewhere. But we demand solid benchmarks to avoid any amalgamation and the use of such a law for political purposes. Thus, we demand that such a law clearly show the border between the legitimate freedom of opinion and the actual crime of minimisation of genocide. "

124. For the Applicant, the theory of margin of appreciation invoked by the Respondent State refers to the latitude that the international monitoring bodies are willing to grant national authorities in fulfilling their obligations under the international human rights instruments they have ratified. The theory can also be described as the latitude a government enjoys in evaluating factual situations and in applying the provisions set out in international human rights instruments. This theory is premised on the fact that the process of realising a "uniform standard" of human rights protection must be gradual because the entire legal framework rests on the fragile foundations of the consent of Member States. According to the Applicant, the margin of appreciation provides the flexibility needed to avoid damaging confrontations between human rights tribunals and Member States, and enables the Court to strike a balance between the sovereignty of States and their international obligations.

125. The Respondent State argues that the right to express one's opinion is subject to limitations and that considering the social context, the history of and environment in Rwanda, there was reason to enact laws to penalise the



minimisation of genocide. It also notes that the Judgment of its Supreme Court had alluded to the fact that other countries had imposed similar restrictions so as to prevent the minimisation of genocide.

126. The Respondent State affirms that this Court should apply the subsidiary principle and adopt a margin of appreciation in its assessment of the internal situation of Rwanda.

127. The Respondent State submits that in examining the Application, the Court should consider the margin of appreciation in complying with Article 1 of the Charter. In this regard, it argues that "the content given to the right cannot be enforced in a vacuum and as such the ambit of its enforcement will be heavily influenced by the domestic context in which that right operates". To this end, the Respondent State avers that "it is critical that the African Court gives serious contextual consideration to the domestic situation when evaluating a particular State's level of compliance". On the principle of subsidiarity, the Respondent State submits that:

"... since the initial responsibility rests with the Respondent [State] to give effect to the rights guaranteed by the Charter, she also has to be given an opportunity through her institutions to decide how to discharge this duty".

128. The National Commission for the Fight against Genocide (*CNLG*), intervening as *Amicus Curiae*, argues that the theory of double genocide to which the Applicant referred is nothing but another way of denying the genocide perpetrated in 1994 against Tutsis in Rwanda. According to *CNLG*, revisionism is structured around a number of affirmations which help to conceal the criminal intent that is an integral part of the crime of genocide, without denying the reality of the massacres and to sustain the idea of double genocide. *CNLG* submits further that the theory of double genocide is intended to transform the 1994 genocide against Tutsis in Rwanda into an inter-ethnic massacre, and at the same time, exonerate the perpetrators, their accomplices and their sympathisers.

129. *CNLG* further alleges that the statements made by the Applicant at the Kigali Genocide Memorial constitute a form of expression of the theory of double genocide in Rwanda, a manipulation skilfully executed and sowing the seeds

of confusion around the genocide committed against the Tutsis in Rwanda in 1994. According to CNLG, this statement signifies that there were two genocides in Rwanda, and that the Tutsis are therefore as guilty as their executioners. It submits that the Applicant's statements are a revisionist manoeuvre with the peculiar feature of using partial and dishonest methodology to select, disguise, divert or destroy information that corroborates the existence of genocide against the Tutsis.

* * *

130. The Court notes that the Charter in its Article 9 (2) enshrines the right to freedom of expression in the following terms:

"Every individual shall have the right to express and disseminate his opinions within the law".

131. Article 19 of the ICCPR also provides that:

"1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

132. The right to freedom of expression is one of the fundamental rights protected by international human rights law, the respect of which is crucial and

indispensable for the free development of the human person and to create a democratic society. It comprises *inter alia*, the freedom to express and communicate or disseminate information, ideas or opinions of any nature in any form and using any means, whether at national or international level. The right to free expression requires that States protect this right from interferences regardless of whether the interferences originate from private individuals or government agents.

133. While freedom of expression is as important as all other rights for the self-development of individuals within a democratic society, it is not a right to be enjoyed without limits. In its Judgment in the Matter of *Lohé Issa Konaté v Burkina Faso* of 5 December 2014, this Court emphasised that freedom of expression is not an absolute right and under some circumstances, it may be subject to some restrictions. In that judgment, relying on Article 19 (3) of ICCPR and the jurisprudence of the African Commission on Human and Peoples' Rights, and other international and regional human rights bodies, the Court held that the terms "within the law" in Article 9 (2) of the Charter envisage the possibility where restrictions may be put in place on the exercise of freedom of expression provided that such restrictions are prescribed by law, serve a legitimate purpose and are necessary and proportional as may be expected in a democratic society.¹⁰

134. In the instant case, the Court infers from the undisputed submissions of both Parties that the Applicant was convicted and sentenced both at the High Court and the Supreme Court of the Respondent State for the remarks that she made at the Kigali Genocide Memorial, and her interviews and other statements she expressed on different occasions. It is no question that the said conviction and sentence of the Applicant constitute a restriction on her freedom of expression for the purpose of Article 9 (2) and in terms of Article 19 (3) of ICCPR. The key issue that the Court should thus address is whether such restriction was admissible, in that, it was provided by law, served a legitimate purpose, and was necessary and proportional in the circumstances of the case.

¹⁰ , *Lohé Issa Konaté v Burkina Faso*, judgment of 5 December 2014 paragraphs 145-166.

1) Whether the interference was provided by law

135. The Applicant does not dispute the fact that her conviction and sentence for the crimes of minimisation (revisionism) of genocide, spreading rumours to undermine the authority of the government, propagating the ideology of genocide and threatening State security and the Constitution were based on the national law of the Respondent State. The records of the case reveal that both the High Court and Supreme Court in their verdicts relied upon Law No. 33/2003, Law No. 84/2013 and the 2012 Penal Code. However, the Applicant challenges the nature of these laws, asserting that they are 'vague and unclear'.

136. The Court recalls its established jurisprudence that the reference to the 'law' in Article 9 (2) of the Charter and in other provisions of the Charter must be interpreted in the light of international human rights standards¹¹, which require that domestic laws on which restrictions to rights and freedoms are grounded must be sufficiently clear, foreseeable and compatible with the purpose of the Charter and international human rights conventions and has to be of general application.¹²

137. In the instant case, regarding the Applicant's assertion that the laws relating to the minimisation of genocide is vague and unclear, the Court notes that some provisions of the aforementioned laws of the Respondent State are couched in broad and general terms, and may be subject to various interpretations.¹³

¹¹ Idem, paragraph 129.

¹² Human Rights Committee, *A v. Australia*, 30 April 1977, para. 9.5; Inter-American Human Rights Committee, *Coard and al. United States*, 29 September 1999, paras 42-59; European Court of Human Rights, *Medvedyev and others v. France*, judgment of 29 March 2010, paras. 92-100.

¹³ See for example, Article 8 of Law No. 84/2013 of 28 October 2013 on the crime of the ideology of genocide, which stipulates that: "The minimization of genocide is any intentional act manifested in public aimed at: 1. Minimising the seriousness of the consequences of the genocide; 2. minimising the methods by which the genocide was committed. Whoever commits an act provided for in the preceding paragraph, shall be guilty of an offense of minimization of the genocide". Article 116 of the Code of Criminal Procedure on negation and minimization of the genocide also stipulates that: "Anyone who, publicly, in his words, writings, images or in any other way, denies the genocide perpetrated against the Tutsi, grossly trivializes it, seeks to justify it or to approve its basis or conceals or destroys the evidence, is liable to imprisonment for more than (5) to (9) years"

138. Nonetheless, the nature of the offences, that these laws seek to criminalise, is admittedly difficult to specify with precision. In addition, considering the margin of appreciation that the Respondent State enjoys in defining and prohibiting some criminal acts in its domestic legislation, the Court is of the view that the impugned laws provide adequate notice for individuals to foresee and adapt their behaviour to the rules.¹⁴ The Court therefore holds that the said laws satisfy the requirement of "the law" as stipulated under Article 9(2) of the Charter.

2) Whether the restriction served a legitimate purpose

139. In its submissions, the Respondent alludes that, given its past history of genocide, the kind of restrictions imposed by the domestic law (which were applied on the Applicant) are meant to protect State security and public order. The nature of the crimes for which the Applicant was charged and convicted also relate to the protection of national security, from expressions which may create divisionis among the people and internal strife against the government.

140. Unlike Article 19 (3) of the ICCPR, the Court notes that Article 9 (2) of the Charter does not list those legitimate purposes for which the right to freedom of expression may be restricted. Nonetheless, the general limitation clause under Article 27 (2) of the Charter requires that all rights and freedoms must be exercised "with due regard to the rights of others, collective security, morality and common interest". In its case law, the Court has also acknowledged that restrictions on freedom of expression may be made to safeguard the rights of others, national security, public order, public morals and public health.¹⁵

141. In the instant case, the Court considers that the crimes for which the Applicant was convicted were serious in nature with potential grave repercussions on State security and public order and the aims of the abovementioned laws were to protect the same. The Court therefore holds that the restriction made on the Applicant's freedom of expression served the legitimate interests of protecting national security and public order.

3) Whether the restriction was necessary and proportional

¹⁴ Issa Konate Judgment, paragraph 128.

¹⁵ Issa Konate v. Burkina Faso, judgment of 5 December 2014 Judgment, paragraph. 134-135.

142. The Court notes that restrictions made on the exercise of freedom of expression must be strictly necessary in a democratic society and proportional to the legitimate purposes pursued by imposing such restrictions.¹⁶ In this regard, the Court wishes to point out that, the determination of necessity and proportionality in the context of freedom of expression should consider that some forms of expression such as political speech, in particular, when they are directed towards the government and government officials, or are spoken by persons of special status, such as public figures, deserve a higher degree of tolerance than others.¹⁷

143. It should also be noted that freedom of expression protects not only "information" or "opinions that are favourably received or regarded as inoffensive, but also those that offend, shock or disturb" a State or any section of the population.¹⁸

144. The Court is also of the opinion that the assessment of necessity and proportionality under Article 9 (2) of the Charter and Article 19 (3) of ICCPR cannot be done in a vacuum and due consideration should be given to particular contexts in which the impugned expressions were made.

145. In the instant Application, the Respondent State and CNLG in their submissions aver that the various statements made by the Applicant on different occasions, including those made at the Kigali Genocide Memorial were intended to minimise the genocide committed against Tutsis, by propagating the idea of 'double genocide', and sought to undermine the authority of the government by inciting citizens to turn against the government by spreading rumours that create divisions and internal strife among the people of Rwanda. In this regard, the Respondent State prays the Court, in determining the matter, to consider

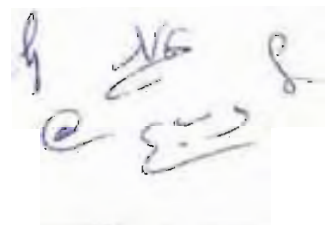
¹⁶ Issa Konate Judgment paragraph 145.

¹⁷ Ibid, paragraph 155. See also: African Commission on Human and Peoples' Rights, *Kenneth Good v Republic of Botswana*, (2010), paragraph 198; Inter-American Court of Human Rights, *Ivcher-Bronstein v. Peru*, Judgment of 6/2/2001, paragraph 15, *Case of Ivcher-Bronstein v. Peru* (IACtHR, Preliminary Objections, Merits, Reparations and Costs), Judgment of 2/7/ 2004, paragraph 127, *Case of Ricardo Canese v. Paraguay*, IACtHR, (Merits, Reparations and Costs), judgment of 31/8/2004, paragraph 98.

¹⁸ See *ECHR Handyside v. the United Kingdom*, (1976), paragraph 49, see also *Gunduz v. Turkey*, Judgment of 4/12/2003, paragraph 37, Human Rights Committee, *General Comment 34* (2011), paragraph 11.

its particular past history and apply the principles of margin of appreciation and subsidiarity.

146. For its part, the Applicant insists that the laws of Rwanda which criminalise the negation and minimisation of genocide do not comply with the requirement that restrictions on the rights of individuals must be necessary. The Applicant also contends that her conviction for spreading rumours likely or seeking to cause a revolt among the population against established authority was not substantiated in the domestic courts through specific and corroborative evidence showing that her positions were likely to establish her criminal liability.
147. The Court wishes to underscore that it is fully aware and cognisant of the fact that Rwanda suffered from the most atrocious genocide in the recent history of mankind and this is recognised as such internationally. This grim fact of its past evidently warrants that the government should adopt all measures to promote social cohesion and concordance among the people and prevent similar incidents from happening in the future. The State has the responsibility to ensure that the laws in this respect are respected and that every offender answers before the law. It goes without saying that it is entirely legitimate for the State to have introduced laws on the "minimisation", "propagation" or "negation" of genocide.
148. Nevertheless, the laws in question should not be applied at any cost to the rights and freedoms of individuals or in a manner which disregards international human rights standards. The legitimate exercise of rights and freedoms by individuals is as important as the existence and proper application of such laws and is of paramount significance to achieve the purposes of maintaining national security and public order. In all circumstances, it is important that restrictions made on the fundamental rights and freedoms of citizens are warranted by the particular contexts of each case and the nature of the acts that are alleged to have necessitated such restrictions.
149. It is thus incumbent upon this Court to examine the nature of the opinion alleged to have been expressed by the Applicant and determine whether such expression warranted her conviction and imprisonment, and whether such measure was proportional under the circumstances.



150. In this regard, the Court notes from the records of the file that the Applicant's statements that were alleged to have been made on different occasions were of two natures: those remarks made in relation to the Genocide, particularly, at the Kigali Genocide Memorial and those directed against the government, including the President of the Republic, and the Judiciary (comprising the *Gacaca Courts*).

151. At the Kigali Genocide Memorial, the Applicant claims to have made the following statement in Kinyarwanda:

"...if we look at this memorial, it only refers to the people who died during the genocide against the Tutsis. There is another untold story with regard to the crimes against humanity committed against the Hutus. The Hutus who lost their loved ones are also suffering; they think about the loved ones who perished and are wondering "When will our dead ones also be remembered?"¹⁹

152. In its submissions, the Respondent has not made any comments on the authenticity of this statement.

153. However, the Court notes from the records that the Applicant's statement at the Memorial, as indicated in the High Court's judgment of 30 October, 2012, reads as follows:

" ...For example, we are honouring at this Memorial the Tutsis victims of Genocide, there are also Hutus who were victims of crimes against humanity and war crimes, not remembered or honoured here. Hutus are also suffering. They are wondering when their time will come to remember their people (...)"²⁰

154. On the other hand, the Court further notes from the files that the statements of the Applicant at the Memorial, as recounted by the Supreme Court reads as:

"...For instance, this memory has been dedicated to people who were killed during the genocide against the Tutsi, however there is another side of

¹⁹ See submission of the Applicant (Annex 3).

²⁰ See the Judgment of the High Court of Kigali of 30 October, 2012 PARA. 404.

genocide: the one committed against the Hutu. They have also suffered: they lost their relatives and they are also asking, "When is our time?" (...)"²¹

155. The key issue at stake is whether in that speech which the Applicant made at the Genocide Memorial she propagated the 'theory of double genocide'. According to article 5 of Law No. 84/2013 of the 2013 "supporting a double genocide theory for Rwanda" is part of the offence of "negation of genocide". Pursuant to article 6 of the said law,

"Minimization of genocide shall be any deliberate act, committed in public, aiming at:

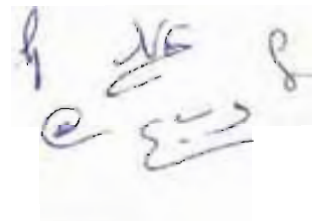
- a. downplaying the gravity or consequences of genocide
- b. Downplaying the methods through which genocide was committed."

156. From the above, the Court takes note that the versions of the Applicant's speech made at the Memorial, as recited by the High Court and the Supreme Court, are at variance with each other and with the Applicant's version. While the version of the speech as indicated by the Supreme Court talks about "another side of genocide: the one committed against the Hutu", the version of the speech, as recounted by the High Court talks about Hutus being "...victims of crimes against humanity and war crimes".

157. In the face of these conflicting versions of the said speech as quoted by the domestic courts of the Respondent State, the Court is of the view that the doubt should benefit the Applicant. In its assessment, the Court therefore will rely on the speech of the Applicant at the Memorial, as recounted by the High Court. In fact, the High Court's version is similar to what the Applicant herself claims to have said and which was tendered before this Court as evidence, which was not challenged by the Respondent State.

158. The Court acknowledges that, as in any country where there is a history of genocide, the issue is very sensitive and opinions or comments made in relation to the genocide may not be treated in a similar manner as opinions expressed on other matters. Statements that deny or minimize the magnitude or effects of the genocide or that unequivocally insinuate the same fall outside the domain

²¹ See the Judgment of the Supreme Court of Rwanda of 13 December 2013 para. 371.



of the legitimate exercise of the right to freedom of expression and should be prohibited by law. In the present Application, the Court is however of the opinion that there is nothing in the statements made by the Applicant, which denies or belittles, the genocide committed against the Tutsi or implies the same.

159. Concerning the allegation that the same remarks at the Genocide Memorial propagated the theory of 'double genocide', the Court is also of the opinion that nothing in her remarks suggests that she advanced this view. The relevant paragraph which the High Court used as evidence for the same (quoted above under paragraph 153) are clear that the Applicant admits "the genocide against the Tutsis" but has never claimed that a genocide was committed against the Hutus. The judgment of the High Court of Kigali itself acknowledges that her statements do not refer to genocide against the Hutu but rather reached a different conclusion relying on the context in which they were made. In this connection, the Court understands that the contexts in which statements are expressed may imply a different meaning than the ordinary message that they convey. Nevertheless, in circumstances where statements are unequivocally clear, as is in the present case, putting severe restrictions such as criminal punishments, on the rights of individuals merely on the basis of contexts would create an atmosphere where citizens cannot freely enjoy basic rights and freedoms, including the right to freedom of expression.

160. The second group of statements made by the Applicant contain severe criticisms against the government and public officials, that includes statements which allege that political power is "dominated by a small clique" that has "a secret parallel power structure around President Kagame, DMI [Directorate of Military Intelligence], the local defence force, ... the judiciary and the executive branches of the government"²²; and stating that she is ready to fight against "the yoke [of fear], poverty, hunger, tyranny, servitudes, corruption, unfair Gacaca court system, repression, prison term for works of general interests (TIG), reasons that lead people to flee the country, inequality, expropriation, homelessness, lack of self-esteem and killing through torture".²³

²² See *Ingabire Victoire and others v. the Prosecution*, Judgment of the High Court of Kigali, para. 288

²³ *Ibid*, para. 306

161. The Court notes that some of these remarks may be offensive and could have the potential to discredit the integrity of public officials and institutions of the State in the eyes of citizens. However, these statements are of the kind that is expected in a democratic society and should thus be tolerated, especially when they originate from a public figure as the Applicant is.²⁴ By virtue of their nature and positions, government institutions and public officials cannot be immune from criticisms, however offensive they are; and a high degree of tolerance is expected when such criticisms are made against them by opposition political figures. An examination of these statements cannot reasonably be considered as capable of 'inciting strife'; creating 'divisions among people' or 'threatening the security of the State'. In fact, even though these statements were made at different times before the Applicant was jailed for the same, there is no evidence showing that the statements caused strife, public outrage or any other particular threat to the security of the State or public order.

162. In light of the foregoing, the Court finds that the Applicant's conviction and sentence for making the above statements both at the Kigali Genocide Memorial and on other occasions, was not necessary in a democratic society. Even if this Court were to accept that there was a need to put restrictions on such statements, the Applicant's punishment was not proportionate to the legitimate purposes which the conviction and sentence seek to achieve. In this regard, the Court notes that the Respondent State could have adopted other less restrictive measures to attain the same objectives.

163. The Court therefore finds that there was a violation of Article 9 (2) of the Charter and Article 19 of the ICCPR.

VIII. REMEDIES SOUGHT

164. In the Application, as stated earlier, the Court is requested to: (a). Repeal, with retroactive effect, sections 116 and 463 of Organic Law N° 01/2012 of 2 May, 2012, relating to the Penal Code as well as that of Law N° 84/2013 of 28 October, 2013, relating to the punishment of the crime of the ideology of the Genocide, (b) Order the review of the Case (c) Annulment of all the decisions

²⁴ Issa Konate Judgment, para 155.

that had been taken since the preliminary investigation up till the pronouncement of the last judgment, (d) Order the Applicant's release on parole; and (e) Payment of costs and reparations.

165. Article 27(1) of the Protocol provides that "if the Court finds that there has been violation of a human or peoples' rights it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

166. In this respect, Rule 63 of the Rules provides that "the Court shall rule on the request for reparation by the same decision establishing the violation of a human and people's rights, or if the circumstances so require, by a separate decision".

167. As regards the Applicant's prayers (a), (b) and (c), the Court reiterates its decision in *Ernest Francis Mtingwi v. Republic of Malawi*, that it is not an appeal court with respect to the decisions and does not have the power to repeal national legislation. It therefore does not grant the requests.

168. Regarding the Applicant's prayer to be set free, the Court has established that such a measure could be directly ordered by the Court only in exceptional and compelling circumstances²⁵. In the instant case, the Applicant has not provided proof of such circumstances. Consequently, the Court does not grant this prayer.

169. The Court however notes that such finding does not preclude the Respondent State from considering such measure on its own.

170. The Court finally notes that none of the parties filed submissions on other forms of reparations. It will therefore make a ruling on this question at a later stage of the procedure after having heard the parties.

X. COSTS

²⁵ Alex Thomas v. The United Republic of Tanzania, Judgment of 20 November 2015, paragraph 157; Mohamed Abubakari v. The United Republic of Tanzania, Judgment of 3 June 2016, paragraph 234.

171. In terms of Rule 30 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."

172. Having considered the circumstances of this matter, the Court decides that the question of cost will be addressed when considering reparations.

173. For these reasons:

THE COURT,

Unanimously

On jurisdiction

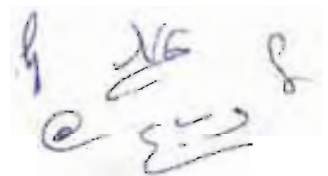
- (i) *Dismisses the objection to the Court's jurisdiction raised by the Respondent State;*
- (ii) *Holds that it has jurisdiction to hear the instant Application;*

On admissibility

- (iii) *Dismisses the objection to admissibility of the Application raised by the Respondent State;*
- (iv) *Holds that the Application is admissible;*

On the Merits

- (v) *Holds that the Respondent State has not violated Article 7 (1) b and d of the Charter as regards the right to presumption of innocence and the right to be tried by a neutral and impartial tribunal;*
- (vi) *Holds that the Respondent State has not violated Article 7 (2) of the Charter as regards the right to the application of the principle of equality of crime and punishment;*



- (vii) *Holds* that the Respondent State has not violate Article 7 (1) (c) of the Charter relating to the searches conducted on the Counsel and on the defence witness;
- (viii) *Holds* that the Respondent State has violated Article 7 (1) (c) of the African Charter on Human and Peoples' Rights as regards the procedural irregularities which affected the rights of the defence listed in paragraph 97 of this Judgment;
- (ix) *Holds* that the Respondent State has violated Article 9 (2) of the African Charter on Human and Peoples' Rights and Article 19 of the International Covenant on Civil and Political Rights on freedom of expression and opinion;
- (x) *Orders* the Respondent State to take all necessary measures to restore the rights of the Applicant and to submit to the Court a report on the measures taken within six (6) months;
- (xi) *Dismisses* the Applicant's prayer for the Court to order her direct release, without prejudice to the Respondent State's power to take this measure itself;
- (xii) *Defers* its decision on other forms of reparation;
- (xiii) *Grants* the Applicant, pursuant to Rule 63 of its Rules, a period of thirty (30) days from the date of this Judgment to file her observations on the Application for reparation and the Respondent State to file its Response within thirty (30) days from the date of receipt of the Applicant's observations.

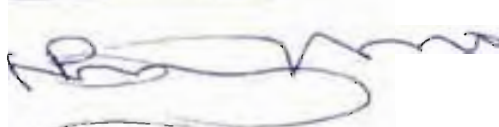
Done at Arusha, this 24th day of the month of November, in the year Two Thousand and Seventeen, in English and French, the French text being authoritative.

Signed:

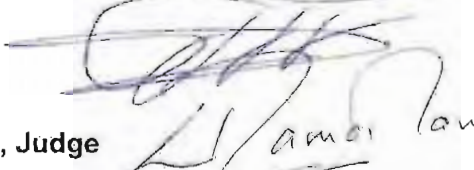
Sylvain ORÉ, President



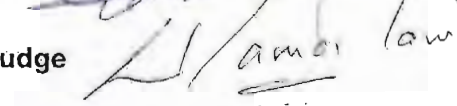
Ben Kioko, Vice President



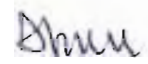
Gérard NIYUNGEKO, Judge



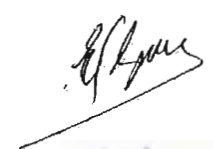
Augustino S.L. RAMADHANI, Judge



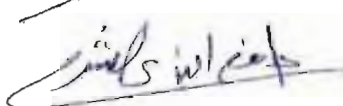
Duncan TAMBALA, Judge



EL Hadji GUISSSE, Judge

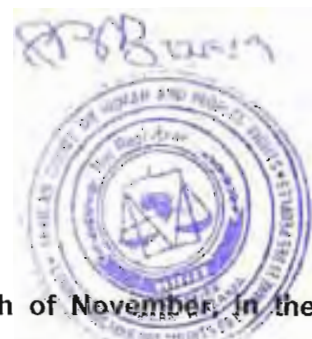


Rafâa Ben ACHOUR,



Solomy S. BOSSA, Judge; and

Robert ENO, Registrar

Done at Arusha, this 24th day of the month of November in the year Two Thousand and Seventeen, in English and French, the French text being authoritative.

ANNEX N

Assessing Rwexit: the impact and implications of Rwanda's withdrawal of its article 34(6)-declaration before the African Court on Human and Peoples' Rights

*Oliver Windridge**

ABSTRACT: This article reviews and analyses Rwanda's withdrawal of the declaration that allows individuals and NGOs direct access to the African Court of Human and Peoples' Rights, pursuant to article 34(6) of the African Court Protocol, which is a first in the young life of the preventing those accused of genocide minimisation or denial from accessing the African Court, thus seemingly attempting to deny certain Rwandans an avenue to assert their rights. The article further argues that, faced with the first prominent challenge to its authority, the African Court produced a well-reasoned decision that allows withdrawal but only after a 12-month cooling off period. What is of more concern is what appears to be a six-month delay in rendering the publicly available decision, which is unfortunate especially in the context of an envisaged 12-month cooling-off period. The article concludes by noting that any concerns of a flood of similar withdrawals has yet to occur, but adds that the decision puts the African Court in good stead to consider similar applications, as long as the African Court adheres to a stricter timeline for the publication of such decisions.

TITRE ET RÉSUMÉ EN FRANCAIS:

Evaluation du Rwexit: impact et conséquences du retrait par le Rwanda de sa déclaration de reconnaissance de la juridiction de la Cour africaine des droits de l'homme et des peuples faite aux termes de l'article 34(6)

RÉSUMÉ: Cet article examine le retrait de la déclaration du Rwanda autorisant les individus et les Organisations Non Gouvernementales à saisir directement la Cour africaine des droits de l'homme et des peuples, conformément à l'article 34(6) du Protocole à la Cour africaine. Ce retrait est une première dans la vie de la jeune juridiction et qui aurait pour but d'empêcher les personnes accusées de minimisation ou de négation du génocide d'avoir accès à la Cour africaine et apparaît visiblement, par conséquent, comme une tentative de dénier à certains Rwandais une voie de recours pour faire valoir leurs droits. Cet article avance en outre que, confrontée au premier défi majeur à son autorité, la Cour africaine a rendu une décision bien motivée qui autorise le retrait, mais seulement après un délai de 12 mois, considéré comme un préavis. Ce qui est plus préoccupant est le retard de six mois mis pour rendre l'arrêt disponible au public, un fait regrettable eu égard particulièrement à l'option d'un retrait assorti d'un délai de préavis de 12 mois. L'article conclut en notant que la crainte d'une multiplication de retraits similaires ne s'est pas encore réalisée mais ajoute que la décision qu'elle a rendue met la Cour en état d'examiner des demandes similaires pour autant que de telles décisions soient publiées dans des délais plus strictes.

KEY WORDS: African Court on Human and Peoples' Rights, African Charter on Human and Peoples' Rights, Rwanda, article 34(6)-declaration, direct access, fair trial

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1 INTRODUCTION

The African Court on Human and Peoples' Rights (African Court) is the apex judicial body of the African Union (AU). It has a wide jurisdiction to consider alleged violations of the African Charter on Human and Peoples' Rights (African Charter) and other international human rights instruments ratified by a AU member state subject to a petition.¹ All 55 African Union member states, with the exception of the recently re-admitted Morocco, have ratified the African Charter, providing – at least in theory – near universal protection of human and peoples' rights across Africa. However, when violations of the African Charter and other international human rights instruments occur, accessing the African Court is far from straight forward. Indeed, while the African Court aspires to be a truly continental human and peoples' rights court, so far, its wings have been clipped.

The difficulty in accessing the African Court derives largely from the triple layer of ratifications and signatures needed from an AU member state in order for individuals and NGOs with observer status

1 The African Charter on Human and Peoples' Rights entered into force in October 1986. For jurisdiction of the African Court see rule 26(1) of the Rules of Court 'Pursuant to the Protocol, the Court shall have jurisdiction: a) to deal with all cases and all disputes submitted to it concerning interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the States concerned ...'; see also article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol). As to what these 'other international human rights instruments' might include see *Actions pour la protection des droits de l'homme (APDH) v Cote D'Ivoire* Application 1/2014 Judgment on Merits 18 November 2016 concluding that the African Charter on Democracy, Elections, and Governance and the ECOWAS Protocol on Democracy and Good Governance met the standard and found violations of both instruments in addition to violations of the African Charter. This approach will likely be tested further by the pending case of *APDH and Institute for Human Rights and Development in Africa (IHRDA) v Mali* Application 46/2011 which alleges violations of the African Charter on the Rights and Welfare of the Child (ACRWC), the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, but not the African Charter itself – a first for an application before the African Court. As to the jurisdictional scope of the African Court, see also MD Evans & R Murray (eds) *African Charter on Human and Peoples' Rights: the system in practice 1986-2000* (2002); F Ougergouz *The African Charter of Human and People's Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 77–192. As to jurisdiction see N Jansen Reventlow 'The unique jurisdiction of the African Court on Human and Peoples' Rights: protection of human rights beyond the African Charter' *Doughty Street International Law Bulletin* 18 February 2017 <http://doughty-street-chambers.newsweaver.com/International/j7yocx3x54xla3dst9l3q9?a=1&p=1457008&t=174031> (accessed 18 January 2019).

before the African Commission on Human and Peoples' Rights (African Commission) to directly bring cases to the Court.² Out of the 54 AU member states that have ratified the African Charter, 30 have ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (African Court Protocol).³ Ratification of the African Court Protocol allows the African Commission, AU state parties that have either lodged complaints or been the subject of complaints before with the African Commission, AU member states whose citizen has been a victim of human rights violations, and African intergovernmental organizations to access the African Court, but not individuals or NGOs.⁴ In order for individuals and suitably qualified NGOs to access the African Court, an additional declaration must be made by a AU member state pursuant to article 34(6) of the African Court Protocol explicitly allowing such access. At the end of 2018, only eight AU Member States have made the declaration, severely limiting access to the African Union's apex human rights organ. But what happens when one of this select group of eight allowing direct access to the African Court decides it no longer wishes to do allow its citizens direct access? Can an African Union member state simply withdraw? And under what circumstances can this occur, and why? The aim of this article is to examine this exact situation. In 2016 Rwanda declared the withdrawal of access for Rwandan individuals and NGOs on the eve of the African Court hearing its first Rwandan case. This event, a first in the African Court's young life, deserves to be examined not only with regard to the implications this will have on Rwanda and its citizens and civil society, but more widely as to what, if any, impact this could have on the African Court's stated aim of becoming a truly continent-wide human rights court.

To examine this watershed case, this article first reviews the perfunctory stages of ratification and signature required to allow individuals and NGOs direct access to the African Court. It then looks at the case that spurred Rwanda to withdraw, before analysing the African Court's approach to Rwanda's withdrawal, which is termed 'Rwexit'. The article then concludes with additional comments and further analysis.

2 It should be noted that for NGOs to directly access the African Court, even when the AU member State in question has signed or ratified all three layers, the NGO must have observer status before the African Commission on Human and Peoples' Rights. This is an important condition which should not be overlooked. For simplification, this article refers to 'NGOs' but this should be read to mean 'NGOs with observer status before the African Commission' unless otherwise stated. For further discussion on observer status before the African Commission and its impact on applications before the African Court see O Windridge 'Necessary checkpoints or immovable roadblocks? Accessing the African Court on Human and Peoples' Rights' (2018) 35 *Wisconsin International Law Journal* 5.

3 <http://www.achpr.org/instruments/court-establishment/>.

4 See article 5 of the African Court Protocol.

2 ACCESSING THE AFRICAN COURT

The African Court's jurisdiction over applications against any particular AU member state depends on that member state's acceptance of a triple layer of instruments: the African Charter, the African Court Protocol and, with regard to direct access and, with regard to direct access, the declaration under article 34(6).

As mentioned above, every AU member state has ratified the African Charter, except Morocco. The African Charter contains many individual rights found in similar international human rights instruments, plus uniquely peoples' rights. This means that almost every case concerning an AU member state violating the African Charter straddles the first jurisdictional hurdle.

While the African Charter contains provision for the existence of the African Court's cousin, the African Commission, it contains no mention of the African Court itself. To begin the jurisdictional journey to the African Court, the second hurdle must be overcome: the African Court Protocol. This additional protocol is the foundation of the African Court and contains the legislative framework for the creation of the African Court. To date, 30 AU member states have ratified the African Court Protocol.⁵ According to articles 5(1) of the African Court Protocol and Rule 33 of the African Court Rules, upon ratification of the African Court Protocol by an AU member state, the African Court may receive complaints or applications submitted by the African Commission, from one of the state parties that has ratified the African Court Protocol which has lodged a complaint at the African Commission or been subject to a complaint before the African Commission, a state party whose citizen is a victim of a human rights violation, or from an African intergovernmental organization. This list is considerably broader than other regional systems since it includes not only the African Commission but also state parties, African intergovernmental organizations (which would include subregional economic communities).⁶ This hurdle, therefore, effectively gives the 30 AU member states who have accepted as binding the African Court Protocol, intergovernmental organizations and the African Commission access to the African Court but crucially, ratifying the African Court Protocol does not provide direct access for individuals and NGOs.

For individuals and NGOs to enjoy direct access to the African Court, a third hurdle must be surmounted. For individuals and NGOs with observer status before the African Commission to directly access the African Court, thereby bypassing the African Commission but still

5 See ratification table https://www.au.int/web/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_17.pdf.

6 As to the definition of an 'African Intergovernmental Organization' see Advisory Opinion, Request 2/2013, 5 December 2014 paras 58-76 <http://en.african-court.org/images/Cases/Advisory%20Opinion/Advisory%20Opinions/Advisory%20Opinion%20no%20%20002-2013.pdf> (accessed 18 January 2019).

subject to exhaustion of local remedies, an AU member state must sign an additional declaration pursuant to articles 5(1) and 34(6) of the African Court Protocol. Making the declaration is optional, and ratification of the African Court Protocol brings no requirement or timeline for the making such a declaration. As of December 2018, only eight AU Member States have made the declaration: Benin, Burkina Faso, Cote d'Ivoire, Ghana, Malawi, Mali, Tanzania and Tunisia.⁷ This in effect means citizens of only eight out of 55 AU Member States can directly petition the African Court alleging violations of their rights. Importantly for the subject of this article, Rwanda enjoyed membership of this exclusive club, but withdrew from it in 2016. Why Rwanda withdrew its declaration and the procedure for withdrawal will be addressed in the remainder of this article.

3 BACKGROUND TO RWEXIT

Rwanda's withdrawal of its declaration occurred during the pre-hearing procedures of the *Ingabire v Rwanda* case.⁸ In essence, this case concerned the prosecution of Rwandan opposition politician Ingabire Victoire Umuhoza (Ingabire), the leader of the opposition political party *FDU Inkingi* who was alleged to have made speeches and claims either denying or downplaying the 1994 Rwandan genocide.⁹ It is hard to think of a more sensitive issue than the 1994 genocide within Rwanda, and it is within this context that Rwanda's withdrawal of its article 34(6) declaration occurred.¹⁰

Between 2003 and 2010 Ingabire made a number of comments, including at the Kigali Genocide Memorial, concerning the 1994 Rwandan genocide and Rwanda's leaders.¹¹ Ingabire was prosecuted for these comments under various Rwandan laws designed to prevent the minimisation of the Rwandan genocide.¹² In particular, in October 2012 Ingabire was convicted by the High Court of Kigali of 'conspiracy

7 Tunisia is the latest signatory, signing the Additional Declaration in April 2017. See <http://en.african-court.org/index.php/news/press-releases/item/145-republic-of-tunisia-signs-african-court-declaration-to-allow-ngos-and-individuals-to-access-the-human-and-peoples-rights-court-directly>. For a list of signatures see https://www.au.int/web/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_17.pdf (accessed 18 January 2019), although it is noted that at the time of writing the current list had not been amended to reflect Tunisia's making the declaration.

8 *Ingabire Victoire Umuhoza v Republic of Rwanda* Application 3/2014 Ruling on Jurisdiction 3 June 2016 (Ruling on Jurisdiction); *Ingabire Victoire Umuhoza v Republic of Rwanda* Application 3/2014 Corrigendum to Ruling on Withdrawal 5 September 2018 (Corrigendum to Withdrawal Ruling); *Ingabire Victoire Umuhoza v Republic of Rwanda* Application 3/2014 Judgment on Merits 24 November 2017 (Judgment on Merits).

9 Ruling on Jurisdiction paras 9-11; Judgment on Merits paras 6-8.

10 In the Judgment on Merits, the African Court considered the 1994 Rwandan genocide as the 'most atrocious genocide in the recent history of mankind'.

11 Judgment on Merits para 134.

12 Judgment on Merits para 8.

to undermine established authority and violate constitutional principles by resorting to terrorism and armed force' and 'minimization of the genocide' and sentenced to eight years' imprisonment with hard labour.¹³ Ingabire appealed these convictions. In December 2013, on appeal, the Rwandan Supreme Court reclassified the convictions, finding her guilty of 'conspiracy to undermine the Government and the Constitution, through acts of terrorism, war or other violent means, of downplaying genocide, and of spreading rumours with the intent to incite the population against the existing authorities'.¹⁴ Ingabire was then re-sentenced to 15 years imprisonment.

Having taken her case to the Rwandan Supreme Court, and therefore as far as possible domestically, Ingabire on 3 October 2014 petitioned the African Court alleging that her arrest, detention, trial and convictions violated the African Charter and the International Covenant on Civil and Political Rights (ICCPR).¹⁵ Specifically, Ingabire argued that her right to fair trial (article 7 of the African Charter) and the right to freedom of expression (article 9(2) of the African Charter and article 19 of the ICCPR) had been violated.¹⁶

4 RWEXIT

In order to properly assess Rwanda's withdrawal of its declaration, which is termed here as 'Rwexit', and the *Ingabire* case that triggered it, some dates are helpful. Rwanda ratified the African Charter on 21 October 1986 and ratified the African Court Protocol on 25 May 2004. It made the article 34(6)-declaration on 22 January 2013.¹⁷ Putting these dates into context with the *Ingabire* case, Rwanda made the declaration approximately four months after Ingabire was convicted by the Kigali High Court.¹⁸ The Rwandan Supreme Court case was dealt with almost a year after the declaration had been put in place. Ingabire then petitioned the African Court on 3 October 2014.¹⁹

Ingabire petitioned the African Court in October 2014 with Rwanda responding on 23 January 2015, to which Ingabire filed her reply on 14 April 2015.²⁰ This sequence of filings is par for the course in African Court litigation, but is notable since at this stage of litigation Rwanda appeared to be fully participating. It cannot be said that Rwanda did not know the content of the application or the identity of the applicant when it chose to respond to the initial petition. The engagement with litigation seems to indicate that Rwanda considered the African Court

13 Judgment on Merits paras 14-25.

14 Judgment on Merits paras 29-33.

15 Ruling on Jurisdiction paras 1 & 12; Judgment on Merits para 9.

16 Ruling on Jurisdiction paras 1 & 12; Judgment on Merits para 9.

17 Judgment on Merits para 2.

18 Additional Declaration signed on 22 January 2013, Ingabire was convicted by the Kigali High Court in October 2012.

19 Ruling on Jurisdiction para 1 & 12.

20 Ruling on Jurisdiction para 14.

a legitimate organ, even if it argued that the case itself was inadmissible and unfounded.

With filing complete, the African Court duly scheduled a public hearing for 4 March 2016.²¹ It appears that in the run up to this hearing Ingabire's legal team wrote to the African Court, seeking an adjournment of the public hearing, while seeking to be heard on procedural matters.²² With four days to go before the public hearing was to take place, on 29 February 2016 Rwanda notified the African Union Commission of its intention to withdraw its declaration.²³ The government's *note verbale* reads as follows:

CONSIDERING the 1994 genocide against the Tutsi was the most heinous crime since the Holocaust and Rwanda, Africa and the world lost a million people in a hundred days;

CONSIDERING that a Genocide convict who is a fugitive from justice has, pursuant to the above-mentioned Declaration, secured a right to be heard by the Honourable Court, ultimately [sic] gaining a platform for re-invention and sanitization, in the guise of defending the human rights of the Rwandan citizens;

CONSIDERING that the Republic of Rwanda, in making the 22nd January 2013 Declaration never envisaged that the kind of person described above would ever seek and be granted a platform on the basis of the said Declaration;

CONSIDERING that Rwanda has set up strong legal and judicial institutions entrusted with and capable of resolving any injustice and human rights issues;

NOW THEREFORE, the Republic of Rwanda, in exercise of its sovereign prerogative, withdraws the Declaration it made on the 22nd day of January 2013 accepting the jurisdiction of the African Court on Human and Peoples' Rights to receive cases under article 5(3) of the Protocol and shall make it afresh after a comprehensive review.²⁴

Rwanda's ambassador to the African Union explained further: 'We quickly realised that [the African Court] is being abused by the judges on absence of a clear position of the court vis-à-vis genocide convicts and fugitives, and that is why we withdrew'.²⁵ Significantly, Rwanda sent its first letter of withdrawal to the AU Commission. Only in a second letter dated 1 March 2016, did Rwanda notify the African Court of its deposit of an instrument of withdrawal with the African Union Commission.²⁶ This sequence appears deliberate. As will be examined in greater detail below, Rwanda sought to argue that the issue of withdrawal of its declaration was a matter for the AU Commission and had nothing to do with the African Court. Rwanda seems to have attempted to strengthen its position by engaging the African Union Commission first, with a subsequent courtesy letter to the African Court

21 Ruling on Jurisdiction para 15.

22 Ruling on Jurisdiction para 17.

23 Judgment on Merits paras 2 & 42.

24 See Centre for Human Rights, University of Pretoria 'Report: Rwanda's withdrawal of its acceptance of direct individual access to the African Human Rights Court' 22 March 2016 https://www.up.ac.za/en/faculty-of-law/news/post_2254556-report-rwandas-withdrawal-of-its-acceptance-of-direct-individual-access-to-the-african-human-rights-court (accessed 18 January 2018).

25 See 'Rwanda rejects calls to endorse African rights court' *The Citizen* 13 July 2016 <http://www.thecitizen.co.tz/News/Rwanda-rejects-calls-to-endorse-African-rights-court/1840340-3292644-1hosoyz/index.html> (accessed 18 January 2018).

26 Ruling on Jurisdiction para 18; Judgment on Merits para 41.

informing it of the action. In its letter to the African Court, this approach is further reinforced by Rwanda arguing that the African Court should suspend hearings involving Rwanda until a review of the withdrawal of the declaration was completed, and that the African Court would be notified in due course, again seemingly attempting to side-line African Court participation.²⁷

Given the contents of the *note verbale* and subsequent diplomatic explanations, the reason for Rwanda's withdrawal seems clear; the declaration's extended jurisdiction was being used by Rwandans alleged to have been involved in genocide minimisation or denial, something the Rwandan government could not accept. In effect, the Rwandan government was taking the stance that access to the African Court was open to Rwandans, just not *all* Rwandans. This position is clearly problematic. Despite the undoubted tragedy that is the Rwandan genocide, the African Charter contains no caveats on who enjoys rights. Simply put, even those accused of the most serious crimes still have protection under the African Charter and other international human rights instruments including the right to a fair trial and the freedom of expression. While the reason for withdrawal does not affect the legitimacy of withdrawal *per se*, the foundations for the withdrawal are nevertheless an important clue to potential future withdrawals by other AU member states.

Despite Rwanda's attempts to halt proceedings, the African Court proceeded with its public hearing on 4 March 2016.²⁸ This can be seen as the African Court's first bold move. It would have been feasible for the African Court to, at the very least, push the date of the public hearing back in order to fully consider Rwanda's withdrawal. However, despite having only a few days' notice, the African Court went ahead with the hearing, indicating perhaps that the African Court was determined to control the timeline of the withdrawal rather than allowing Rwanda to do so. Ingabire's legal team appeared at the public hearing, but Rwanda was unrepresented.²⁹ Ingabire took the opportunity to raise a number of issues concerning the lack of client access and other procedural issues, but the matter of the withdrawal itself was not discussed in any detail during the public hearing.

Following this public hearing, on 18 March 2016, the African Court rendered an interim order giving all parties an opportunity to address the issues of Rwanda's withdrawal of its declaration.³⁰ The order requested that parties file written submissions on the effect of Rwanda's withdrawal of its declaration within 15 days of receipt of the order, and that its ruling on the effect of the Rwanda's withdrawal

27 Judgment on the Merits para 41.

28 Ruling on Jurisdiction paras 20-22

29 Ruling on Jurisdiction para 23. Judgment on Merits para 43. This public hearing largely comprised of procedural matters, with Ingabire's legal team requesting, *inter alia*, the African Court order Rwanda to comply with disclosure of documents and allow access to Ingabire in prison.

30 *Ingabire Victoire Umuhoza v Republic of Rwanda* App 3/2014 Interim Order 18 March 2016 (Interim Order).

would be handed down at a later date.³¹ This again can be seen as a move by the African Court to control the narrative. It also gave all parties an opportunity to set out its thoughts with more clarity than simply the letter of withdrawal.

In its response to the interim order, Rwanda did indeed flesh out somewhat the arguments first raised in its letter of withdrawal. It argued that having deposited its instrument of withdrawal with the AU Commission, by virtue of the principle of ‘parallelism of forms’, only the AU Commission was empowered to decide the withdrawal and its effects.³² Rwanda contended therefore that the African Court and the parties in the case ‘have nothing to do’ with the withdrawal and its effect once the instrument of withdrawal was deposited with the AU Commission and that the debate regarding withdrawal was a matter for the AU.³³

Ingabire argued that while preventing member states from withdrawing from a voluntary declaration may be ‘too radical a position’, this should not allow AU Member States to withdraw ‘at any moment and in any manner’.³⁴ Ingabire further argued that since there were no provisions within the African Court Protocol concerning withdrawal of the declaration, the African Court should be guided by article 56 of the Vienna Convention on the Law of Treaties (Vienna Convention).³⁵ Ingabire contended that the African Court should be further guided by the principle of *pacta sunt servanda*; that parties to a treaty perform their duties in good faith and that this meant any withdrawal must take effect only after a ‘reasonable amount of time’ served as a cooling off period.³⁶ In support, Ingabire pointed to the International Court of Justice decision in *Nicaragua v United States of America, Jurisdiction and Admissibility Judgement*, which argued for a reasonable time for withdrawal from treaties that contain no termination provision.³⁷ Ingabire argued that requiring advance notice of withdrawal is to discourage ‘opportunistic defections’ that would cause the treaty base system to ‘unravel’.³⁸ Ingabire also pointed to the European Court of Human Rights and Inter-American Court of Human Rights that provide for notice periods of six and twelve months respectively, arguing that the African Court should apply a similar standard to withdrawals.³⁹

As to the effect on her case, Ingabire argued that Rwanda’s withdrawal of its declaration should have no effect on cases pending before the African Court based on the principle of non-retroactivity, relying on article 70(1)(b) of the Vienna Convention, which provides

31 Interim Order para 7; Judgment on Merits para 44.

32 Ruling on Jurisdiction para 36.

33 As above.

34 Ruling on Jurisdiction para 38.

35 As above.

36 Ruling on Jurisdiction paras 38-39.

37 Ruling on Jurisdiction para 40.

38 Ruling on Jurisdiction para 41.

39 As above.

that the termination of a treaty, unless otherwise agreed, does not affect pre-existing obligations or legal situations.⁴⁰ Ingabire argued that complaints submitted to the African Court after withdrawal would still be admissible to the extent that they address alleged violations in Rwanda that occurred during the period when Rwanda was still bound by the declaration.⁴¹

The Court also considered an *amicus curiae* brief from the Coalition for the African Court (Coalition).⁴² The Coalition focused on two issues. First, whether Rwanda was entitled to withdraw its declaration and second, if Rwanda could withdraw, the legal effects of withdrawal on pending proceedings.⁴³ Similar to Ingabire, the Coalition argued that since there was a lack of express provision in the African Court Protocol, Rules of the Court or African Charter on the withdrawal of a declaration, the African Court should rely on article 56 of the Vienna Convention.⁴⁴ The Coalition further argued that in making the declaration, Rwanda was under international obligations, and that any reservations included pursuant to article 19(c) of the Vienna Convention must be compatible with the object and purpose of the treaty.⁴⁵ The Coalition then went further, arguing that withdrawal of declaration was inconsistent with the 'spirit' of the AU's human rights instruments.⁴⁶

As to what effect the withdrawal has on pending proceedings, the Coalition argued that Rwanda was required to serve notice of its intention to withdraw at least 12 months in advance to comply with article 56(2) of the Vienna Convention, and that Rwanda's request for an immediate suspension of pending cases breached the provisions of international law on treaties, the African Charter and African Court Protocol.⁴⁷ It noted that the role of the African Court is to preserve, complement and reinforce progress made in the protection of human rights across Africa by the African Commission, which includes ensuring compliance with the criteria on the equality of parties to a trial whether or not a party is a sovereign state.⁴⁸ The Coalition also contended that the African Court should aim at ensuring observance of the right of any victim to seek an effective legal remedy in line with article 7 of the African Charter and the Principles on the Right to a Fair Trial and Legal Assistance in African, as adopted by the African Commission in 2003.⁴⁹

In its decision, the African Court first dealt, albeit briefly, with Rwanda's argument that the African Union Commission rather than

40 Ruling on Jurisdiction para 42.

41 As above.

42 Ruling on Jurisdiction paras 43-47.

43 Ruling on Jurisdiction para 43.

44 As above.

45 Ruling on Jurisdiction para 44.

46 Ruling on Jurisdiction para 45.

47 Ruling on Jurisdiction paras 46-47.

48 Ruling on Jurisdiction para 47.

49 RulAs above.

the African Court had jurisdiction to decide on the issue of withdrawal.⁵⁰ Relying on article 3(2) of the African Court Protocol, which states that in the event of debate over whether the African Court has jurisdiction the African Court shall decide, the African Court found that it was going to do just that and dismissed Rwanda's submissions.⁵¹ Rwanda's arguments on withdrawal appear, at least on the summary submissions available, to have been based solely on the theory that having deposited the instrument of withdrawal with the AU Commission, the issue was out of the African Court's hands. This position can be best described as hopeful. Since the African Court had the express power to consider challenges to its jurisdiction under article 3(2) of the African Court Protocol, Rwanda's attempts to steer the matter away from the African Court to the AU Commission were unlikely to ever to succeed.⁵² Whether Rwanda was keeping its powder dry for further submissions before the AU Commission is unclear, but given the unlikelihood of the African Court leaving a matter as important and so relevant as this to the AU Commission, it may have benefitted Rwanda to have added further submissions on the nature of its withdrawal before the African Court.

With jurisdiction firmly established, and Rwanda's arguments seemingly spent, the African Court was left to consider whether the withdrawal was in fact allowable and if so when it would take effect and what the effect would be. To do this the African Court divided its analysis into three parts: (i) is the withdrawal valid; (ii) if it is valid, what are the conditions for withdrawal?; and (iii) what are the effects of withdrawal?⁵³

With regards to whether Rwanda's withdrawal was valid, the African Court acknowledged that the African Court Protocol does not contain any provisions for the withdrawal from either the African Court Protocol or the declaration contained within it.⁵⁴ The African Court therefore first considered whether the Vienna Convention applies as argued by Ingabire and the Coalition. It noted that the declaration found under article 34(6) of the African Court Protocol necessarily emanates from the African Court Protocol which in turn is subject to the law of treaties, but the making of the declaration is a unilateral act that is not subject to the law of treaties, and therefore the Vienna Convention does not apply to the Additional Declaration.⁵⁵ In a corrigendum to the ruling issued in September 2016 the African Court amended its reasoning to read that with regard to the applicability of the Vienna Convention on the declaration, while the declaration emanates from the African Court Protocol, which is subject to the law of treaties, the declaration itself is a unilateral act that is not directly

50 Ruling on Jurisdiction paras 49-52.

51 Ruling on Jurisdiction para 52.

52 See Article 3(2) African Court Protocol which states 'In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.'

53 Ruling on Jurisdiction para 48.

54 Ruling on Jurisdiction para 53.

55 Ruling on Jurisdiction para 54.

subject to the law of treaties.⁵⁶ This sounds similar if not exactly the same as the African Court's first explanation. However, in the Corrigendum, the African Court added some nuance by finding that while the Vienna Convention does not apply directly to the declaration, it can be applied by analogy, and the African Court can 'draw inspiration from it when it deems appropriate'.⁵⁷

With this in mind, the African Court held that its consideration on the validity of Rwanda's withdrawal of its declaration was to be guided by 'relevant rules governing declarations of recognition of jurisdiction as well as the international law principle of state sovereignty'.⁵⁸ In particular, this meant that the African Court looked to the rules governing recognition of jurisdiction of international courts, with the African Court noting that 'related declarations' are generally optional in nature, such as those relied on for the recognition of jurisdiction of the International Court of Justice, European Court of Human Rights, and Inter-American Court of Human Rights.⁵⁹

The African Court found that in comparison, the declaration is of a similar nature to these other declarations, since although it emanates from the African Court Protocol, the article 34(6) declaration is optional in nature and is therefore separable from the African Court Protocol and is subject to withdrawal independent of the African Court Protocol.⁶⁰ The African Court reinforced this view with the principle of state sovereignty.⁶¹ It held that as far as unilateral acts were concerned, state sovereignty commands that states are free to commit themselves and they retain the discretion to withdraw their commitments.⁶² With all this in mind, the African Court found that Rwanda was entitled to withdraw its declaration and that such withdrawal is valid under the African Court Protocol.⁶³ The African Court's finding that the African Court Protocol and declaration remain separate is an obvious but welcome clarification. It would have been detrimental to the African Court's future had there been any ambiguity as to whether withdrawal of the declaration meant withdrawal from the African Court Protocol too. However, the African Court's decision to separate the African Court Protocol and the declaration follows a convoluted and somewhat unnecessary line of reasoning. To simply say that the declaration is optional, but is clearly contained within the African Court's Protocol and Rules and therefore is subject to the Vienna Convention, seems like the most common-sense approach to the issue.

56 Corrigendum to Withdrawal Rulings para ii.

57 As above.

58 Ruling on Jurisdiction para 55.

59 Ruling on Jurisdiction para 56 referring to article 36(2) of the Statute of the International Court of Justice, article 46 of the European Convention on Human Rights (before the entry into force of Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms and article 62(1) of the American Convention on Human Rights.

60 Ruling on Jurisdiction para 57.

61 Ruling on Jurisdiction para 58.

62 As above.

63 Ruling on Jurisdiction para 59.

The complicated route taken by the African Court seems to have played a large part in the concerning delay of the decision being rendered publicly. The addition of a corrigendum appears to have been an attempt to clarify a situation which needed little clarification. To recall, Rwanda filed its withdrawal at the end of February 2016. The official decision on jurisdiction was dated 3 June 2016, yet this decision was not made public until much later in September 2016.⁶⁴ The reason for rendering the decision but not making it public is unexplained. Alongside the June 2016 decision, the public decision that did emerge also included the corrigendum dated 3 September 2016. It appears that having rendered the decision in June 2016, the African Court decided to amend its reasoning slightly, thus delaying the public availability until September 2016. This approach is concerning. The purpose of a corrigendum is usually to correct a judgement or decision already publicly issued. In any event, in these circumstances, the decision should be considered handed down in September 2016. This is of particular importance since a delay of seven months is highly significant when considering that the African Court knew from June 2016 the decision would be to impose a 12 month notice period. Simply put then, the African Court rendered its decision telling the public, and most importantly Rwandans, that it had 12 months left before the declaration was effectively withdrawn with only six months remaining of the notice period. The African Court therefore halved the notice period available to Rwandans.

Nevertheless, with withdrawal found valid, the African Court turned to the conditions of withdrawal. The African Court held that even if withdrawal is unilateral, the discretionary character of withdrawal 'is not absolute', particularly where the act, in this case signing the declaration, creates rights to the benefit of third parties, the enjoyment of which require legal certainty.⁶⁵ Put another way, the African Court recognised that the signing and withdrawal of the declaration effects not only Rwanda the African Union member state, but Rwandan individuals and NGOs who, through the declaration, obtain the right to directly petition the African Court. The African Court found that in such circumstances, even when states can withdraw, they should be required to give prior notice to prevent an abrupt suspension of rights which would inevitably impact the rights of individuals and NGOs, the very holders of the rights, and that any immediate withdrawal without notice has the potential to weaken the human rights protection regime provided for in the African Charter.⁶⁶

As to how long such notice period should be, the African Court looked to the Inter-American Court of Human Rights, and the case of *Bronstein v Peru* in particular, where the Inter-American Court of Human Rights found that on the basis of the principle of legal certainty, a formal notice of 12 months would need to be given in the case of withdrawal for the sake of juridical security and continuity. With this

64 See Ruling on Jurisdiction.

65 Ruling on Jurisdiction para 60.

66 Ruling on Jurisdiction paras 61-62.

practice in mind, the African Court found notice is compulsory in cases of withdrawal of the declaration.⁶⁷

As to the period of notice, the African Court was again inspired by the practice of the Inter-American Court of Human Rights and article 78 of the American Convention on Human Rights as applied in the case of *Bronstein v Peru* which provides for 12 months, the notice period found in article 56(2) of the Vienna Convention.⁶⁸ The African Court therefore found the period of one year shall apply to the withdrawal of Rwanda's declaration.⁶⁹ The length of the notice period was not however unanimously supported. Judge Niyungeko and Judge Ramadhani issued a dissenting opinion arguing for a six month notice period.⁷⁰ The length of the notice period cannot be unduly criticised but it appears the African Court relied on the practice of the Inter-American system solely in arriving at its conclusion, without looking at other regional courts or international human rights organs. However, given the concerning issues over the public rendering of the decision, the 12 month notice period allowed at least some notice to Rwandans that a six month notice period would not have.

Finally, as to the legal effects of the withdrawal, the African Court considered two distinct issues.⁷¹ First, the precise date of the notice period. Based on the African Court's decision to impose a 12 month notice period on any withdrawal of a declaration, the African Court found that Rwexit could only take effect after the expiry of the 12 month notice period, from 1 March 2017.⁷² Second, the African Court considered the possible effect of the withdrawal on pending cases.⁷³ It found that Rwanda's withdrawal of its declaration cannot divest the African Court of jurisdiction to hear the *Ingabire* case, a position supported by the principle of non-retroactivity which stipulates that new rules apply only to future situations. The African Court therefore held that Rwanda's notification of intention to withdraw its declaration had no legal effects on cases pending before it.⁷⁴ However, while the decision is clear that cases currently pending before the African Court are not affected, it leaves at least two other scenarios that the African Court did not explicitly deal with. The one scenario concerns future cases filed before 1 March 2017, that is to say cases filed between the rendering of the decision and 1 March 2017. These cases are presumably safe since the African Court clearly stated that withdrawal takes effect on 1 March 2017. In the other scenario, and this may be more complicated, cases have been filed after 1 March 2017 but relating to events occurring before 1 March 2017. This scenario is especially applicable to cases where delays have occurred while bringing cases

67 Ruling on Jurisdiction para 64.

68 Ruling on Jurisdiction para 65.

69 Ruling on Jurisdiction para 66.

70 Dissenting Opinion of Judge Niyungeko and Judge Ramadhani 3 February 2017 para 20.

71 Ruling on Jurisdiction paras 67-68.

72 Ruling on Jurisdiction para 67.

73 Ruling on Jurisdiction para 68.

74 As above.

domestically in order to fulfil the exhaustion of local remedies requirement. Certainly, the requirement that applicants first exhaust local remedies has the potential to stymie cases being filed before the African Court by 1 March 2017 and this may be an ongoing issue that the African Court will have to resolve.

Following the rendering of this watershed decision, the African Court stayed true to its promise to examine the case on the merits, handing down a judgement on 24 November 2017. The judgment itself is notable for its examination of the right to fair trial pursuant to article 7 of the African Charter and right to freedom of expression pursuant to article 9(2) of the African Charter. In particular, the African Court developed an important precedent on what can be considered legitimate restrictions on freedom of expression, developing the notions of restrictions proscribed by law, serving a legitimate purpose and whether they are necessary and proportional.⁷⁵

5 CONCLUSION

As the African Court acknowledged, the African Court Protocol, African Court Rules and African Charter have no provisions on the withdrawal of a member state from the African Protocol or declaration made under article 34(6) of the Court Protocol. Rwanda's withdrawal of its declaration was a first for the African Court. Its impact would be felt not only in Rwanda but across Africa where curious nations watched to see how the African Court would deal with it. Reject the possibility of withdrawal and the African Court would appear inflexible and may put off potential ratification of the African Court Protocol or declaration. Allow Rwanda to withdraw immediately, rendering current cases inadmissible and risk appearing to pander to member states. The African Court instead chose a pragmatic and sensible middle ground that is likely to stand it in good stead moving forward. The African Court's decisions that withdrawal is valid and should take place after a notice period are of safe ground. It would defy international practice and common sense not to allow a state to withdraw voluntarily from a declaration it made voluntarily. Any decision that a withdrawal was prohibited would have scared off potential declarations. In the end the African Court appears to have taken the pragmatic line to follow the Vienna Convention, Inter-American Court and European Court by granting the withdrawal subject a notice period. While the length of the notice period did not attract unanimous support amongst judges, it does fall in line with international practice. While precedent exists for a six months notice period, the decision to plump for 12 months seems most pragmatic. Certainly, a period other than six months or 12 months

⁷⁵ See Judgment on Merits paras 137-138 (proscribed by law), paras 139-141 & 147 (legitimate purpose), paras 162-163 (necessary and proportional). For further discussion on the freedom of expression element of the Judgment on Merits see O Windridge 'A fine balance: assessing restrictions on freedom of expression at the African Court on Human and Peoples' Rights' (2017) 1 *Gambia Law Review* http://gambialawreview.com/index.php/issue/2018/right-to-free-speech#_ (accessed 18 January 2018).

would have seemed less rational, and given the issues over rendering the decision and the ongoing issues surrounding the African Court's difficulties in raising its profile in AU member states, a relatively short notice period of six months may have been too short.

The African Court's decision places it alongside other regional courts and avoids any accusations of bending to the will of AU member states over and above what is appropriate. The break is not however entirely clean and some questions remain. How will the African Court approach cases filed during the twelve-month notice period? It seems that Rwanda has no interest in engaging with these cases, so how will the African Court seek to implement decisions if violations are found? The African Court's decision is also somewhat unclear on the possible jurisdictional situation of cases involving alleged violations of rights during the period in which Rwanda was an declaration signee. While these questions linger, particularly given the surfeit of Rwandan cases still pending before the African Court,⁷⁶ any concern over a coattail effect, and the sudden rush of withdrawals, has thus far failed to materialise. At the time of writing, none of the other AU member states that have made the declaration have sought to withdraw.

How influential the African Court's *Rwexit* decision and subsequent judgment on the merits has been within Rwanda and on Rwandan authorities is difficult to gauge. It should be noted however that in September 2018 reports emerged that Rwandan authorities had released Ingabire following a presidential pardon.⁷⁷ What, if any, influence the African Court's approach to Ingabire's case had on this decision is debatable. While it would likely be too far a stretch to point to the African Court's decisions as the sole reason for Ingabire's release, it at least potentially demonstrates that African Court decisions can be part, if not the complete reason for AU member states' complying with human rights obligations.

Clearly, much is still to be done for the African Court to achieve its mandate as a truly continent-wide human and peoples' rights court, but with *Rwexit* the African Court has demonstrated when it comes to complex and sensitive matters it is fit for purpose. Let us hope this continues.

76 As of October 2018, the African Court website listed eleven cases still pending see <http://en.african-court.org/index.php/cases/2016-10-17-16-18-21#pending-cases> (accessed 18 October 2018).

77 See 'Rwandan opposition leader among 2,100 released from prison' *Aljazeera News* 15 September 2018 <https://www.aljazeera.com/news/2018/09/rwandan-opposition-leader-2100-released-prison-180915094047528.html>; 'Victoire Ingabire: Rwanda frees 2,000 people including opposition figure' *BBC News* 15 September 2018 <https://www.bbc.co.uk/news/world-africa-45532922> (accessed 12 January 2019).



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