1396) SCSL-03-01-ES (11129-11504)

RESIDUAL SPECIAL COURT FOR SIERRA LEONE

Churchillplein 1, 2517 JW The Hague, Netherlands
P. O. Box 19536, 2500CM The Hague

Before: **The Honourable Justice Philip Waki, President**

Acting Registrar: **Binta Mansaray**

Date Filed: **24 June 2014**

Case No.: **SCSL-03-01-ES**

In the matter of

CHARLES GHANKAY TAYLOR

PUBLIC WITH PUBLIC AND CONFIDENTIAL ANNEXES

MOTION FOR TERMINATION OF ENFORCEMENT OF SENTENCE IN THE UNITED KINGDOM AND FOR TRANSFER TO RWANDA

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Refiled

MOTION FOR TERMINATION OF ENFORCEMENT OF SENTENCE IN THE UNITED KINGDOM AND FOR TRANSFER TO RWANDA

I Introduction

1. Charles Taylor is the first and only person sent by an international court to serve their sentence, against their wish, outside of their continent of origin. This previously invariable practice accords with a basic requirement of humane treatment: that prisoners should be able to receive periodic visits from their families. International human rights standards, including as recently affirmed by the European Court of Human Rights ("ECtHR") in *Khodorkovskiy*, prohibit sending a prisoner unnecessarily for away from the habitual residence of family members, or otherwise creating obstacles that prevent periodic visits.

2. That is precisely the consequence of Mr. Taylor's detention in the United Kingdom ("UK"). The extraordinary cost and difficulty of travel for Liberian citizens to the UK, given the financial circumstances of Mr. Taylor's family, means that Mr. Taylor will seldom, if ever, see his wife and three young daughters, let alone the rest of his family, again. That deprivation will continue, given the length of Mr. Taylor's sentence, for the remainder of his life unless significant measures are taken to facilitate those visits. The UK has, to the contrary, obstructed such visits. Visa requests by Mr. Taylor's wife and two of his young daughters have been denied even though the UK was well aware of the purpose of the requested visit. Mr. Taylor has not seen his wife and children since being transferred to the UK eight months ago. This already constitutes a human rights violation: the ECtHR has specifically held that even shorter periods of deprivation of family contact constitute a violation of the right to family life.

3. Even if these legal impediments were to be surmounted, neither the UK nor the RSCSL has demonstrated any willingness to overcome the inherent difficulties

and cost of travel to the UK so as to permit family visits of even a minimally acceptable frequency. The United Kingdom and the RSCSL are jointly and severally responsible for the violation of not only Mr. Taylor's right to family life, but that of his family members. An immediate remedy is required to put an end to this ongoing violation, and a remedy is readily available to the RSCSL: terminate his enforcement in the UK and transfer Mr. Taylor to Rwanda.

4. Mr. Taylor's isolation is exacerbated by the conditions in which he is, and must be, held in the UK. Mr. Taylor has been confined to the prison's hospital wing, effectively in isolation, since his arrival there. The prison authorities believe, correctly, that Mr. Taylor is too much of a target and too vulnerable to be accommodated within the general prison population. The seriousness of the danger is underscored by the interception of an anonymous letter, possibly originating from within the prison itself, threatening Mr. Taylor with bodily harm and death. Radislav Krstić, whose crimes were less notorious than those for which Mr. Taylor has been found responsible, suffered a near-fatal attack by fellow inmates in a UK prison in 2010. The ICTY was apparently sufficiently concerned about the UK's ability to ensure adequate conditions of detention for Mr. Krstić that he was transferred back to The Hague. The RSCSL should be equally concerned about the real threat faced by Mr. Taylor, and the unsuitability of a UK prison to ensure that he is kept in a situation that meets the minimum standards required by international law.

5. The RSCSL should accordingly exercise its authority pursuant to Article 9(2) of the Enforcement of Sentences Agreement between the Court and the UK on 10 July 2007 ("SCSL-UK Enforcement Agreement") and immediately terminate the enforcement of Mr. Taylor's sentence, and order that he be transferred directly to Rwanda or, in the alternative, to The Hague pending further deliberations. Rwanda is a location that will permit reasonably frequent family visits and

provide Mr. Taylor with a safe environment without being segregated from all other prisoners.

6. Given the importance and complexity of the issues addressed, leave is requested to exceed the word limit set out in Article 6(C) of the RSCSL Practice Direction, assuming it applies, or any other applicable word limit, assuming that it is exceeded. Waiver is also sought, if necessary, of Article 6(G) in the interests of judicial economy.

II The RSCSL Must Ensure That the Conditions of Enforcement Comply With International Standards of Detention, If Necessary, By Terminating the Enforcement of Sentence and Ordering a Transfer to Another State

i. The RSCSL Is Vested With The Authority And Obligation to Supervise the Conditions of Enforcement of Sentences

7. The RSCSL has the responsibility under Article 23(2) of its Statute and Article 3(2) of the SCSL-UK Enforcement Agreement to supervise the detention conditions of prisoners detained in a State pursuant to sentences imposed by the Special Court for Sierra Leone ("SCSL"), and retains an unfettered authority to recall or transfer those prisoners to another State.

8. Article 23(2) of the RSCSL Statute provides that "[c]onditions of imprisonment, whether in Sierra Leone or in a third State, shall be governed by the law of the State of enforcement *subject to the supervision of the Residual Special Court*."[1] Article 23(3) of the RSCSL Statute underscores the RSCSL's final authority in respect of detention matters, affirming that the "Residual Special Court shall have the power to supervise the enforcement of sentences, including the implementation of the sentence enforcement agreements." These powers reflect

[1] Emphasis added.

the RSCSL's mandate conferred by Article 1 of the RSCSL Statute to "carry out the functions of the Special Court for Sierra Leone," which includes to "supervise enforcement of sentences."

9. The modalities of supervision are set out in more detail in each of the SCSL's agreements for the enforcement of sentences, concluded with four countries: the UK, Rwanda, Finland and Sweden.[2] Authority over detention is bifurcated in each case between the State and the SCSL. As stipulated in Article 3 of the SCSL-UK Enforcement Agreement, "[t]he conditions of detention shall be governed by the law of the United Kingdom, *subject to* the supervision of the Special Court, as provided for in Articles 6 to 9 of the present agreement."[3] Article 6 of the SCSL-UK Enforcement Agreement defines the modalities for inspection of the detention conditions and requires reporting thereof to the SCSL. Article 7 lists specific occurrences that must be proactively reported by the State to the SCSL. Article 8 governs the application of the State's rules on early release, pardon or commutation of sentence, with the final authority to determine such matters conferred on the SCSL.

10. Article 9 of the SCSL-UK Enforcement Agreement reserves to the RSCSL an unconditional authority to terminate the enforcement of sentence in the UK and order the detainee's transfer elsewhere. This authority can be exercised "at any time" and the State is obliged to ("shall") follow that instruction from the RSCSL:

[2] Agreement Between the Special Court for Sierra Leone and the Government of Great Britain and Northern Ireland, 9 July 2007 ("SCSL-UK Enforcement Agreement") (**Annex A**); Agreement Between the Special Court for Sierra Leone and The Government of the Republic of Rwanda on the Enforcement of Sentences of the Special Court for Sierra Leone, 2009 ("SCSL-Rwanda Enforcement Agreement") (**Annex B**); Agreement Between the Special Court for Sierra Leone and The Government of Finland on the Enforcement of Sentences of the Special Court for Sierra Leone, 2009 ("SCSL-Finland Enforcement Agreement") (**Annex C**); Agreement Between the Special Court for Sierra Leone and The Government of Sweden on the Enforcement of Sentences of the Special Court for Sierra Leone, 2009 ("SCSL-Sweden Enforcement Agreement") (**Annex D**).

[3] SCSL-UK Enforcement Agreement, Art. 3 (emphasis added).

> 2. The Special Court *may at any time decide* to request the termination of the enforcement of the sentence in the United Kingdom and transfer the sentenced person to another State or to the Special Court.
>
> 3. The competent authorities of the United Kingdom *shall* terminate the enforcement of the sentence as soon as they are informed by the Registrar of any decision or measure as a result of which the sentence shall cease to be enforceable.[4]

11. The RSCSL's discretion to terminate the enforcement of sentence is not predicated on any specific conditions, and the State has no authority or discretion to deny the RSCSL's exercise of this discretion.

12. The breadth of authority conferred on the RSCSL means that any violations of human rights are attributable not only to the detaining State but also the RSCSL itself. The RSCSL has sufficient authority to apprise itself of the conditions of detention in a State, and to terminate any enforcement that does not comply with the SCSL-UK Enforcement Agreement and/or with international human rights and standards of detention.

ii. The RSCSL Is Required To Ensure That the Conditions of Enforcement Comply With International Human Rights and International Minimum Standards of Detention

13. The RSCSL is required to act in accordance with international human rights standards in all of its conduct.[5] This includes supervising the enforcement of a

[4] *Id*. Art. 9 (emphasis added).
[5] *See Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports 1980, (**Annex E**), pp. 89-90 para. 37 ("International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.") The ICTR Appeals Chamber has applied human rights standards to the conduct of the ICTR even when those standards went beyond those specifically enumerated in its statute. *See Barayagwiza v. The Prosecutor*, Decision, 3 November 1999 (**Annex F**), para. 88 ("Although neither the Statute nor the Rules specifically address writs of *habeas*

sentence in a State, which is one of the primary functions and obligations of the RSCSL. The website of the RSCSL announces that:

> The supervision of the enforcement of sentences is a continuing obligation that may extend until 2055. This supervision includes inspection of the conditions of imprisonment, as well as tracking of time served and dates of release, including early release, pardon or commutation.[6]

14. The Appeals Chambers of the ICTY and ICTR have held that a requirement for transferring a person to a State is that "the conditions of detention must accord with internationally recognized standards."[7] "Internationally recognized standards," as discussed in more detail below, are to be determined with reference to human rights treaties, pronouncements of international human rights bodies, instruments promulgated by the United Nations, and decisions of international courts applying relevant rights.

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corpus as such, the notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority's acts is well-established by the Statute and Rules. *Moreover, this is a fundamental right and is enshrined in international human rights norms, including Article 8 of the Universal Declaration of Human Rights, Article 9(4) of the ICCPR, Article 5(4) of the ECtHR and Article 7(6) of the ACHR*") (emphasis added).

[6] http://www.rscsl.org/RSCSL-Mandate.html (accessed on 19 March 2014) (**Annex G**). Inspection of "the conditions of detention" is prescribed in each of the SCSL's enforcement agreements with States. The inspections are to be conducted either by the ICRC or, as in the case of the UK, by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, with reports to be provided to the President of the RSCSL. The President, in turn, may consult the State concerning those inspection reports, and request further reports on any changes in the conditions of detention. *See* SCSL-UK Enforcement Agreement, Art. 6; SCSL-Rwanda Enforcement Agreement, Art. 6; SCSL-Finland Enforcement Agreement, Art. 7; SCSL-Sweden Enforcement Agreement, Art. 6.

[7] *See The Prosecutor v. Munyakazi*, Case No. ICTR-97-36-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis*, 8 October 2008 (**Annex H**), para. 4; *The Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis*, 30 October 2008 (**Annex I**), para. 4 ("conditions of detention must accord with internationally recognized standards"); *The Prosecutor v. Uwinkindi*, Case No. ICTR-01-75-AR11*bis*, Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions, 16 December 2011 (**Annex J**), para. 22 ("conditions of detention must accord with internationally recognized standards"); *The Prosecutor v. Rašević & Todović*, Case No. IT-97-25/1-AR11*bis*.1 & IT-97-25/1-AR11*bis*.2, Decision on Savo Todović's Appeals Against Decisions on Referral Under Rule 11*bis*, 4 September 2006 (**Annex K**), para. 99 ("the Appeals Chamber recalls the Prosecution's obligation to alert the Referral Bench in case there are any serious concerns that the minimum standards of pre-trial – or, in case of a conviction, post-conviction – detention will not be met").

15. The United Nations Mechanism for International Criminal Tribunals ("MICT"), which performs the same supervisory functions as does the RSCSL, defines "international standards of detention" with reference to specific United Nations standards:

> Sentences handed down by the ICTR, ICTY, and Mechanism are enforced in accordance with international standards of detention and the applicable law of the enforcing State, subject to the supervision of the Mechanism.
>
> Conditions of imprisonment must be compatible with relevant human rights standards including:
>
> - *The Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.
> - *The Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment*, approved by the UN General Assembly resolution 43/173 of 9 Dec. 1988.
> - *The Basic Principles for the Treatment of Prisoners*, affirmed by the UN General Assembly resolution 45/111 of 14 Dec. 1990.[8]

16. Nineteen of the twenty-one enforcement agreements concluded by the ICTY[9] and ICTR[10] refer expressly to these three international instruments. Three out of the four SCSL enforcement agreements also make reference to these same three UN instruments.[11]

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[8] http://unmict.org/enforcement-of-sentences.html (accessed on 19 March 2014) (**Annex L**).
[9] See the various agreements set out at: http://www.icty.org/sid/137 (accessed on 21 April 2014) (**Annex M**).
[10] See the various agreements set out at: http://www.unictr.org/Legal/BilateralAgrements/tabid/99/Default.aspx (accessed on 21 April 2014) (**Annex N**).
[11] *See* SCSL-Rwanda Enforcement Agreement (Annex B), page 1 ("RECALLING the widely accepted international standards governing the treatment of prisoners, including the Standard Minimum Rules for the Treatment of Prisoners approved by ECOSOC resolutions 663 C (XXIV) of 31 July 1957 and 2067 (LXII) of 13 May 1977, the Body of Principles for the Protection of all Persons under any Form of Detention or

17. The UK is one of only two States, along with Austria, whose enforcement agreements omit reference to the three foregoing UN instruments. A possible inference is that the UK is unwilling to expressly affirm that it is bound by pronouncements of the United Nations defining the minimum standards of detention. The reluctance to do so does not detract, however, from the UK's international human rights obligations. The United Kingdom is party to the International Covenant on Civil and Political Rights ("ICCPR") and the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"). The "international standards of detention" articulated in the three United Nations instruments described above are merely interpretative of the UK's obligations under the ICCPR and, as more fully discussed below, those interpretations converge in all relevant respects with the interpretation of those same rights by the ECtHR. Both the UK and the RSCSL are therefore obliged by the same international standards of detention.

iii. Whether the RSCSL Or the UK Are Violating Mr. Taylor's Rights Must Be Assessed According to a Correctness Standard

18. The present motion is not a request for mere review or reconsideration of the decision to designate the UK as the state in which Mr. Taylor would serve his sentence.[12] The RSCSL has a free-standing and continuing obligation, as described above, to ensure that Mr. Taylor's detention complies with international human rights standards. The present motion must therefore be assessed *de novo* according to a "correctness" standard. A human rights violation either exists, or it does not exist. If a violation exists, and the RSCSL is unable to compel the UK to

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Imprisonment adopted by General Assembly resolution 43/173 of 9 December 1988, and the Basic Principles for the Treatment of Prisoners adopted by General Assembly resolution 45/111 of 14 December 1990").

[12] *The Prosecutor v. Taylor*, Case No. SCSL-03-01-ES, Order Designating the State In Which Charles Ghankay Taylor Is To Serve His Sentence, 4 October 2013.

remedy the violation, then the RSCSL must itself take steps to end the violation by terminating the enforcement of sentence. The RSCSL's obligation to do so arises from its continuing and unconditional authority to terminate the enforcement of Mr. Taylor's sentence in a particular country and to order his detention elsewhere.

III. International Human Rights Law Requires That Prisoners Be Detained Under Conditions That Preserve, To the Extent Reasonably Possible, Contact With Family Members, Particularly Children

i. The United Nations Recognizes a Right to Family Life, Which Includes a Right of Prisoners to Be Visited By Their Families

19. One of the most basic conditions of humane detention is that a prisoner be allowed to have contact with family members while in custody. Such contact is essential to at least two foundational human rights: the right to be treated with "humanity and with respect to the inherent dignity of the human person";[13] and the right to respect for family life.[14] The right to family life is a universally accepted value, having been incorporated into the ICCPR, the Banjul Charter, and the European Convention on Human Rights.[15]

[13] ICCPR, Art. 10(1).

[14] *Id*. Art. 23 ("The family is the natural and fundamental group unit of soceity and is entitled to protection by society and the State"); European Convention on Human Rights ("European Convention"), Art. 8 ("1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."); African (Banjul) Charter on Human and Peoples' Rights ("Banjul Charter"), Art. 18 ("1. The family shall be the natural unit and basis of society. It shall be protected by the Statute which shall take care of its physical health and morals. 2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.")

[15] *Id*.

20. Deprivation of liberty in accordance with a sentence imposed by law inherently occasions a substantial limitation on family life but does not justify avoidable or unnecessary restrictions on that right. The UN Human Rights Committee has affirmed that the rights of prisoners "must be guaranteed under the same conditions as for that of free persons […] subject to the restrictions that are unavoidable in a closed environment."[16]

21. The United Nations has elaborated specific minimum standards to uphold prisoners' right to family life. Rule 37 of the *Standard Minimum Rules for Treatment of Prisoners* of 1957 ("UN Minimum Rules") provides that "prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits."[17] Principle 19 of *The Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment* of 1988 ("UN Protection Principles") elevates family visitation to a "right" in itself: "A detained or imprisoned person shall have the *right* to be visited by and to correspond with, in particular, members of his family."[18] Principle 20 of the UN Protection Principles provides that "[i]f a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence."

[16] CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty), Adopted at the Forty-fourth Session of the Human Rights Committee, on 10 April 1992 (**Annex O**), para. 3. *See also* The Basic Principles for the Treatment of Prisoners, affirmed by the UN General Assembly resolution 45/111 of 14 Dec. 1990 (**Annex P**), para. 5 ("Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.").

[17] *Standard Minimum Rules for Treatment of Prisoners* of 1957, (**Annex Q**).

[18] *The Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment* of 1988, (**Annex R**) (emphasis added).

ii. *ECtHR Jurisprudence Confirms That The Place and Conditions of Detention Must Not Unnecessarily Interfere, Either* De Facto *or* De Jure*, With Family Visits*

22. The ECtHR has affirmed that the right to family life may be violated by detaining a prisoner unnecessarily far from his family. After his conviction by a Russian court in 2005, Mikhail Khodorkovskiy was transferred by Russian prison authorities to a penitentiary in Krasnokamensk, a minimum of two days' travel by train from where his family lived.[19] The European Court of Human Rights found that this violated Mr. Khodorkovskiy's right to family life protected by Article 8 of the European Convention.[20] The applicable principles defined by the Court are identical to those set out in the UN instruments applicable to the RSCSL:

> Thus, as a starting point, the Court accepts that the authorities had a wide discretion in matters related to execution of sentences. However, the Convention cannot stop at the prison gate and there is no question that a prisoner forfeits all of his Article 8 rights merely because of his status as a person detained following a conviction. The Court will not turn a blind eye to such limitations which go beyond what would normally be accepted in the case of an ordinary detainee. Thus, for example, it is an essential part of a prisoner's right to respect of family life that the prison authorities assist him in maintaining contact with his close family. Limitations on contacts with other prisoners and with family members, imposed by prison rules, have been regarded by the Court as an "interference" with the rights protected by Article 8 of the Convention.[21]

23. The ECtHR examined the concrete effect of Mr. Khodorkovskiy's place of detention on his family's ability to visit him. His two young children, given the arduous journey, had been unable to visit him over the course of a year; his wife had only been able to visit once for a period of four days.[22] Conversely, Russia had not established that there were no prison places closer to Moscow that would

[19] *Khodorkovskiy and Lebedev v. Russia*, 11082/06 and 13772/05 (2013) ("*Khodorkovskiy*") (**Annex S**), paras. 324, 823.
[20] *Id*. para. 838.
[21] *Id*. para. 836.
[22] *Id*. paras. 324-325.

have made Mr. Khodorkovskiy more accessible to his family.[23] After reviewing its previous case-law, the Court held that it had:

> no difficulty in accepting that a trip from Moscow to the Krasnokamensk colony [...] was a long and exhaustive endeavor, especially for the applicants' young children. Indeed, it was not the applicants themselves but the members of their respective families who suffered from the remoteness of the colonies. Still, the applicants were affected by this measure, albeit indirectly, because they probably received fewer visits that they would have received had they been located closer to Moscow. In sum, the court finds that this measure constituted an interference with the applicants' Article 8 rights to privacy and family life.[24]

24. In *Moiseyev v. Russia*, the detainee was limited to a maximum of two family visits per month, and was otherwise unable to have any family visits at all for two periods of eight months, and for two periods of one-month each, over a total of three years.[25] In the absence of any showing by the Russian government that the restriction on such contact was justified to prevent interference with ongoing criminal investigations, the ECtHR found that the restrictions violated Article 8 of the European Convention:

> In these circumstances, and having regard to the duration of the limitations on the applicant's contact with his family, the Court concludes that they went beyond what was necessary in a democratic society "to prevent disorder and crime". Indeed, the measure in question reduced the applicant's family life to a degree that can be justified neither by the inherent limitations involved in detention nor by the pursuance of the legitimate aim relied on by the Government. The Court therefore holds that the authorities failed to maintain a fair balance of proportionality between the means employed and the aim they sought to achieve.[26]

25. The length of time between family visits is an important consideration in the jurisprudence of the ECtHR. Thus, a husband and wife were prohibited from

[23] *Id*. paras. 848-849.
[24] *Id*. para. 838.
[25] *Moiseyev v. Russia*, 62936/00 (2008) (**Annex T**), paras. 248, 255.
[26] *Id*. para. 255.

direct contact for one year by Polish authorities, although written communication was still permitted.[27] The European Court of Human Rights accepted that the measures might have been justified "initially" but found that a violation arose with the passage of time:

> [W]ith the passage of time and given the severity of the measures, as well as the authorities' general obligation to assist the applicant in maintaining contact with his family during his detention, the situation called, in the Court's opinion, for a careful review of the necessity of keeping him in a complete isolation from his wife."[28]

The Court, in the absence of any adequate justification, and "having regard to the duration and nature of the restrictions", declared a violation of the right to family life.[29]

26. As the *Khodorkovskiy* case illustrates, violations of the right to family life can arise from *de facto* obstacles to family visitation, not just *de jure* prohibitions. In *Selmani*, a wife and daughter of a Yugoslav citizen imprisoned in Switzerland were stripped of their residency status during his detention in that country. The ECtHR declined to find a violation of Article 8 of the European Convention, noting the relatively short period – about 18 months – of the prisoner's continued detention.[30] The ECtHR also noted that the "Swiss authorities enable the applicants regularly to visit [the detainee] and to communicate with him in writing and by telephone."[31] The implication is that a longer period of detention or substantial impediments to visitation would have been factors that the ECtHR would have considered relevant in determining whether there had been a breach

[27] *Klamecki v. Poland (No. 2)*, 31583/96 (2003) (**Annex U**), paras. 72-73, 100, 149.
[28] *Id*, paras. 150-151.
[29] *Id*, para. 152. See *Kučera v. Slovakia*, 48666/99 (2007) (**Annex V**), paras. 126-127 (finding a violation of the right to family life arising from a prohibition of family visits between husband and wife for thirteen months, without any satisfactory justification).
[30] *Selmani v. Switzerland*, 70258/01 (2001) ("*Selmani*") (**Annex W**), para. 1. The applicant's residency status was terminated in May 2001, whereas her husband was scheduled to be released in November 2002.
[31] *Selmani*, para. 1.

of the right to family life. Those factors were applied in finding a violation of the right to family life in *Khodorkovskiy*.

iii. National Interpretations of International Obligations Confirm That the Right to Family Life of Prisoners and Families Can Be Breached By De Facto *Obstacles to Visitation By Close Family Members, Particularly Children*

27. The UK Supreme Court has confirmed that government action that separates family members may breach not only the Article 8 rights of the detainee, but also his or her family members. The UK Supreme Court has held, for example, that "there is only one family life" which is shared by every member of the family.[32] The authorities responsible for such a separation "must necessarily have regard to the article 8 rights of each and all of the family members" [33] and that the "right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed."[34]

28. The effect of a parent's detention on a child must be assessed with particular care when the latter's rights are at stake. Thus, "[d]epriving a child of her family life is altogether more serious than depriving an adult of his."[35] The best interests of the child must be a primary consideration,[36] bearing in mind that "a child is not to be held responsible for the moral failures of either of his parents."[37]

[32] *Beoku-Betts v Secretary of State for the Home Department,* [2009] 1 AC 115 (**Annex X**), para. 43 (per Lord Brown writing for the Court).
[33] *Ibid*, para. 21.
[34] *Ibid*, para. 4 (per Baroness Hale). See *Selmani*, para. 1 (application for breach of family life brought not by prisoner, but by wife and child).
[35] *HH v Deputy Prosecutor of the Italian Republic* [2013] 1 AC 338, para. 33 (**Annex Y**).
[36] At para. 15. See also *ZH (Tanzania) v Secretary of State for the Home Department*[2011] 2 AC 166, para. 24 ("any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be 'in accordance with the law' for the purpose of article 8(2)") (**Annex Z**).
[37] *EM (Lebanon) v. Secretary of State for the Home Department* [2008] UKHL 64 (**Annex AA**), para. 49.

29. Article 3(1) of the UN Convention on the Rights of the Child expressly requires that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

iv. International Treaties Reflect A Strong Trend Toward Incarcerating Prisoners As Close to Their Families As Possible, As a Reflection of the Rights of Prisoners and Family Members Alike

30. The international community has adopted many instruments, consistent with the human rights obligations described above, to facilitate transfers of prisoners to places of detention closer to their families.[38] The United Nations Office of Drugs and Crime *Handbook on the International Transfer of Sentenced Persons* explains that such transfers are directly related to humane treatment, as well as the well-being of the detainee's family:

> Finally, the humanitarian argument is also applicable to the needs of the family and dependents of a sentenced person who is held in a foreign prison while they remain in their country of origin. Research suggests that prisoners' families face an array of challenges as a consequence of their family member's imprisonment that include marital difficulties, financial and housing problems, social stigma and victimization, loneliness, anxiety and emotional hardship. Prisoners' children may experience psychological harm and develop behavioral problems. Such indirect consequences of imprisonment are highly likely to be exacerbated by the imprisonment of a family member abroad.[39]

[38] Scheme for the Transfer of Convicted Offenders Within the Commonwealth; Council of Europe Convention on the Transfer of Sentenced Prisoners, European Treaty Series No. 112, 21 March 1983 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/286790/Commonwealth_Scheme_for_the_Transfer_of_ConvictedOffenders.pdf (accessed on 4 May 2014) (**Annex BB**).

[39] United Nations Office of Drugs and Crime *Handbook on the International Transfer of Sentenced Persons,* (New York: United Nations 2012) (**Annex CC**), pp. 12-13. See also Council of Europe, *Explanatory Report on the Convention on the Transfer of Sentenced Persons,* Strasbourg 1983, (**Annex DD**), para. 9 (referring to the "humanitarian considerations" underlying such treaties) (underline added).

v. Conclusion: International Human Rights Law Requires That Prisoners ***Be Detained Under Conditions That Preserve, To the Extent Reasonably Possible, Contact With Family Members***

31. The right to family life includes a right to family visits under internationally recognized standards (UN Protection Principle 19). *De jure* or *de facto* obstacles to such visits, or a combination of the two, can violate this right. Sending a prisoner unnecessarily far from his or her family can, in itself, violate that right. Relevant factors in assessing whether there is a violation of the right include: (i) the duration of the prisoner's sentence and, hence, the duration of the interference with family contact (*Selmani*); (ii) the period between family visits arising from *de facto* or *de jure* obstacles (*Khodorkovskiy*, *Moiseyev*); (iii) the effect of such obstacles on children whose visitation is impeded or prevented by the conditions or place of detention (*Khodorkovskiy*, interpretations of Article 8 by the UK Supreme Court); and (iv) the availability of a place of detention closer to the inmate's family (UN Protection Principle 20, *Khodorkovskiy*). Interruptions of visitation rights of as little as one month, when not justified by any compelling interest, have attracted close scrutiny to determine whether the right to family life was violated.

IV. Mr. Taylor's Ongoing Detention in the United Kingdom Violates His Right to Family Life, And the Rights of His Family to Family Life

i. Introduction

32. Mr. Taylor is serving what amounts to a life sentence. He has been unable to receive a single visit from his wife and young children since his transfer to the UK eight months ago. The practical and legal obstacles to such visits are unlikely to be substantially alleviated, even assuming that the UK relents and grants visas to Mr. Taylor's family members in Liberia. This means that Mr. Taylor and his family face the brutal prospect of hardly ever seeing other again.

33. That separation is not an "unavoidable" incident of detention.[40] There is an alternative. The RSCSL has a detention agreement with Rwanda and has sent every other RSCSL/SCSL prisoner there. That prison, for both legal and practical reasons, is much more accessible to visitors from West Africa. Enforcing Mr. Taylor's sentence in the UK rather than in Rwanda renders family visits almost impossible for the rest of Mr. Taylor's life. This is unnecessary, inhumane (to Mr. Taylor and his family members alike) and legally impermissible.

ii. No One Has Ever Been Sent By An International Court to Serve Their Sentence In a Foreign Continent Against Their Will

34. Charles Taylor is the first prisoner convicted by an international court to be sent, against his wishes, to a place outside of his continent of origin to serve his sentence. Every person convicted by the ICTY from Europe is or was detained in Europe.[41] The sole person of European origin convicted by the ICTR was transferred to serve his sentence in Europe.[42] Every person convicted by the ICTR from Africa is detained in Africa.[43] Every person convicted by the SCSL from Africa is detained in Africa.[44] The practice of international courts therefore accords with the international human rights principle that prisoners should not be detained under conditions that unnecessarily interfere with their ability to stay in contact with family members.

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[40] CCPR General Comment No. 21: Article 10, para. 3.
[41] http://unmict.org/enforcement-of-sentences.html (accessed on 6 April 2014).
[42] *The Prosecutor v. Ruggiu*, Case No. ICTR-97-32-A26, Decision on the Enforcement of Sentence, 13 February 2008 (**Annex EE**). Michel Bagaragaza was also sent to serve his sentence in Europe, apparently because none of the countries hosting other ICTR convicts were able to offer adequate security guarantees, given his particular status: Hirondelle News Agency, 26 October 2010 (http://www.hirondellenews.com/ictr-rwanda/408-collaboration-with-states/collaboration-with-states-other-countries/24576-en-en-261010-ictrsweden-bagaragaza-transferred-to-sweden-last-july1362713627) (accessed on 6 April 2014) (**Annex FF**). ("Before his transfer, the convict was held in Arusha in an isolated area from other inmates. Bagaragaza had special reasons to fear for his security. He had testified against several prominent personalities of the previous regime who were charged by the ICTR, notably Protais Zigiranyirazo.")
[43] http://unmict.org/enforcement-of-sentences.html (accessed on 6 April 2014).
[44] Seventh Annual Report of the President of the SCSL, June 2009 to May 2010 (**Annex GG**), p. 10.

35. Mr. Taylor has therefore been singled out for treatment different from anyone else convicted by an international court. The consequence of this different treatment, as discussed below, is that Mr. Taylor and his family are deprived of the minimally-acceptable conditions of detention.

iii. Mr. Taylor, By Serving His Sentence In The UK Instead of Rwanda, Is Unnecessarily and Almost Completely Isolated From His Family

a. De Facto Obstacles

36. Mr. Taylor's detention in the UK occasions a far more serious interference with family visitation than the conditions that have been found to constitute a violation the right to family life by the ECtHR. The obstacles to family visits are both *de jure* and *de facto*.

37. Most of Mr. Taylor's family resides in Liberia, including his wife, Mrs. Victoria Addison Taylor, and their three daughters, aged 10, 7 and 3. Visa applications by Liberians for the UK must be submitted in Accra, in neighbouring Ghana. The cost of each visa application alone is about US$135. The cost of a flight to Accra is at least US$650, or an arduous 24-hour bus journey. Flights from Accra to London cost a minimum of over US$1000. A round-trip ticket from London to Durham, where Mr. Taylor is currently serving his sentence, costs about US$220. The cost of accommodation in the UK, at least by African standards, is extremely high. Mr. Taylor's family members do not have the financial resources to accomplish such journeys over the long term and on a recurring basis. The unavoidable consequence, especially over the long term of Mr. Taylor's sentence, is that he will receive few, if any, visits from even his closest family members.

38. The extent to which these obstacles are attributable to the place of Mr. Taylor's detention should be assessed in relation to the available alternatives. The SCSL has an enforcement agreement with Rwanda. Moreover, as mentioned above, every other SCSL sentence is being enforced by Rwanda.[45] Visas may be issued to Liberians upon arrival in Rwanda at a cost of $20. Accommodation can be obtained for dollars a day – a fraction of the cost of accommodation in the UK. The prison is a relatively short drive from Kigali Airport. Further, Rwanda and the SCSL, unlike the UK, have apparently collaborated to ensure the facilitation of family visits to detainees:

> The Special Court also facilitates visits by family members. In 2012, all eight prisoners were visited by family members. The visits were partially funded by the Court. The RSCSL will take on responsibility for yearly inspection of detention conditions and facilitating family visits after the Court's closure.[46]

39. The obstacles to maintaining Mr. Taylor's family life are not, to use the language of the ECtHR, an "inherent limitation" arising from his detention as such.[47] Rather, the salient interference with Mr. Taylor's family life occurs because he is detained in the UK instead of Rwanda.

40. The RSCSL could mitigate this interference, and eliminate the unnecessary infringement of the right to family life, by terminating the enforcement of Mr. Taylor's sentence in the UK and ordering his transfer to Rwanda. The consequences of failing to do so, including the continuing violation of the right to family life, are squarely attributable to the RSCSL. Indeed, the RSCSL is the only international institution that countenances enforcement of sentence outside of the home continent of the prisoner, with all the self-evident obstacles to preserving family ties that implies.

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[45] Seventh Annual Report of the President of the SCSL, June 2009 to May 2010, p. 10.
[46] Tenth Annual Report of the President of the SCSL, June 2012 to May 2013 (**Annex HH**), p. 41.
[47] *Moiseyev*, para. 246.

41. Given the extremely long sentence imposed on Mr. Taylor, his deprivation of family life will likely be permanent. This shocks the conscience. Whatever the crimes for which Mr. Taylor has been found criminally responsible, the justice of his sentence is not enhanced by violating his basic human rights or those of his family, nor by imposing avoidable conditions upon him that can only be described as cruel. As declared by the United Nations Human Rights Committee:

> Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7, including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.[48]

42. Similarly, the UN Minimum Rules provide that punishment is achieved by the deprivation of liberty itself, and that nothing further should be done to exacerbate this punishment. Rule 57 states:

> Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.

43. Mr. Taylor's sentence is reflected in the number of years of lost liberty. That sentence is already heavy, depriving him of his personal liberty, in all likelihood, for the remainder of his life. Imposing avoidable conditions of detention which also deprive him of his family for the remainder of his life seriously aggravates his suffering beyond that which is incidental to the purpose of incarceration and clearly violates human rights standards. On this ground alone, the enforcement of

[48] CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty), Adopted at the Forty-fourth Session of the Human Rights Committee, on 10 April 1992, para. 3.

Mr. Taylor's sentence in the UK should be terminated immediately, and he should be transferred to Rwanda.

b. De Jure Obstacles

44. Mr. Taylor was transferred to the UK on 15 October 2013. On 3 January 2014, less than three months later, the UK refused to allow Mrs. Taylor and her two youngest daughters entry to the UK to visit Mr. Taylor.[49] The UK was aware that the purpose of the requested visa was to visit Mr. Taylor.[50] Indeed, the fact that Mr. Taylor was in detention in the UK was cited as a factor *against* granting Mrs. Taylor a visitor's visa because it was thought to raise doubts about whether "you intend to leave the UK at the end of your visit":

> The purpose of your trip is to visit your husband […] . The attraction for you and your family to remain in the UK having gained entry is a risk that needs to be weighed up against your current circumstances. You have now lost the security that your husband's presence provided and on the basis of very limited information about your living circumstances, I am not satisfied that you are living in settled circumstances in Liberia. Taking all of the above into account, I am not satisfied that you are genuinely seeking entry as a visitor and that you intend to leave the UK at the end of your visit.[51]

45. This reasoning – which was characterized as determinative in rejecting Mrs. Taylor's application for a temporary visitor's visa – reflects a shameful disregard of international standards of detention. The UK, having chosen to enforce Mr. Taylor's sentence, now has an obligation to ensure family visits. The *de facto* and *de jure* obstacles to family visitation are not of Mr. or Mrs. Taylor's

[49] "Refusal of Entry Clearance", ACC/812205, 3 January 2014 ("3 January Decision") (**Confidential Annex II**).
[50] *Id*. p. 2 ("The purpose of your trip is to visit your husband. I am aware that your husband, Charles Taylor has been sentenced to 50 years imprisonment for aiding and abetting the commission of war crimes and he is currently serving his sentence in the UK.")
[51] *Id*. p. 2.

creation; they have been created jointly by the UK and the RSCSL. Denying Mrs. Taylor's visa to the UK on the ground that Mr. Taylor is incarcerated there can only be described as perverse. It is directly contrary to the approach taken by the Netherlands when Mr. Taylor was detained in The Hague for seven years during his trial and appeal, during which time visits from his wife and children were facilitated frequently. Mr. Taylor has now been in detention for eight months and has yet to see his wife and children. The UK, given the standards applied in its 3 January Decision, appears content that Mr. Taylor should never see his wife or children again.

46. Further, the 3 January Decision relies partially on the alleged absence of documentation of Mrs. Taylor's financial resources. Mrs. Taylor does not have a regular income, and therefore does not have the documentation necessary to establish that she has "settled circumstances in Liberia," at least as the UK immigration officer apparently understands that phrase.[52] These are *de jure* impediments compounding the *de facto* obstacles that already make family visits extremely difficult.

47. Following the 3 January decision, the RSCSL Registry kindly offered to assist Mrs. Taylor in her visa application. Unfortunately, these efforts too have come to no avail. Mrs. Taylor has advised the RSCSL Registrar's representative that she simply does not have the documentation sought by the UK government. She does not have a regular income, and does not have more financial resources than she declared on her visa application. Mrs. Taylor has expressed her wish to re-submit her visa application, but the Registrar's representative has noted that it is futile to do so without further documentation. Given that there is no further documentation

[52] One of the more absurd deficiencies cited in the 3 January Decision is the failure to provide original title deeds to property owned by Mrs. Taylor in Liberia. The immigration officer asserts that these documents "cannot be verified as the originals have not been provided." 3 January Decision, p. 2. The implication is that Liberian visa applicants should be compelled to travel from Liberia to Ghana with original title deeds. This unrealistic expectation suggests a total lack of understanding of the actual circumstances for visa applicants, or a lack of good faith in assessing Mrs. Taylor's visa application.

or information that Mrs. Taylor can provide, she and her representatives are at a loss as to how to surmount the barriers, put in place by the UK government, which are currently preventing her from exercising her right to family life by visiting her husband.

48. The RSCSL Registrar claims, on the other hand, that: "there is no reason to believe [Mrs. Taylor's] reapplication will be unsuccessful. High level talks with UK authorities will also continue in order to facilitate Taylor family visits."[53]

49. These hopeful sentiments have yet to be reflected in any concrete steps. Indeed, the decision already taken already indicates that the UK is not genuinely interested in accommodating the unique circumstances of Mr. Taylor according to international standards of detention. Mr. Taylor has now been in detention for eight months without a single visit from his wife or their three daughters. This is the direct result of the actions of the UK government. The ECtHR has found that preventing family visits over a much shorter duration violates the right to family life. Contrary to the RSCSL Registrar's optimistic assessment, even if the 3 January Decision is reversed, future visa applications are likely to be so burdensome, expensive and time-consuming that they will, in themselves, continue to constitute a significant *de facto* and/or *de jure* impediment to Mr. Taylor's right to family visitation.

V The UK Is Unwilling or Unable to Keep Mr. Taylor In a Secure Setting That Conforms With International Standards of Detention

50. Upon his arrival at HMP Frankland in the UK, Mr. Taylor was segregated from the general prison population. Mr. Taylor was informed, quite correctly, that he was too much of a target to be placed safely amongst the general prison

[53] Letter of Binta Mansaray to the President of the RSCSL "Re: Update on issues pertaining to SCSL prisoner Charles Taylor", dated 24 March 2014, (**Annex JJ**) p. 2.

population in that prison. He was accordingly confined to a hospital ward of the prison, and has been detained there ever since. He has little or no contact with other prisoners.

51. In late January 2014, an anonymous letter addressed to Mr. Taylor was intercepted by the correspondence office at HMP Frankland. A typewritten version of the letter, provided by the prison authorities to Mr. Taylor, is attached as a confidential annex.[54] The letter, which had apparently originated from within the prison, contained a threat against Mr. Taylor's life.

52. The UK authorities are to be commended for recognizing the mortal threat facing Mr. Taylor if he were to be placed in the general prison population of a maximum security prison in the UK. Nevertheless, international detention standards require that prisoners not be unduly segregated from fellow prisoners[55] or held in isolation.[56] Mr. Taylor's predicament arises from his status as the sole SCSL prisoner at HMP Frankland, and is a notorious and vilified figure. Mr. Taylor will presumably continue to need to be segregated for as long as he is detained at HMP Frankland – which, unless he is transferred elsewhere, likely means for the remainder of his natural life. In contrast, all SCSL prisoners in Rwanda are held together in a single facility so that they can safely interact without the danger of unidentified threats from the general prison population.

[54] Confidential **Annex KK.**
[55] *Khodorkovskiy*, para. 836 ("Limitations on contacts with other prisoners […] imposed by prison rules, have been regarded by the court as an 'interference' with the rights protected under Article 8 of the Convention.").
[56] *Munyakazi* Referral Decision, para. 22 ("Specifically with regard to imprisonment in isolation or solitary confinement, although the prohibition of contact with other prisoners for security, disciplinary or protective reasons may be necessary, human rights bodies have consistently held that imprisonment in isolation is an undesirable penalty and should be used only in exceptional circumstances and for limited periods […]. Arrangements for solitary confinement should also be reviewed in order to provide prisoners with a wider range of activities and ensuring appropriate human contact.").

53. Mr. Taylor's situation is similar to that of Radislav Krstić, whom the ICTY had sent to the UK for enforcement of sentence. On 7 May 2011, General Krstić was attacked and severely wounded in a UK prison by three men wielding knives. The ICTY President subsequently ordered his transfer back to the ICTY's detention facility in The Hague. The ICTY decision recalling General Krstić is not publicly available, but reports indicate that it was because the UK was either unable or unwilling to ensure his security.[57] He has now been transferred to a new enforcement State.

54. The Krstić attack, and the current threat to Mr. Taylor, raise doubts as to whether maximum security prisons in the UK are capable of detaining a high-profile inmate from an international court who is likely to be targeted based on very specific cultural or national factors of which British officials may not be aware or equipped to deal with.

55. The reasonableness of a particular regime of isolation can only be assessed in light of the available alternatives. Those alternatives must, in respect of the RSCSL, be assessed in light of the alternatives available to the RSCSL. The UK may well have no choice but to segregate certain high-threat prisoners; but the RSCSL certainly *does* have a choice that can ensure that Mr. Taylor is not isolated. Rwanda has a purpose-built facility to securely enforce the sentence against Mr. Taylor. The prison population, and the cultural affinity of prison officials, will ensure that he can also be kept there safely and without being separated from other prisoners. The RSCSL has the power to transfer Mr. Taylor to Rwanda. Incarcerating Mr. Taylor in a hospital wing in northern England is not the least restrictive means of ensuring his safety because he can instead be transferred to a much more suitable and safe environment outside of the UK.

[57] Balkan Transitional Justice, "ICTY: Radislav Krstić Transferred Back to The Hague," 23 December 2011 (**Annex LL**) ("The International Criminal Tribunal for the former Yugoslavia (ICTY) was unable to comment on the reasons for transferring Krstić, but according to diplomatic sources it was due to 'security issues.'")

56. There is no doubt that imposing even "relative isolation" indefinitely is an unacceptable condition of detention and violates basic human rights. As the ECtHR has held even in respect of prisoners whose own conduct ostensibly justified segregation: "The Court nevertheless wishes to emphasise that solitary confinement, even in cases entailing only relative isolation, cannot be imposed on a prisoner indefinitely.t[58] This principle must apply with much greater force when a prisoner is segregated for reasons unrelated to his own fault or conduct.

57. The length of Mr. Taylor's sentence is also relevant in this context. In the UK, the stress and pressure of isolation or constant fear of lethal attack in the general prison population will presumably continue indefinitely. It is not humane to condemn a person to live under those circumstances for the remainder of their life, at least not when there is a reasonable alternative available. There is a reasonable alternative available, and the RSCSL should exercise its authority accordingly.

VI Conclusion and Relief Sought

58. Mr. Taylor has a long sentence to serve, one that will probably see him die in prison. Regardless of the nature of the crimes for which he was convicted, he is entitled to be detained in conditions of basic dignity. Basic dignity includes the right to see his wife periodically. Basic dignity includes the right to see his very young children at least once in a while. Basic dignity includes the right not to live the rest of his life, including into old age, in constant isolation or fear of being stabbed to death. The justice of Mr. Taylor's sentence is not enhanced by conditions of detention that violate his rights and his dignity. The only appropriate remedy to ensure compliance with the minimum international standards – one that

[58] *Case of Ramirez Sanchez. V. France*, (59450/00) (2006) (**Annex MM**) para. 145.

has been afforded to every single person convicted by an international court – is for Mr. Taylor to be transferred to serve his sentence in his continent of origin. The RSCSL can do so, without in any way diminishing the quality and punitive function of the sentence imposed, by transferring Mr. Taylor to Rwanda.

Word count: 9.059.

Respectfully submitted.
The Hague, 24 June 2014

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Counsel for Mr. Charles Ghankay Taylor

John Jones QC
Counsel for Mr. Charles Ghankay Taylor

List of Authorities

(i) *Authorities Cited And Annexed To the Present Filing in Accordance With Article 7(A) of the RSCSL Practice Direction on Filing of Documents of 24 April 2014*

Annex A The Agreement Between the Special Court for Sierra Leone and the Government of Great Britain and Northern Ireland, 9 July 2007, Articles 3, 6-9.

Annex B The Agreement Between the Special Court for Sierra Leone and The Government of the Republic of Rwanda on the Enforcement of Sentences of the Special Court for Sierra Leone, 18 March 2009, p. 1; Articles 6-9.

Annex C Agreement Between the Special Court for Sierra Leone and The Government of Finland on the Enforcement of Sentences of the Special Court for Sierra Leone, 2009, Articles 7-10.

Annex D Agreement Between the Special Court for Sierra Leone and The Government of Sweden on the Enforcement of Sentences of the Special Court for Sierra Leone, 2009, Articles 6-9.

Annex E Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, ICJ Reports 1980, pp. 89-90, para. 37.

Annex F *Barayagwiza v. The Prosecutor*, Decision, 3 November 1999, para. 88.

Annex G The Mandate of the Residual Special Court for Sierra Leone, available at the web page of Residual Special Court for Sierra Leone: <http://www.rscsl.org/RSCSL-Mandate.html> (accessed on 19 March 2014).

Annex H *The Prosecutor v. Munyakazi*, Case No. ICTR-97-36-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, 8 October 2008, paras. 4 and 22.

Annex I *The Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, 30 October 2008, para. 4.

Annex J *The Prosecutor v. Uwinkindi*, Case No. ICTR-01-75-AR11bis, Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions, 16 December 2011, para. 22.

Annex K *The Prosecutor v. Todović*, Case No. IT-97-25/1-AR11*bis*.1 & IT-97-25/1-AR11*bis*.2, Decision on Savo Todovic's Appeals Against Decisions on Referral Under Rule 11*bis*, 4 September 2006, para. 99.

Annex L Enforcement of sentences, Available at web page of United Nations Mechanism for International Criminal Tribunals: <http://unmict.org/enforcement-of-sentences.html> (accessed on 19 March 2014).

Annex M Member States Cooperation, available at web page of ICTY: <http://www.icty.org/sid/137> (accessed on 21 April 2014).

Annex N Bilateral agreements, available at web page of ICTR: <http://www.unictr.org/Legal/BilateralAgrements/tabid/99/Default.aspx> (21 April 2014).

Annex O CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty), Adopted at the Forty-fourth Session of the Human Rights Committee, on 10 April 1992, para. 3.

Annex P *The Basic Principles for the Treatment of Prisoners*, affirmed by the UN General Assembly resolution 45/111 of 14 Dec. 1990, para. 5.

Annex Q *United Nations, Standard Minimum Rules for the Treatment of Prisoners, 30 August 1955*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Rule 37.

Annex R *UN General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment : resolution / adopted by the General Assembly, 9 December 1988, A/RES/43/173*, Principles 19 and 20.

Annex S *Khodorkovskiy and Lebedev v. Russia* (app. nos. 11082/06 and 13772/05) ECtHR 25 July 2013, paras. 324-325, 823, 836, 838, 848-849.

Annex T *Moiseyev v. Russia* (app. no. 62936/00) ECtHR 9 October 2008, paras. 246, 248 and 255.

Annex U *Klamecki v. Poland (No. 2)* (app. no. 31583/96) ECtHR 3 April 2003, paras. 72-73, 100, 149-152

Annex V *Kucera v. Slovakia* (app. no. 48666/99) ECtHR 17 July 2007, paras. 126-127.

Annex W *Selmani v. Switzerland* (app. no. 70258/01) ECtHR 28 June 2001, para. 1.

Annex X *Beoku-Betts v Secretary of State for the Home Department,* [2009] 1 AC 115.

Annex Y *HH v Deputy Prosecutor of the Italian Republic* [2013] 1 AC 338, para. 33.

Annex Z *ZH (Tanzania) v Secretary of State for the Home Department*[2011] 2 AC 166, para. 24

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Annex BB Scheme for the Transfer of Convicted Offenders Within the Commonwealth, available at web page of UK Government: < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/286790/Commonwealth_Scheme_for_the_Transfer_of_ConvictedOffenders.pdf> (accessed on 4 May 2014).

Annex CC United Nations Office of Drugs and Crime *Handbook on the International Transfer of Sentenced Persons,* (New York: United Nations 2012), pp. 12-13.

Annex DD Council of Europe, *Explanatory Report on the Convention on the Transfer of Sentenced Persons,* Strasbourg 1983, para. 9.

Annex EE *The Prosecutor v. Ruggiu*, Case No. ICTR-97-32-A26, Decision on the Enforcement of Sentence, 13 February 2008, p. 6.

Annex FF *Bagaragaza transferred to Sweden last July*, Hirondelle news agency, 26 October 2010, available at: <http://www.hirondellenews.com/ictr-rwanda/408-collaboration-with-states/collaboration-with-states-other-countries/24576-en-en-261010-ictrsweden-bagaragaza-transferred-to-sweden-last-july1362713627> (accessed on 6 April 2014).

Annex GG Seventh Annual Report of the President of the SCSL, June 2009 to May 2010, p. 10.

Annex HH Tenth Annual Report of the President of the SCSL, June 2012 to May 2013, p. 41.

Annex II Confidential.

Annex JJ Letter of Binta Mansaray to the President of the RSCSL "Re: Update on issues pertaining to SCSL prisoner Charles Taylor", dated 24 March 2014, p. 2.

Annex KK Confidential.

Annex LL Balkan Transitional Justice, "ICTY: Radislav Krstić Transferred Back to The Hague," 23 December 2011

Annex MM *Case of Ramirez Sanchez. V. France*, (59450/00) (2006) para. 145

(ii) Authorities Cited But Not Annexed To the Present Filing In Accordance with Article 7 (B) of the RSCSL Practice Direction on Filing of Documents of 24 April 2014

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UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Articles 7, 10 , 23 and 10.

The Prosecutor v. Taylor, Case No. SCSL-03-01-ES, Order Designating the State In Which Charles Ghankay Taylor Is To Serve His Sentence, 4 October 2013.

The Statute of the Residual Special Court for Sierra Leone, Articles 1 and 23.

ANNEX A

AGREEMENT BETWEEN THE SPECIAL COURT FOR SIERRA LEONE AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND ON THE ENFORCEMENT OF SENTENCES OF THE SPECIAL COURT FOR SIERRA LEONE

The Special Court for Sierra Leone (hereinafter referred to as "the Special Court"), and the Government of the United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as "the United Kingdom");

Having regard to Article 22 of the Statute of the Special Court annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed at Freetown on 16 January 2002;

Noting the willingness of the United Kingdom to enforce sentences imposed by the Special Court;

Have agreed as follows:

ARTICLE 1

Purpose and Scope of the Agreement

This Agreement shall regulate matters relating to or arising out of all requests to the United Kingdom to enforce sentences imposed by the Special Court.

ARTICLE 2

Procedure

1. A request to the United Kingdom to enforce a sentence shall be made by the Registrar of the Special Court (hereinafter "the Registrar"), with the approval of the President of the Special Court (hereinafter "the President").

2. The Registrar shall submit the request to the United Kingdom Foreign and Commonwealth Office, through the High Commission in Freetown.

3. The Registrar shall provide the following documents to United Kingdom Foreign and Commonwealth Office when making the request:

a) a certified copy of the judgement;

b) details of the offences to which the sentence of imprisonment relates:

c) a statement indicating how much of the sentence has already been served, including information on any pre-trial detention, any other measure altering the length or conditions of the sentence and any other factors relevant to the enforcement of the sentence;

d) when appropriate, any medical or psychological reports on the sentenced person, any recommendation for his further treatment in the United Kingdom and any other report relevant to the enforcement of the sentence; and

e) The name, date and place of birth of the sentenced person together with any known family or other ties with the United Kingdom or any other reason for making the request.

4. The competent national authorities of the United Kingdom shall decide upon any such request of the Registrar, in accordance with its national law, and the United Kingdom shall promptly inform the Special Court whether or not it agrees to the request.

ARTICLE 3

Enforcement

1. In enforcing the sentence pronounced by the Special Court, the competent national authorities of the United Kingdom shall be bound by the duration of the sentence.

2. The conditions of imprisonment shall be governed by the law of the United Kingdom, subject to the supervision of the Special Court, as provided for in Articles 6 to 9 of this Agreement.

3. The conditions of imprisonment shall be equivalent to those applicable to prisoners serving sentences under the law of the United Kingdom and shall be in accordance with relevant human rights standards.

ARTICLE 4

Transfer of the Convicted Person

The Registrar shall make appropriate arrangements with the United Kingdom for the transfer of the convicted person from the Special Court to the competent authorities of the United Kingdom. Prior to his transfer, the convicted person will be informed by the Registrar of the contents of this Agreement. The transfer shall take place at a time and place agreed between the United Kingdom and the Registrar.

ARTICLE 5

Non-bis-in-idem (rule of speciality)

The convicted person shall not be tried before a court in the United Kingdom for acts which the Special Court has the power to prosecute under Articles 2, 3, 4 and 5 of the Statute of the Special Court, for which he has already been tried by the Special Court.

ARTICLE 6

Inspection

1. The competent authorities of the United Kingdom shall allow the inspection of the conditions of detention and treatment of the prisoners, detained under this Agreement, by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter "the CPT") at any time and on a periodic basis, the frequency of visits to be determined by the CPT. The CPT will submit a confidential report based on the findings of those inspections to the Foreign and Commonwealth Office and to the President of the Special Court. The confidential report shall not be released, by the President of the Special Court to any person or body, outside the Special Court, without the consent of the Government of the United Kingdom.

2. The United Kingdom and the President shall consult each other on the findings of the reports referred to in paragraph 1 of this Article. The President may thereafter request the United Kingdom to report to him or her any changes in the conditions of detention suggested by the CPT.

ARTICLE 7

Information

1. The United Kingdom shall immediately notify the Registrar:

   a) six months prior to the completion of the sentence;

   b) if the sentenced person has escaped from custody before the sentence has been completed;

   c) if the sentenced person has deceased; and

   d) six months prior to the point at which early release would be considered for an equivalent domestic sentence in the jurisdiction of the United Kingdom to which the sentenced person has been transferred.

2. Notwithstanding paragraph 1 of this Article, the Registrar and the United Kingdom shall consult each other on all matters relating to the enforcement of the sentence upon the request of either Party.

3. The Registrar shall, during the course of enforcement of any sentence under this Agreement, provide the United Kingdom with any report or other information requested by the United Kingdom, which is relevant to the enforcement of such a sentence and within the possession of the Registrar.

ARTICLE 8

Early release, pardon and commutation of sentences

1. If, pursuant to the applicable national law of the United Kingdom, the sentenced person is eligible for early release, pardon or commutation of the sentence, the United Kingdom shall notify this to the Registrar, in advance of such eligibility, and shall include in any such notification all the circumstances pertaining to the eligibility for early release, pardon or commutation of the sentence.

2. The President of the Special Court shall determine, in consultation with the Judges of the Special Court, whether any early release, pardon or commutation of the sentence is appropriate. The Registrar shall inform the United Kingdom of the President's determination. If the President determines that an early release, pardon or commutation of the sentence is not appropriate, the United Kingdom shall act accordingly.

ARTICLE 9

Termination of enforcement

1. The enforcement of the sentence shall cease:

   a) when the sentence has been completed;

   b) upon the death of the sentenced person;

   c) upon the pardon or commutation of the sentenced person; or

   d) following a decision of the Special Court referred to in paragraph 2 of this Article.

2. The Special Court may at any time decide to request the termination of the enforcement of the sentence in the United Kingdom and transfer the sentenced person to another State or to the Special Court.

3. The competent authorities of the United Kingdom shall terminate the enforcement of the sentence as soon as they are informed by the Registrar of any decision or measure as a result of which the sentence shall cease to be enforceable.

4. After the enforcement of the sentence has ceased in accordance with this Agreement, the United Kingdom may transfer or deport the convicted person as appropriate and in accordance with its international obligations.

ARTICLE 10

Impossibility of enforcement of sentence

If, at any time after the decision has been taken to enforce the sentence, for any legal or practical reasons, further enforcement has become impossible, the United Kingdom shall promptly inform the Registrar. The Registrar shall make the appropriate arrangements for the transfer of the sentenced person. The competent authorities of the United Kingdom shall allow at least sixty days following the notification of the Registrar before taking further action on the matter.

ARTICLE 11

Costs

The Special Court shall bear the expenses related to the transfer of the sentenced person to and from the United Kingdom, unless the Parties agree otherwise. The United Kingdom shall pay all other expenses incurred in the enforcements of the sentence.

ARTICLE 12

Entry into force

This Agreement shall enter into force 30 days after signature by the Special Court and the United Kingdom.

ARTICLE 13

Duration of the Agreement

1. This Agreement shall remain in force as long as sentences of the Special Court are being enforced by the United Kingdom under the terms and conditions provided in this Agreement.

2. Either Party may terminate this Agreement following consultations with the other Party and after the expiry of two months from the date on which written notice has been given by the terminating Party to the other Party. This Agreement shall not be terminated before any sentences to which this Agreement applies have been completed or terminated in accordance with this Agreement nor before any sentenced individual has been transferred or deported from the United Kingdom subsequent to the completion or termination of such a sentence.

In witness whereof, the undersigned, duly authorised thereto, have signed this Agreement.

Done at London this 10th day of July 2007, in duplicate, in the English language.

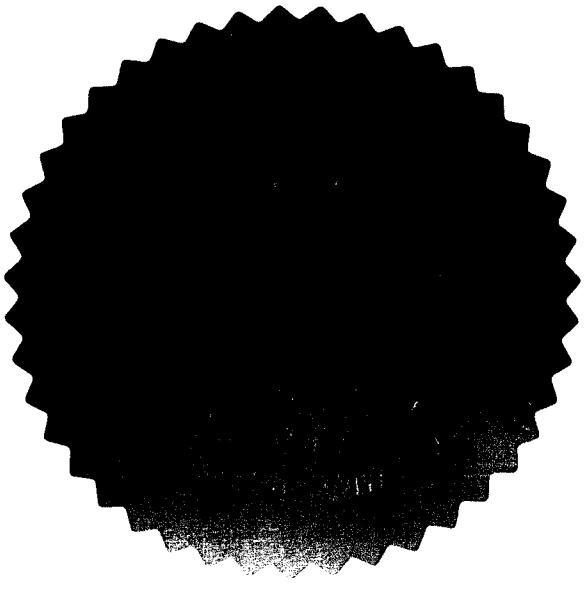
For the Special Court for Sierra Leone:

For the Government of the United Kingdom of Great Britain and Northern Ireland:

Lord Mark Malloch-Brown, Minister of State for Africa, Asia and the United Nations, is hereby granted full powers to sign, on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland, the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Special Court for Sierra Leone on the Enforcement of Sentences of the Special Court for Sierra Leone.

In witness whereof I, David Miliband, Her Majesty' s Principal Secretary of State for Foreign and Commonwealth Affairs, have signed these presents.

Signed and sealed at the Foreign and Commonwealth Office, London, the 9th day of July, Two thousand and seven.



David Miliband

ANNEX B

AMENDED AGREEMENT BETWEEN THE SPECIAL COURT FOR SIERRA LEONE AND THE GOVERNMENT OF THE REPUBLIC OF RWANDA ON THE ENFORCEMENT OF SENTENCES OF THE SPECIAL COURT FOR SIERRA LEONE

The Special Court for Sierra Leone, established by the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone signed on 16 January 2002 (hereinafter "the Special Court") and

The Government of the Republic of Rwanda (hereinafter "the Government of Rwanda"),

RECALLING Article 22 of the Statute of the Special Court annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, according to which imprisonment of persons sentenced by the Special Court shall be served in Sierra Leone; or if circumstances so require, in any State that has concluded with the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for former Yugoslavia an agreement for the enforcement of sentences and which has indicated to the Special Court its willingness to accept convicted persons; or alternatively, in any State with which the Special Court has concluded similar agreements;

RECALLING United Nations Security Council Resolution 1470 (2003), adopted on 28 March 2003, which urges all the States to cooperate fully with the Special Court;

NOTING the willingness of the Government of Rwanda to enforce sentences imposed by the Special Court for violations of international humanitarian law and Sierra Leonean law in the territory of Sierra Leone since 30 November 1996;

RECALLING the widely accepted international standards governing the treatment of prisoners, including the Standard Minimum Rules for the Treatment of Prisoners approved by ECOSOC resolutions 663 C (XXIV) of 31 July 1957 and 2067 (LXII) of 13 May 1977, the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment adopted by General Assembly resolution 43/173 of 9 December 1988, and the Basic Principles for the Treatment of Prisoners adopted by General Assembly resolution 45/111 of 14 December 1990;

IN ORDER to give effect to the judgements and sentences of the Special Court;

HAVE AGREED as follows:

Article 1

Purpose and Scope of the Agreement

This Agreement shall regulate matters relating to or arising out of all requests to the Government of Rwanda to enforce sentences imposed by the Special Court.

Article 2

Procedure

1. A request to the Government of Rwanda to enforce a sentence shall be made by the Registrar of the Special Court (hereinafter "the Registrar"), with the approval of the President of the Special Court.

2. The Registrar shall provide the following documents to the Government of Rwanda when making the request:

   a. a certified copy of the judgement;

   b. a statement indicating how much of the sentence has already been served, including information on any pre-trial detention;

   c. when appropriate, any medical or psychological reports on the convicted person, any recommendation for his further treatment in the Government of Rwanda and any other factor relevant to the enforcement of the sentence;

   d. certified copies of identification papers of the convicted person in the possession of the Special Court;

3. All communications to the Government of Rwanda relating to matters provided for in this Agreement shall be made to the Minister in charge of Penitentiary Administration through the Minister in charge of Foreign Affairs.

4. The competent national authorities of the Government of Rwanda shall promptly decide upon the request of the Registrar, in accordance with national law, and inform the Registrar in writing of its decision whether or not to accept the convicted person(s).

Article 3

Enforcement

1. In enforcing the sentence pronounced by the Special Court, the Government of Rwanda shall be bound by the duration of the sentence so pronounced and ensure the sentence is served in a prison facility identified and agreed to by the parties.

2. The conditions of imprisonment shall be governed by the laws of the Government of Rwanda, exclusive of Article 4.2 of Organic Law No. 31/2007 of 25/07/2007 relating to the Abolition of the Death Penalty, and any other provisions relating to holding convicted persons in isolation.

3. The conditions of imprisonment shall be subject to the supervision of the Special Court, as provided for in Articles 6 to 8 and paragraphs 2 and 3 of Article 9 below.

4. The conditions of imprisonment shall be consistent with the widely accepted international standards governing treatment of prisoners.

Article 4

Transfer of the convicted person

1. The Registrar shall make appropriate arrangements for the transfer of the convicted person from the Special Court to the competent authorities of the Government of Rwanda. Prior to his transfer, the convicted person will be informed by the Registrar of the contents of this Agreement.

2. If, after the transfer of the convicted person to the Government of Rwanda, the Special Court, in accordance with its Rules of Procedure and Evidence, orders that the convicted person appears in a proceeding before it, the convicted person shall be transferred temporarily to the Special Court for that purpose, conditioned upon his return to the Government of Rwanda within the period decided by the Special Court.

3. The Registrar shall transmit the order for the temporary transfer of the convicted person to the national authorities of the Government of Rwanda. The Registrar shall ensure the proper transfer of the convicted person from the Government of Rwanda to the Special Court and back to the Government of Rwanda for the continued imprisonment after the expiration of the period of temporary transfer decided by the Special Court. The duration of the temporary transfer shall be deducted from the overall sentence to be served in the Government of Rwanda.

Article 5

Non-bis-in-idem

The convicted person shall not be tried before a court of the Government of Rwanda for acts constituting a crime falling within the jurisdiction of the Special Court, for which he has already been tried by the Special Court.

Article 6

Inspection

1. The competent authorities of the Government of Rwanda shall allow the inspection of the conditions of detention and the treatment of the prisoner(s) at any time and on a periodic basis by the International Committee of the Red Cross (hereinafter the ICRC) or such other body or person as the Special Court may designate for that purpose. The frequency of visits will be determined by the ICRC or the designated body or person. The Special Court may furthermore request the ICRC or the designated body or person to carry out such an inspection. The ICRC or the designated body or person will submit a confidential report based on the findings of these inspections to the Government of Rwanda and to the President and the Registrar of the Special Court.

2. Representatives of the Government of Rwanda, the President and the Registrar of the Special Court shall consult each other on the findings of the reports referred to in the previous paragraph. The President of the Special Court may thereafter request the

Government of Rwanda to report to him or her any changes in the conditions of detention suggested by the ICRC or the designated body or person.

Article 7
Information

1. The Government of Rwanda shall immediately notify the Registrar of the following:

   a. if the convicted person has completed his sentence, two months, or as soon as practicable, prior to such completion;

   b. if the convicted person has escaped from custody;

   c. if the convicted person has deceased;

2. Notwithstanding the previous paragraph, the Registrar of the Special Court and the Government of Rwanda shall consult each other on all matters relating to the enforcement of the sentence upon the request of either party.

Article 8
Early release, pardon and commutation of sentences

1. If, pursuant to the applicable national law of the Government of Rwanda, the convicted person is eligible for early release, pardon or commutation of the sentence, the Government of Rwanda shall notify this to the Registrar of the Special Court in advance of such eligibility, and shall include in any such notification all the circumstances pertaining to the eligibility for early release, pardon or commutation of the sentence.

2. In the determination of eligibility of the convicted person, consideration shall be given to the length of the sentence imposed by the Special Court and the necessity to ensure equality of treatment among convicted persons.

3. The President of the Special Court shall determine, in consultation with the Judges of the Special Court, whether any early release, pardon or commutation of the sentence is appropriate in the interest of justice and the general principles of law. The Registrar of the Special Court shall inform the Government of Rwanda of the President's decision. If the President determines that early release, pardon or commutation of the sentence is not appropriate, the Government of Rwanda shall act accordingly.

Article 9
Termination of enforcement

1. The enforcement of the sentence shall terminate:

   a. when the convicted person has completed his sentence;

   b. when the convicted person has died;

   c. when the convicted person has been released as a result of being granted early release, pardon or commutation of sentence;

d. when the Special Court has issued a decision as referred to in paragraph 2;

2. The Special Court may at any time decide to request the termination of the enforcement in the Government of Rwanda and transfer the convicted person to another State or to the Special Court.

3. The competent authorities of the Government of Rwanda shall terminate the enforcement of the sentence as soon as it is informed by the Registrar of any decision or measure as a result of which the sentence ceases to be enforceable.

4. Upon the termination of the enforcement of a sentence, the Registrar shall in consultation with the Government of Rwanda make the appropriate arrangements for the transfer of the convicted person from the Government of Rwanda or, in the case of death, the repatriation of the convicted person's body.

Article 10

Impossibility to enforce sentence

If, at any time after the decision has been taken to enforce the sentence, for any legal or practical reasons, further enforcement has become impossible, the Government of Rwanda shall promptly inform the Registrar of the Special Court. The Registrar shall then make the appropriate arrangements for the transfer of the convicted person. The competent authorities of the Government of Rwanda shall allow for at least sixty days following the notification of the Registrar before taking other measures on the matter.

Article 11

Costs

1. Unless the parties agree otherwise, the Special Court shall bear the expenses related to the following:

   a. the transfer of the convicted person to and from the Government of Rwanda, at the beginning and at the end of the sentence, including the temporary transfer to and from the Special Court for the purposes of appearing in a proceeding before the Special Court;

   b. in case of death, the cost of transportation and return of the body of the deceased to the family members of the deceased, for burial, or if and when necessary, the costs of the burial by the Rwanda authorities, in the event that the family of the deceased does not take possession of the body; and

   c. upkeep and maintenance costs (related to meals, sanitation and communications) as well as incidentals and special medical care which may entail extraordinary costs in respect of a convicted person who is to serve a sentence in the Government of Rwanda pursuant to this Agreement.

2. The Government of Rwanda shall pay all other expenses incurred by the enforcement of the sentence, including:

a. safety and security of the identified quarters for persons convicted by the Special Court;

b. prison wardens' remuneration and basic utilities (water, electricity, sewage, etc);

c. any travel document necessary to authorize the convicted person to exit Rwanda upon completion of his sentence, in accordance with Rwanda laws.

3. The Government of Rwanda and the Registrar will conclude a Memorandum of Understanding detailing the average yearly costs that are to be borne by the Special Court for Sierra Leone, in accordance with paragraph 1 above.

Article 12
Substitution Clause

Upon completion of the mandate of the Special Court for Sierra Leone, as per Article 23 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, and Article 1 of the Statute of the Special Court, its designated successor body, mandated to discharge all residual functions of the Special Court, will take over all functions of the President, the Registrar and the Judges pertaining to the execution of this Agreement.

Article 13
Entry into force

This Agreement shall enter into force provisionally upon the signature of both parties, and definitely upon the date of notification by the Government of Rwanda of ratification or approval of the Agreement by its competent authorities.

Article 14
Duration of the Agreement

1. This Agreement shall remain in force as long as sentences of the Special Court are being enforced by the Government of Rwanda under the terms and conditions of this Agreement.

2. Upon consultation, either party may terminate this Agreement, with six months prior notice in writing. This Agreement shall not be terminated before the sentences to which this Agreement applies have been terminated and, if applicable, before the transfer of the convicted person as provided for in Article 10 has been effected.

Article 15
Amendment

This Agreement may be amended by mutual consent of the parties.

IN WITNESS WHEREOF, the undersigned, duly authorized thereto, have signed this Agreement.

Done at Kigali, on the Eighteenth day of March in the year Two Thousand and Nine, in duplicate, in English and French, both texts being equally authentic, with Articles 3.2 and 8.2 having been amended on this Sixteenth day of September in the year Two Thousand and Nine, in English.

FOR THE SPECIAL COURT FOR SIERRA LEONE

Binta Mansaray,
Acting Registrar of the Special Court for Sierra Leone

FOR THE GOVERNMENT OF THE REPUBLIC OF RWANDA

H.E. Mrs. Rosemary Museminali,
Minister of Foreign Affairs and Cooperation of the Republic of Rwanda

ANNEX C

AGREEMENT
BETWEEN
THE SPECIAL COURT FOR SIERRA LEONE
AND
THE GOVERNMENT OF FINLAND
ON THE ENFORCEMENT OF SENTENCES
OF THE SPECIAL COURT FOR SIERRA LEONE

THE SPECIAL COURT FOR SIERRA LEONE, established by the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone signed on 16 January 2002 (hereinafter "the Special Court") and

THE GOVERNMENT OF FINLAND (hereinafter "the Requested State"),

RECALLING Article 22 of the Statute of the Special Court annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, according to which imprisonment of persons sentenced by the Special Court shall be served in Sierra Leone; or if circumstances so require, in any State that has concluded with the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for former Yugoslavia an agreement for the enforcement of sentences and which has indicated to the Special Court its willingness to accept convicted persons; or alternatively, in any State with which the Special Court has concluded similar agreements;

RECALLING United Nations Security Council Resolution 1470 (2003), adopted on 28 March 2003, which urges all the States to cooperate fully with the Special Court;

NOTING the willingness of the Requested State to enforce sentences imposed by the Special Court;

RECALLING the widely accepted international standards governing the treatment of prisoners, including the Standard Minimum Rules for the Treatment of Prisoners approved by ECOSOC resolutions 663 C (XXIV) of 31 July 1957 and 2067 (LXII) of 13 May 1977, the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment adopted by General Assembly resolution 43/173 of 9 December 1988, the Basic Principles for the Treatment of Prisoners adopted by General Assembly resolution 45/111 of 14 December 1990, and the Recommendation Rec(2006)2 of the Council of Europe Committee of Ministers to member states on the European Prison Rules;

IN ORDER to give effect to the judgements and sentences of the Special Court;

HAVE AGREED as follows:

Article 1

Purpose and Scope of the Agreement

This Agreement shall regulate matters relating to or arising out of all requests to the Requested State to enforce sentences imposed by the Special Court.

Article 2

Procedure

1. A request to the Requested State to enforce a sentence shall be made by the Registrar of the Special Court (hereinafter "Registrar"), with the approval of the President of the Special Court.

2. The Registrar shall provide the following documents to the Requested State when making the request:

   a. a certified copy of the judgement;
   b. a statement indicating how much of the sentence has already been served, including information on any pre-trial detention;
   c. when appropriate, any medical or psychological reports on the convicted person, any recommendation for his or her further treatment in the Requested State and any other factor relevant to the enforcement of the sentence; and
   d. certified copies of identification papers of the convicted person in the possession of the Special Court.

3. The Requested State shall transmit the request and all communications relating to matters provided for in this Agreement to the competent national authorities.

4. The competent national authorities of the Requested State shall promptly decide upon the request of the Registrar, in accordance with national law, and inform the Registrar in writing of its decision whether or not to accept the convicted person.

Article 3

Enforcement

1. In enforcing the sentence pronounced by the Special Court, the Requested State shall be bound by the duration of the sentence.

2. The conditions of imprisonment shall be governed by the laws of the Requested State, subject to the supervision of the Special Court, as provided for in Articles 7 to 9 and paragraphs 2 and 3 of Article 10 below.

3. The conditions of imprisonment shall be consistent with the widely accepted international standards governing treatment of prisoners; in no case shall such

conditions be more or less favourable than those available to prisoners convicted of similar offences in the Requested State.

4. When a convicted person is eligible for a prison programme or benefit available under the national law of the Requested State which may entail some activity outside the prison facilities, the Requested State shall communicate that fact to the Registrar of the Special Court, together with any relevant information or observation, to enable the Special Court to exercise its supervisory function.

Article 4

Transfer of the convicted person

1. The Registrar shall make appropriate arrangements for the transfer of the convicted person from the Special Court to the competent authorities of the Requested State. Prior to his or her transfer, the convicted person will be informed by the Registrar of the contents of this Agreement.

2. If, after the transfer of the convicted person to the Requested State, the Special Court, in accordance with its Rules of Procedure and Evidence, orders that the convicted person appears in a proceeding before it, the convicted person shall be transferred temporarily to the Special Court for that purpose, conditioned upon his or her return to the Requested State within the period decided by the Special Court.

3. The Registrar shall transmit the order for the temporary transfer of the convicted person to the national authorities of the Requested State. The Registrar shall ensure the proper transfer of the convicted person from the Requested State to the Special Court and back to the Requested State for the continued imprisonment after the expiration of the period of temporary transfer decided by the Special Court. The duration of the temporary transfer shall be deducted from the overall sentence to be served in the Requested State.

Article 5

Non-bis-in-idem

The convicted person shall not be tried before a court of the Requested State for acts constituting a crime falling within the jurisdiction of the Special Court, for which he or she has already been tried by the Special Court.

Article 6

Rule of speciality

1. The convicted person in the custody of the Requested State shall not be subject to prosecution, punishment or to extradition to a third State for any conduct engaged in prior to that person's transfer to the territory of the Requested State, unless such prosecution, punishment or extradition has been approved by the President of the Special Court, at the request of the Requested State.

2. When the Requested State intends to prosecute or enforce a sentence against the convicted person, it shall notify its intention to the Registrar of the Special Court, and transmit the following documents:

   a. a statement of the facts of the case and their legal characterization;
   b. a copy of any applicable legal provisions, including those concerning statutes of limitation and applicable penalties;
   c. a copy of any sentence, warrant of arrest or other document having the same force, or of any other legal writ which the Requested State intends to enforce;
   d. a protocol containing views of the sentenced person obtained after the person has been informed sufficiently about the proceedings.

3. In the event of a request for extradition made by a third State, the Requested State shall transmit the entire request to the Registrar of the Special Court, with a protocol containing the views of the convicted person obtained after informing the person sufficiently about the extradition request.

4. The Registrar of the Special Court may, in relation to paragraphs 2 and 3 of this Article, request any document or additional information from the Requested State or the third State requesting the extradition.

5. The Registrar, in consultation with the President of the Special Court, shall make a determination as soon as possible. This determination shall be notified to all those who have participated in the proceedings. If the request submitted under paragraphs 2 and 3 of this Article concerns the enforcement of a sentence, the convicted person may serve that sentence in the Requested State or be extradited to a third State only after the enforcement of the sentence imposed by the Special Court has been terminated.

6. The Registrar, in consultation with the President of the Special Court, may authorize the temporary extradition of the convicted person to a third State for prosecution only if it has obtained assurances which it deems to be sufficient that the convicted person will be kept in custody in the third State during prosecution, and transferred back to the Requested State after the prosecution, until termination of enforcement of the sentence imposed by the Special Court.

7. Paragraph 1 of this Article shall cease to apply if the convicted person remains voluntarily for more than 30 days in the territory of the Requested State after termination of enforcement of the sentence imposed by the Special Court, or returns to the territory of that State after having left it.

Article 7

Inspection

1. The competent authorities of the Requested State shall allow the inspection of the conditions of detention and the treatment of the prisoner(s) by the International Committee of the Red Cross (hereinafter the ICRC). The frequency of visits will be determined by the ICRC. The Special Court may furthermore request the ICRC to carry out such an inspection. The ICRC will

submit a confidential report based on the findings of these inspections to the Requested State as well as to the President and the Registrar of the Special Court.

2. The Requested State, the President and the Registrar of the Special Court shall consult each other on the findings of the reports referred to in the previous paragraph. The President of the Special Court may thereafter request the Requested State to report to him or her any changes in the conditions of detention suggested by the ICRC.

Article 8

Information

1. The Requested State shall immediately notify the Registrar of the following:

   a. if the convicted person has completed his or her sentence, two months, or as soon as practicable, prior to such completion;
   b. if the convicted person has escaped from custody;
   c. if the convicted person has deceased; and
   d. if the convicted person becomes eligible for early release, pardon or commutation of sentence, six months or as soon as practicable prior to such early release, pardon or commutation of sentence.

2. Notwithstanding the previous paragraph, the Registrar of the Special Court and the Requested State shall consult each other on all matters relating to the enforcement of the sentence upon the request of either party.

Article 9

Early release, pardon and commutation of sentences

1. If, pursuant to the applicable national law of the Requested State, the convicted person is eligible for early release, pardon or commutation of the sentence, the Requested State shall notify this to the Registrar of the Special Court in advance of such eligibility, and shall include in any such notification all the circumstances pertaining to the eligibility for early release, pardon or commutation of the sentence.

2. The President of the Special Court shall determine, in consultation with the Judges of the Special Court, whether any early release, pardon or commutation of the sentence is appropriate in the interest of justice and the general principles of law. The Registrar shall inform the Requested State of the President's decision. If the President determines that early release, pardon or commutation of the sentence is not appropriate, the Requested State shall act accordingly.

Article 10

Termination of enforcement

1. The enforcement of the sentence shall terminate:

   a. when the convicted person has completed his or her sentence;
   b. when the convicted person has died;
   c. when the convicted person has been released as a result of being granted early release, pardon or commutation of sentence; or
   d. when the Special Court has issued a decision as referred to in paragraph 2.

2. The Special Court may at any time decide to request the termination of the enforcement in the Requested State and transfer the convicted person to another State or to the Special Court.

3. The competent authorities of the Requested State shall terminate the enforcement of the sentence as soon as it is informed by the Registrar of any decision or measure as a result of which the sentence ceases to be enforceable.

4. Upon the termination of the enforcement of a sentence, the Registrar shall in consultation with the Requested State make the appropriate arrangements for the transfer of the convicted person from the Requested State or, in the case of death, the repatriation of the convicted person's body.

Article 11

Impossibility to enforce sentence

If, at any time after the decision has been taken to enforce the sentence, for any legal or practical reasons, further enforcement has become impossible, the Requested State shall promptly inform the Registrar of the Special Court. The Registrar shall then make the appropriate arrangements for the transfer of the convicted person. The competent authorities of the Requested State shall allow for at least sixty days following the notification of the Registrar before taking other measures on the matter.

Article 12

Costs

1. Unless the parties agree otherwise, the Special Court shall bear the expenses related to the following:

   a. the transfer of the convicted person to and from the Requested State, including the temporary transfer to and from the Special Court for the purposes of appearing in a proceeding before the Special Court; and
   b. the repatriation of the body of the convicted person, in case of his or her death.

2. The Requested State shall pay all other expenses incurred by the enforcement of the sentence, including, but not limited to, medical treatment of the convicted person, if needed.

Article 13

Substitution Clause

Upon completion of the mandate of the Special Court for Sierra Leone, as per Article 23 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, and Article 1 of the Statute of the Special Court, its designated successor body, mandated to discharge all residual functions of the Special Court, will take over all functions of the President, the Registrar and the Judges pertaining to the execution of this Agreement.

Article 14

Entry into force

This Agreement shall enter into force on the 30th day following receipt by the Special Court of the notification by the Requested State that it has completed its constitutional requirements for the entry into force of this Agreement.

Article 15

Duration of the Agreement

1. This Agreement shall remain in force as long as sentences of the Special Court are being enforced by the Requested State under the terms and conditions of this Agreement.

2. Upon consultation, either party may terminate this Agreement, with six months prior notice in writing. This Agreement shall not be terminated before the sentences to which this Agreement applies have been terminated and, if applicable, before the transfer of the convicted person as provided for in Article 11 has been effected.

Article 16

Amendment

This Agreement may be amended by mutual consent of the parties.

IN WITNESS WHEREOF, the undersigned, duly authorized thereto, have signed this Agreement.

Done at The Hague this 19 day of June 2009, in duplicate, in the English language.

FOR THE SPECIAL COURT FOR SIERRA LEONE

Binta Mansaray
Acting Registrar of
the Special Court for Sierra Leone

FOR THE GOVERNMENT OF FINLAND

Mikko Jokela
Ambassador of Finland
to the Netherlands

ANNEX D

AGREEMENT BETWEEN THE SPECIAL COURT FOR SIERRA LEONE AND THE GOVERNMENT OF SWEDEN ON THE ENFORCEMENT OF SENTENCES OF THE SPECIAL COURT FOR SIERRA LEONE

The Special Court for Sierra Leone, established by the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone signed on 16 January 2002 (hereinafter "Special Court") and

The Government of Sweden (hereinafter "requested State"),

RECALLING Article 22 of the Statute of the Special Court annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, according to which imprisonment of persons sentenced by the Special Court shall be served in Sierra Leone; or if circumstances so require, in any State that has concluded with the International Criminal Tribunal For Rwanda or the International Criminal Tribunal for former Yugoslavia an agreement for the enforcement of sentences and which has indicated to the Special Court its willingness to accept convicted persons; or alternatively, in any State with which the Special Court has concluded similar agreements;

RECALLING United Nations Security Counsel Resolution 1470 (2003), adopted on 28 March 2003, which urges all the States to cooperate fully with the Special Court;

NOTING the willingness of the requested State to enforce sentences regarding violations of international humanitarian law imposed by the Special Court;

RECALLING the provisions of the Standard Minimum Rules for the Treatment of Prisoners approved by ECOSOC resolutions 663 C XXIV) of 31 July 1957 and 2067 (LXII) of 13 May 1977, the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment adopted by General Assembly resolution 43/173 of 9 December 1988, and the Basic Principles for the Treatment of Prisoners adopted by General Assembly resolution 45/111 of 14 December 1990;

IN ORDER to give effect to the judgements and sentences of the Special Court;

HAVE AGREED as follows:

Article 1

Purpose and Scope of the Agreement

This Agreement shall regulate matters relating to or arising out of all requests to the requested State to enforce sentences imposed by the Special Court.

Article 2

Procedure

1. A request to the requested State to enforce a sentence shall be made by the Registrar of the Special Court (hereinafter "Registrar"), with the approval of the President of the Special Court.

2. The Registrar shall provide the following documents to the requested State when making the request:

a. a certified copy of the judgement;
b. a statement indicating how much of the sentence has already been served, including information on any pre-trial detention;
c. when appropriate, any medical or psychological reports on the convicted person, any recommendation for his or her further treatment in the requested State and any other factor relevant to the enforcement of the sentence; and
d. certified copies of identification papers of the convicted person in the possession of the Special Court.

3. The requested State shall promptly decide upon the request of the Registrar, in accordance with national law, and inform the Registrar in writing of its decision whether or not to accept the convicted person.

Article 3

Enforcement

1. In enforcing the sentence pronounced by the Special Court, the competent national authorities of the requested State shall be bound by the duration of the sentence.

2. The conditions of imprisonment shall be governed by the law of the requested State, subject to the supervision of the Special Court, as provided for in Articles 6 to 8 and paragraphs 2 and 3 of Article 9 below.

3. The conditions of imprisonment shall be compatible with the Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Basic Principles for the Treatment of Prisoners.

Article 4

Transfer of the convicted person

1. The Registrar shall make appropriate arrangements for the transfer of the convicted person from the Special Court to the competent authorities of the requested State. Prior to his or her transfer, the convicted person will be informed by the Registrar of the contents of this Agreement.

2. If, after the transfer of the convicted person to the requested State, the Special Court, in accordance with its Rules of Procedure and Evidence, orders that the convicted person appears as a witness in a proceeding before it, the convicted person shall, in accordance with the national law of the requested State, be transferred temporarily to the Special Court for that purpose, conditional on his or her return to the requested State within the period decided by the Special Court.

3. The Registrar shall transmit the order for the temporary transfer of the convicted person to the national authorities of the requested State. The Registrar shall ensure the proper transfer of the convicted person from the requested State to the Special Court and back to the requested State for the continued imprisonment after the expiration of the period of temporary transfer decided by the Special Court. The convicted person shall receive credit for the period he or she may have spent in the custody of the Special Court.

Article 5

Non-bis-in-idem

The convicted person shall not be tried before a court of the requested State for acts constituting a crime falling within the jurisdiction of the Special Court, for which he or she has already been tried by the Special Court.

Article 6

Inspection

1. The competent authorities of the requested State shall allow the inspection of the conditions of detention and the treatment of the prisoner(s) by the International Committee of the Red Cross (hereinafter "ICRC"). The frequency of visits shall be determined by the ICRC. The Special Court can furthermore request the ICRC to carry out such an inspection. The ICRC shall submit a confidential report based on the findings of these inspections to the requested States and to the President of the Special Court.

2. The requested State and the President of the Special Court shall consult each other on the findings of the reports referred to in the previous paragraph. The President of the Special Court may thereafter request the requested State to report to him or her any changes in the conditions of detention suggested by the ICRC.

Article 7

Information

1. The requested State shall immediately notify the Registrar of the following:

a. if the convicted person has completed his or her sentence, two months prior to such completion;
b. if the convicted person has escaped from custody;
c. if the convicted person has deceased; and

d. if the convicted person becomes eligible for early release, pardon or commutation of sentence, six months or as soon as practicable prior to such early release, pardon or commutation of sentence.

2. Notwithstanding the previous paragraph, the Registrar and the requested State shall consult each other on all matters relating to the enforcement of the sentence upon the request of either party.

Article 8

Early release, pardon and commutation of sentences

1. If, pursuant to the applicable national law of the requested State, the convicted person is eligible for early release, pardon or commutation of the sentence, the requested State shall notify this to the Registrar, in advance of such eligibility, and shall include in any such notification all the circumstances pertaining to the eligibility for early release, pardon or commutation of the sentence.

2. The Special Court will give its view as to whether early release, pardon or commutation of sentence is appropriate. The requested State will take these views into consideration and respond to the Special Court prior to taking any decision in the matter.

3. Following the receipt of the response, the Special Court may request the transfer of the convicted person in accordance with paragraph 2 of Article 9.

Article 9

Termination of enforcement

1. The enforcement of the sentence shall terminate:

a. when the convicted person has completed his or her sentence;
b. when the convicted person has died;
c. when the convicted has been released as a result of being granted early release, pardon or commutation of sentence; or
d. when the Special Court has issued a decision as referred to in paragraph 2.

2. The Special Court may at any time decide to request the termination of the enforcement in the requested State and transfer the convicted person to another State or to the Special Court.

3. The competent authorities of the requested State shall terminate the enforcement of the sentence as soon as it is informed by the Registrar of any decision or measure as a result of which the sentence ceases to be enforceable.

4. Upon the termination of the enforcement of a sentence, the Registrar shall in consultation with the requested State make the appropriate arrangements for the transfer of the convicted person from the requested State or in the case of death, the repatriation of the convicted person's body.

Article 10

Impossibility to enforce sentence

If, at any time after the decision has been taken to enforce the sentence, for any legal or practical reasons, further enforcement has become impossible, the requested State shall promptly inform the Registrar. The Registrar shall make the appropriate arrangements for the transfer of the convicted person. The competent authorities of the requested State shall allow for at least sixty days following the notification of the Registrar before taking other measures on the matter.

Article 11

Costs

1. Unless the parties agree otherwise, the Special Court shall bear the expenses related to the following:

a. the transfer of the convicted person to and from the requested State, including the temporary transfer to and from the Special Court for the purposes of appearing as a witness in a proceeding before the Special Court; and
b. the repatriation of the body of the convicted person, in case of his or her death.

2. The requested State shall pay all other expenses incurred by the enforcement of the sentence, including, but not limited to, medical treatment for the convicted person, if needed.

Article 12

Entry into force

This Agreement shall be signed by both Parties. It shall be subject to ratification by Sweden, and shall enter into force on the first day of the first month following the date of receipt by the Special Court of the notification from Sweden of its ratification.

Article 13

Duration of the Agreement

1. This Agreement shall remain in force as long as sentences of the Special Court are being enforced by the requested State under the terms and conditions of this Agreement.

2. Upon consultation, either party may terminate this Agreement, with two months' prior notice in writing. This Agreement shall not be terminated before the sentences to which this Agreement applies have been terminated and, if applicable, before the transfer of the convicted person as provided for in Article 10 has been effected.

Article 14

Amendment

This Agreement may be amended by mutual consent of the parties.

IN WITNESS WHEREOF, the undersigned, duly authorized thereto, have signed this Agreement.

Done at Freetown this 15th day of October, 2004, in duplicate, in the English language.

FOR THE SPECIAL COURT FOR SIERRA LEONE

Robin Vincent
Registrar

FOR THE GOVERNMENT OF SWEDEN

Hans Dahlgren
State Secretary for Foreign Affairs

ANNEX E

The authority exceeds 30 pages

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

INTERPRETATION OF THE AGREEMENT OF 25 MARCH 1951 BETWEEN THE WHO AND EGYPT

ADVISORY OPINION OF 20 DECEMBER 1980

1980

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

INTERPRÉTATION DE L'ACCORD DU 25 MARS 1951 ENTRE L'OMS ET L'ÉGYPTE

AVIS CONSULTATIF DU 20 DÉCEMBRE 1980

Official citation :

Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 73.

Mode officiel de citation :

Interprétation de l'accord du 25 mars 1951 entre l'OMS et l'Egypte, avis consultatif, C.I.J. Recueil 1980, p. 73.

Sales number
N° de vente : 457

Charter), Advisory Opinion, I.C.J. Reports 1962, pp. 156-158). It also points out in this connection that the Permanent Court of International Justice, in replying to requests for an advisory opinion, likewise found it necessary in some cases first to ascertain what were the legal questions really in issue in the questions posed in the request (cf. *Jaworzina, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8,* p. 282 ; *Interpretation of the Greco-Turkish Agreement of 1 December 1926, Advisory Opinion, 1928, P.C.I.J., Series B, No. 16,* pp. 5-16). Furthermore, as the Court has stressed earlier in this Opinion, a reply to questions of the kind posed in the present request may, if incomplete, be not only ineffectual but actually misleading as to the legal rules applicable to the matter under consideration by the requesting Organization. For this reason, the Court could not adequately discharge the obligation incumbent upon it in the present case if, in replying to the request, it did not take into consideration all the pertinent legal issues involved in the matter to which the questions are addressed.

36. The Court will therefore now proceed to consider its replies to the questions formulated in the request on the basis that the true legal question submitted to the Court is : What are the legal principles and rules applicable to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected ?

* * *

37. The Court thinks it necessary to underline at the outset that the question before it is not whether, in general, an organization has the right to select the location of the seat of its headquarters or of a regional office. On that question there has been no difference of view in the present case, and there can be no doubt that an international organization does have such a right. The question before the Court is the different one of whether, in the present case, the Organization's power to exercise that right is or is not regulated by reason of the existence of obligations vis-à-vis Egypt. The Court notes that in the World Health Assembly and in some of the written and oral statements before the Court there seems to have been a disposition to regard international organizations as possessing some form of absolute power to determine and, if need be, change the location of the sites of their headquarters and regional offices. But States for their part possess a sovereign power of decision with respect to their acceptance of the headquarters or a regional office of an organization within their territories ; and an organization's power of decision is no more absolute in this respect than is that of a State. As was pointed out by the Court in one of its early Advisory Opinions, there is nothing in the character of international organizations to justify their being considered as some form of "super-State" (*Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949,* p. 179). International organizations are subjects of international law and, as such, are bound by

Certaines dépenses des Nations Unies (article 17, paragraphe 2, de la Charte), avis consultatif, C.I.J. Recueil 1962, p. 156 à 158). Elle souligne également à ce propos qu'en réponse à des requêtes pour avis consultatif la Cour permanente de Justice internationale a elle aussi jugé parfois nécessaire de déterminer quels points de droit étaient véritablement mis en jeu par les questions posées dans la requête (voir *Jaworzina, avis consultatif, 1923, C.P.J.I. série B n° 8*, p. 282 ; *Interprétation de l'accord gréco-turc du 1er décembre 1926, avis consultatif, 1928, C.P.J.I. série B n° 16*, p. 5 à 16). En outre, comme la Cour l'a relevé plus haut dans le présent avis consultatif, une réponse incomplète à des questions comme celles de la requête peut non seulement être inefficace mais induire réellement en erreur sur les règles juridiques qui régissent le sujet examiné par l'Organisation requérante. Aussi la Cour ne pourrait-elle s'acquitter convenablement de l'obligation qui lui incombe en l'espèce si, dans sa réponse à la requête, elle ne prenait pas en considération tous les aspects juridiques pertinents du sujet sur lequel portent les questions.

36. La Cour se propose donc maintenant d'étudier les réponses aux demandes formulées dans la requête en partant de l'idée que la véritable question juridique qui lui est soumise est celle-ci : Quels sont les principes et les règles juridiques applicables à la question de savoir selon quelles conditions et selon quelles modalités peut être effectué un transfert du Bureau régional hors d'Egypte ?

* * *

37. La Cour estime nécessaire de souligner dès le départ que la question dont elle est saisie n'est pas de savoir si en général une organisation a le droit de choisir l'emplacement de son siège ou d'un bureau régional. Il n'y a pas eu de divergences de vues à cet égard en la présente espèce et il n'est pas douteux qu'une organisation internationale jouit de ce droit. La question posée à la Cour est différente ; elle est de savoir si, en l'occurrence, le pouvoir que possède l'Organisation d'exercer ce droit est ou non soumis à des règles, du fait de l'existence d'obligations dont l'Organisation serait tenue envers l'Egypte. La Cour constate que, au sein de l'Assemblée mondiale de la Santé comme dans certains des exposés écrits ou oraux qui lui ont été présentés, on paraît avoir eu tendance à considérer que les organisations internationales jouissent d'une sorte de pouvoir absolu de déterminer ou éventuellement de changer l'emplacement de leur siège ou de leurs bureaux régionaux. Mais les Etats aussi possèdent un pouvoir souverain de décision pour ce qui est d'accueillir le siège ou un bureau régional d'une organisation sur leur territoire ; et le pouvoir de décision d'une organisation à cet égard n'est pas plus absolu que celui d'un Etat. Ainsi que la Cour l'a souligné dans l'un de ses premiers avis consultatifs, rien dans le caractère d'une organisation internationale ne justifie qu'on la considère comme une sorte de « super-Etat » (*Réparation des dommages subis au service des Nations Unies, avis consultatif, C.I.J. Recueil 1949*, p. 179). L'organisation internationale est un sujet de droit international lié en tant

any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties. Accordingly, it provides no answer to the questions submitted to the Court simply to refer to the right of an international organization to determine the location of the seat of its regional offices.

*

38. The "differing views" expressed in the World Health Assembly regarding the relevance of the Agreement of 25 March 1951, and regarding the question whether the terms of Section 37 of the Agreement are applicable in the event of any transfer of the Regional Office from Egypt, were repeated and further developed in the written and oral statements submitted to the Court. As to the relevance of the 1951 Agreement in the present connection, the view advanced on one side has been that the establishment of the Regional Office in Alexandria took place on 1 July 1949, pursuant to an agreement resulting either from Egypt's offer to transfer the operation of the Alexandria Bureau to the WHO and the latter's acceptance of that offer, or from Egypt's acceptance of a unilateral act of the competent organs of the WHO determining the site of the Regional Office. Proponents of this view maintain that the 1951 Agreement was a separate transaction concluded after the establishment of the Regional Office in Egypt had been completed and the terms of which only provide for the immunities, privileges and facilities of the Regional Office. They point to the fact that some other host agreements of a similar kind contain provisions expressly for the establishment of the seat of the Regional Office and stress the absence of such a provision in the 1951 Agreement. This Agreement, they argue, although it may contain references to the seat of the Regional Office in Alexandria, does not provide for its location there. On this basis, and on the basis of their understanding of the object of the 1951 Agreement deduced from its title, preamble, and text, they maintain that the Agreement has no bearing on the Organization's right to remove the Regional Office from Egypt. They also contend that the 1951 Agreement was not limited to the privileges, immunities and facilities granted only to the Regional Office, but had a more general purpose, namely, to regulate the above-mentioned questions between Egypt and the WHO in general.

39. Proponents of the opposing view say that the establishment of the Regional Office and the integration of the Alexandria Bureau with the WHO were not completed in 1949 ; they were accomplished by a series of acts in a composite process, the final and definitive step in which was the conclusion of the 1951 host agreement. To holders of this view, the act of transferring the operation of the Alexandria Bureau to the WHO in 1949 and the host agreement of 1951 are closely related parts of a single transaction whereby it was agreed to establish the Regional Office at Alexandria. Stressing the several references in the 1951 Agreement to the location of the Office in Alexandria, they argue that the absence of a specific provision regarding its establishment there is due to the fact that this

que tel par toutes les obligations que lui imposent les règles générales du droit international, son acte constitutif ou les accords internationaux auxquels il est partie. Dès lors, se contenter d'invoquer le droit que possède une organisation internationale de déterminer le siège de ses bureaux régionaux ne fournit aucune réponse aux questions posées à la Cour.

*

38. Les « divergences de vues » qui se sont fait jour à l'Assemblée mondiale de la Santé au sujet de la pertinence de l'accord du 25 mars 1951 et de l'applicabilité des termes de sa section 37 dans l'éventualité d'un transfert du Bureau régional hors d'Egypte se retrouvent et s'accusent dans les exposés écrits et oraux présentés à la Cour. A propos de la pertinence de l'accord de 1951 en l'espèce, l'une des thèses soutenues est que le Bureau régional a été établi à Alexandrie le 1er juillet 1949 en vertu d'un accord consistant, ou bien dans l'offre faite par l'Egypte de transférer les fonctions du Bureau d'Alexandrie à l'OMS suivie de l'acceptation de cette offre par l'OMS, ou bien dans l'acceptation par l'Egypte d'un acte unilatéral des organes compétents de l'OMS déterminant le siège du Bureau régional. Les tenants de cette thèse maintiennent que l'accord de 1951 représente une transaction distincte, consécutive à l'établissement du Bureau régional en Egypte et qui concerne uniquement les immunités, les privilèges et les facilités accordés à ce Bureau. Ils font observer que certains autres accords comparables contiennent des dispositions fixant expressément le siège du Bureau régional et ils soulignent l'absence d'une disposition à cet effet dans l'accord de 1951. Ils font valoir que, si celui-ci mentionne le siège du Bureau régional à Alexandrie, aucune de ses dispositions ne spécifie que ce siège y est situé. Ils se fondent sur cette constatation et sur la manière dont ils comprennent l'objet de l'accord de 1951 d'après son titre, son préambule et son texte pour soutenir que cet accord ne touche en rien le droit que possède l'Organisation de transférer le Bureau régional hors d'Egypte. Ils soutiennent aussi que l'accord de 1951 ne se limitait pas aux privilèges, immunités et facilités accordés au seul Bureau régional, mais qu'il avait un objet plus large, à savoir qu'il réglait d'une façon générale les questions susmentionnées entre l'Egypte et l'OMS.

39. D'après les partisans de la thèse contraire, l'établissement du Bureau régional et l'intégration du Bureau d'Alexandrie dans l'OMS n'ont pas été achevés en 1949 ; ils sont le résultat d'un processus complexe, comportant une série d'actes, dont l'étape définitive a été la conclusion de l'accord de siège de 1951. Pour ceux qui défendent cette thèse, le transfert effectif des fonctions du Bureau d'Alexandrie à l'OMS en 1949 et l'accord de 1951 sont des éléments intimement liés d'une transaction unique par laquelle il a été convenu d'établir le Bureau régional à Alexandrie. Rappelant que l'accord de 1951 fait à plusieurs reprises mention d'Alexandrie comme siège du Bureau, ils soutiennent que l'absence d'une disposition prévoyant expressément son établissement dans cette ville tient à ce que

ANNEX F

The authority exceeds 30 pages

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

IN THE APPEALS CHAMBER

Before:
Judge Gabrielle Kirk McDonald, Presiding
Judge Mohamed Shahabuddeen
Judge Lal Chand Vohrah
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: Mr. Agwu U. Okali

Decision of: 3 November 1999

JEAN-BOSCO BARAYAGWIZA
v.
THE PROSECUTOR

DECISION

Counsel for the Appellant:
Mr. Justry P. L. Nyaberi

The Office of the Prosecutor:
Mr. Mohamed C. Othman
Mr. N. Sankara Menon
Mr. Mathias Marcussen

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85. In the present case, the Appellant was detained for a total period of 11 months before he was informed of the general nature of the charges that the Prosecutor was pursuing against him. While we acknowledge that only 35 days out of the 11-month total are clearly attributable to the Tribunal (the periods from 17 April—16 May 1996 and 4—10 March 1997), the fact remains that the Appellant spent an inordinate amount of time in provisional detention without knowledge of the general nature of the charges against him. At this juncture, it is irrelevant that only a small portion of that total period of provisional detention is attributable to the Tribunal, since it is the Tribunal—and not any other entity—that is currently adjudicating the Appellant's claims. Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant's right to be promptly informed of the charges against him was violated.

86. As noted above, in Bell v. DPP of Jamaica, the abuse of process doctrine was applied where unreasonable delay would have resulted in an oppressive result had the case gone to trial. Applying the guidelines set forth in that case convinces us that the abuse of process doctrine is applicable under the facts of this case. The Appellant was detained for 11 months without being notified of the charges against him. The Prosecutor has offered no satisfactory justifications for this delay. The numerous letters attached to one of the Appellant's submissions point to the fact that the Appellant was in continuous communication with all three organs of the Tribunal in an attempt to assert his rights. Moreover, we find that the effect of the Appellant's pre-trial detention was prejudicial.

3. The failure to resolve the *writ of habeas corpus* in a timely manner

87. The next issue concerns the failure of the Trial Chamber to resolve the Appellant's *writ of habeas corpus* filed on 29 September 1997. The Prosecutor asserts that *after* the Appellant filed the *writ of habeas corpus*, the President of the Tribunal wrote a letter to the Appellant informing the Appellant that the Prosecutor would be submitting an indictment shortly. In fact, the President's letter is dated *8 September 1997*, and the Appellant claims that the *writ* was filed on the basis of this letter from the President. Moreover, the Appellant asserts that he was informed that the hearing on the *writ of habeas corpus* was to be held on 31 October 1997. The Appellant asserts that 'the Registry without the consent of the Defence removed the hearing of the motion from the calendar only because the Prosecution promised to issue the indictment soon'. The Appellant also claims that the indictment was filed and confirmed on 22 October 1997 and 23 October 1997, respectively, in order to pre-empt the hearing on the *writ of habeas corpus*. These assertions by the Appellant are, of course, impossible for him to prove, absent an admission by the Prosecutor. We note, however, that the Prosecutor has not directed the Appeals Chamber to any evidence to the contrary, and that the Appellant was never afforded an opportunity to be heard on the *writ of habeas corpus*.

88. Although neither the Statute nor the Rules specifically address *writs of habeas corpus* as such, the notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority's acts is well-established by the Statute and Rules. Moreover, this is a fundamental right and is enshrined in international human rights norms, including Article 8 of the Universal Declaration of Human Rights,

Article 9(4) of the ICCPR, Article 5(4) of the ECHR and Article 7(6) of the ACHR. The Inter-American Court of Human Rights has defined the *writ of habeas corpus* as:

> [A] judicial remedy designed to protect personal freedom or physical integrity against arbitrary decisions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered.

Thus, this right allows the detainee to have the legality of the detention reviewed by the judiciary.

89. The European Court of Human Rights has held that the detaining State must provide recourse to an independent judiciary in all cases, whether the detention was justified or not. Under the jurisprudence of that Court, therefore, a *writ of habeas corpus* must be heard, even though the detention is eventually found to be lawful under the ECHR. Thus, the right to be heard on the *writ* is an entirely separate issue from the underlying legality of the initial detention. In the present case, the Appellant's right was violated by the Trial Chamber because the *writ* was filed but was not heard.

90. The Appeals Chamber is troubled that the Appellant has not been given a hearing on his *writ of habeas corpus*. The fact that the indictment of the Appellant has been confirmed and that he has had his initial appearance does not excuse the failure to resolve the *writ*. The Appellant submits that as far as he is concerned the *writ of habeas corpus* is still pending. The Appeals Chamber finds that the *writ of habeas corpus* is rendered moot by this Decision. Nevertheless, the failure to provide the Appellant a hearing on this *writ* violated his right to challenge the legality of his continued detention in Cameroon during the two periods when he was held at the behest of the Tribunal and the belated issuance of the indictment did not nullify that violation.

4. The duty of prosecutorial due diligence

91. Article 19(1) of the Statute of the Tribunal provides that the Trial Chambers shall ensure that accused persons appearing before the Tribunal are guaranteed a fair and expeditious trial. However, the Prosecutor, has certain responsibilities in this regard as well. For example, the Prosecutor is responsible for, *inter alia*: conducting investigations, including questioning suspects; seeking provisional measures and the arrest and transfer of suspects; protecting the rights of suspect, by ensuring that the suspect understands those rights; submitting indictments for confirmation; amending indictments prior to confirmation; withdrawing indictments prior to confirmation; and, of course, for actually prosecuting the case against the accused.

92. Because the Prosecutor has the authority to commence the entire legal process, through investigation and submission of an indictment for confirmation, the Prosecutor has been likened to the 'engine' driving the work of the Tribunal. Or, as one court has stated, '[T]he ultimate responsibility for bringing a defendant to trial rests on the

ANNEX G

Residual Special Court for Sierra Leone

THE SPECIAL COURT FOR SIERRA LEONE AND THE RESIDUAL SPECIAL COURT FOR SIERRA LEONE, FREETOWN AND THE HAGUE

The Mandate of the Residual Special Court for Sierra Leone

Background

To maintain international standards and fulfilment of the Special Court's mandate, there are a number of legal and practical obligations that did not terminate upon the completion of trials and appeals. The term "residual functions" is used to describe the obligations which are derived from the core mandate of the SCSL as a criminal tribunal mandated to prosecute persons who bear the greatest responsibility for the war in Sierra Leone.

After the closure of the SCSL in 2012 a residual mechanism- the Residual Special Court for Sierra Leone (RSCSL) - will be established to manage the ongoing residual functions. In August 2010 the United Nations and the Government of Sierra Leone signed the Agreement on the Establishment of a Residual Special Court for Sierra Leone (RSCSL). The RSCSL shall carry out its functions at an interim seat in the Netherlands, with a branch or sub-office in Sierra Leone for witness protection and support, until such time as the UN and Government of Sierra Leone agree otherwise.

The 10 critical residual functions of the SCSL are broadly divided into two categories: "ongoing functions" and "ad hoc functions." The ongoing functions will be managed by a small, permanent office. If any of the ad hoc functions trigger, the office will make all the necessary arrangements to convene the RSCSL as required.

Ongoing Functions

Maintenance, Preservation and Management of the Archive – Long-term preservation of SCSL records in a secure environment. The SCLS archives will be moved to the Dutch National Archive to be collocated with the Nuremberg records in December 2010. A copy of the archives public records will remain in Freetown.

Witness Protection and Support – Respond to threats related to testimony given before the SCSL and provide appropriate protection and support measures. Witness protection officers will be located in Freetown. All communications with third States concerning relocations will be managed by the permanent office.

Assistance to National Prosecution Authorities – Manage Governmental requests for evidence and information to support investigations, prosecutions, forfeiture proceedings and asylum cases. Ensure that confidentiality obligations are upheld. Manage the disclosure of exculpatory evidence and requests from other States for documents relevant to witness projection orders.

Supervision of Prison Sentences/Pardons/Commutations/Early Releases – The supervision of the enforcement of sentences is a continuing obligation that may extend until 2055. This supervision includes inspection of the conditions of imprisonment, as well as tracking of time served and dates of release, including early release, pardon or commutation.

Ad Hoc Functions

Trial of Johnny Paul Koroma – Koroma is the only person indicted by the SCSL who is not in custody. The RSCSL will have jurisdiction to try him if he is arrested after the closure of the Special Court. The RSCSL shall also have the power and shall undertake every effort to refer the case to a competent national jurisdiction for trial if, under the SCSL Rules of Procedure and Evidence, the Court has not referred the case before closure in 2012.

Review of Convictions and Acquittals – To guarantee the rights of those convicted, the RSCSL will have the authority to manage requests for review from convicted persons and this function may extend until 2055.

Contempt of Court Proceedings – The need to ensure respect for and implementation of court orders as well as the need to sanction persons who violate them is a continuing obligation.

Defence Counsel and Legal Aid Issues – The RSCSL will provide Defense Counsel for residual proceedings. Thus the RSCSL will contract and support Defense Counsel if they are required.

Claims for Compensation – Provision of information to claimants before Sierra Leonean courts.

Prevention of Double Jeopardy – No person shall be tried before a national court of Sierra Leone for acts which he has already been tried by the SCSL or the RSCSL. If JPK is tried by a national court the RSCSL may try him subsequently if the national proceedings were not impartial or independent or were designed to shield him from international justice.

Composition of the Residual Special Court for Sierra Leone

The RSCSL shall carry out its functions at an interim seat in the Netherlands, with a branch or sub-office in Sierra Leone for witness protection and support, until such time as the UN and Government of Sierra Leone agree otherwise. The RSCSL may meet away from its seat if it considers it necessary for the exercise of its functions. Discussions are ongoing in relation to the RSCSL sharing an administrative stage with another organization in the Netherlands and Freetown. The key services to be provided by the host institution would include security, procurement, finance, IT services and facilities management.

The RSCSL shall be composed of the Chambers, consisting of the President and when necessary a Trial Chamber and Appeals Chamber, the Prosecutor, and the Registrar. There shall be a roster of judges who may be assigned to the Trial and Appeals Chamber. The judges shall not receive any remuneration for being on the roster, but shall be remunerated on a pro-rata basis if called upon by the President to serve the RSCSL.

The judges on the roster shall elect a President, who shall serve as the duty judge of the RSCSL. The President shall in as far as possible carry out his or her functions remotely and shall be present at the seat of the RSCSL only as necessary. The President shall be remunerated on a pro-rata basis.

The Secretary-General, after consultation with the Government of Sierra Leone, shall appoint a Prosecutor. The Prosecutor shall in as far as possible carry out his or her functions remotely and shall be present at the seat of the RSCSL only as necessary. The Prosecutor shall be remunerated on a pro-

rata basis.

The Secretary-General, in consultation with the President of the RSCSL, shall appoint a Registrar. The Registrar shall be based permanently at the seat of the RSCSL. The Registrar shall be responsible for the administration of the RSCSL and shall also administer the financial resources of the RSCSL. The RSCSL shall retain a small number of administrative staff commensurate with its functions.

The RSCSL shall have an oversight committee to assist in obtaining adequate funding and to provide advice and policy direction on all non-judicial aspects of its operations. The oversight committee shall consist of the UN, the Government of Sierra Leone and significant contributors to the RSCSL. The expenses of the RSCSL shall be borne by voluntary contributions.

ANNEX H

UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Fausto Pocar, Presiding** **Judge Mohamed Shahabuddeen** **Judge Mehmet Güney** **Judge Liu Daqun** **Judge Andrésia Vaz**
Registrar:	**Mr. Adama Dieng**
Decision of:	**8 October 2008**

THE PROSECUTOR

v.

Yussuf MUNYAKAZI

Case No. ICTR-97-36-R11bis

DECISION ON THE PROSECUTION'S APPEAL AGAINST DECISION ON REFERRAL UNDER RULE 11*bis*

Counsel for Yussuf Munyakazi
Mr. Jwani Timothy Mwaikusa
Ms. Eliane Nyampinga

Office of the Prosecutor
Mr. Hassan Bubacar Jallow
Mr. Bongani Majola
Mr. Alex Obote-Odora
Mr. Richard Karegyesa

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an appeal filed by the Prosecution pursuant to Rule 11*bis*(H) of the Rules of Procedure and Evidence of the Tribunal ("Rules")[1] against a decision of Trial Chamber III denying its request to refer the case of Yussuf Munyakazi ("Munyakazi") to the Republic of Rwanda ("Rwanda") ("Appeal").[2]

I. BACKGROUND

2. Munyakazi is charged with genocide, or alternatively, with complicity in genocide, and extermination as a crime against humanity.[3] On 7 September 2007, the Prosecutor requested the referral of his case to Rwanda pursuant to Rule 11*bis* of the Rules.[4] Munyakazi responded on 16 November 2007, opposing the referral.[5] On 2 October 2007, the President of the Tribunal designated a Chamber under Rule 11*bis* to consider whether to grant the Prosecution's request for referral.[6] The Trial Chamber granted leave to Rwanda, the Kigali Bar Association, the International Criminal Defence Attorneys Association ("ICDAA") and Human Rights Watch ("HRW") to appear as *amici curiae*[7] and held a hearing on the Prosecutor's request on 24 April 2008. On 28 May 2008, the Trial Chamber denied the Prosecutor's request for referral of Munyakazi's case to Rwanda.[8]

3. The Prosecution appealed against the Rule 11*bis* Decision, filing its Notice of Appeal on 12 June 2008 and its Appeal Brief on 27 June 2008. Munyakazi filed his response on 10 July 2008[9]

[1] Prosecutor's Notice of Appeal (Rule 11 *bis* (H)), 12 June 2008 ("Notice of Appeal"); Appeal Brief (Rule 11 *bis* (H)), 27 June 2008 ("Appeal Brief").
[2] Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, 28 May 2008 ("Rule 11*bis* Decision").
[3] Amended Indictment, 29 November 2002.
[4] Prosecutor's Request for the Referral of the Case of Yussuf Munyakazi to Rwanda pursuant to Rule 11*bis* of the Rules of Procedure and Evidence, 7 September 2007.
[5] Defence Response to the Prosecutor's Request for the Referral of the Case of Yussuf Munyakazi to Rwanda Pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence, 2 October 2007.
[6] Designation of a Trial Chamber for the Referral of Yussuf Munyakazi to Rwanda, 2 October 2007.
[7] Order for Submissions of the Republic of Rwanda as the State Concerned by the Prosecutor's Request for Referral of the Indictment against Yussuf Munyakazi to Rwanda, 9 November 2007; Decision on the Application by the Kigali Bar Association for Leave to Appear as *Amicus Curiae*, 6 December 2007; Decision on the Application by the International Criminal Defence Attorneys Association (ICDAA) for Leave to File a Brief as *Amicus Curiae*, 6 December 2007; Decision on the Request by Human Rights Watch to Appear as *Amicus Curiae*, 10 March 2008.
[8] Rule 11*bis* Decision.
[9] Defence Brief in Response to the Prosecution's Appeal, 10 July 2008 ("Response"). Munyakazi also filed a request for extension of time to file his response, Defence Request for Extension of Time to File Brief in Response to the Prosecutor's Appeal, 14 July 2008 ("Motion for Extension of Time").

and the Prosecution replied on 14 July 2008.[10] The ICDAA and Rwanda both requested leave to file *amicus curiae* briefs.[11] The Appeals Chamber dismissed the ICDAA's request but granted Rwanda leave to file an *amicus curiae* brief.[12] Rwanda filed its brief on 28 July 2008,[13] and Munyakazi responded to it on 4 August 2008.[14]

II. APPLICABLE LAW

4. Rule 11*bis* of the Rules allows a designated Trial Chamber to refer a case to a competent national jurisdiction for trial if it is satisfied that the accused will receive a fair trial and that the death penalty will not be imposed. In assessing whether a state is competent within the meaning of Rule 11*bis* of the Rules to accept a case from the Tribunal, a designated Trial Chamber must first consider whether it has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure.[15] The penalty structure within the state must provide an appropriate punishment for the offences for which the accused is charged,[16] and conditions of detention must accord with internationally recognized standards.[17] The Trial Chamber must also consider whether the accused will receive a fair trial, including whether the accused will be

[10] Prosecutor's Reply to "Defence Brief in Response to the Prosecutor's Appeal", 14 July 2008 ("Reply").
[11] Request of International Criminal Defence Attorneys Association (ICDAA) for Permission to File an *Amicus Curiae* Brief Concerning the Prosecutor's Appeal of the Denial, by Trial Chamber III, of Request for Referral of the Case of Yussuf Munyakazi to Rwanda Pursuant to Rule 11*bis* of the Rules (Rules 74 and 107 of the Rules of Procedure and Evidence), 17 June 2008; Request of the Republic of Rwanda for Permission to File an *Amicus Curiae* Brief Concerning the Prosecutor's Appeal of the Denial by Trial Chamber III, of the Request for Referral of the Case of Yussuf Munyakazi to Rwanda Pursuant to Rule 11 *bis* of the Rules, 30 June 2008.
[12] Decision on Request from the International Criminal Defence Attorneys Association (ICDAA) for Permission to File an *Amicus Curiae* Brief, 15 July 2008; Decision on Request by Rwanda for Permission to File an *Amicus Curiae* Brief, 18 July 2008.
[13] *Amicus Curiae* Brief on Behalf of the Government of Rwanda, 28 July 2008 ("Rwanda *Amicus* Brief").
[14] Defence Response to the *Amicus Curiae* Brief on Behalf of the Government of Rwanda, 4 August 2008 ("Response to *Amicus* Brief"). The Appeals Chamber notes that Munyakazi appended several annexes to his response. These include a HRW report from July 2008 entitled "Law and Reality: Progress in Judicial Reform in Rwanda" ("Report"), an article from the newspaper UMOCO from the issue of 12-27 March 2008, and a letter dated 15 July 2008 from the detainees at the United Nations Detention Facility in Arusha ("UNDF") to the President and Judges of the Tribunal. The Appeals Chamber will not consider this new evidence because it is not part of the record of the case and has not been admitted pursuant to Rule 115 of the Rules. *See Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11*bis*.1, Decision on Rule 11*bis* Referral, 1 September 2005 ("*Stanković* Appeal Decision"), para. 37; *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-AR11*bis*.1, Decision on Appeal against Decision on Referral under Rule 11bis, 4 July 2006 ("*Ljubičić* Appeal Decision"), para. 40; *Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-AR11*bis*.2, Decision on Rule 11*bis* referral, 15 November 2005 ("*Janković* Appeal Decision"), para. 73. The Appeals Chamber also notes that it declined to admit the same HRW report as additional evidence under Rule 115 of the Rules in another case. *See The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, Decision on Request to Admit Evidence of 1 August 2008, 1 September 2008.
[15] *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-AR11*bis,* Decision on Rule 11*bis* Appeal, 30 August 2006 ("*Bagaragaza* Appeal Decision"), para. 9; *Prosecutor v. Zeljko Mejakić et al*., Case No. IT-02-65-AR11*bis*.1, Decision on Joint Defence Appeal against Decision on Referral under Rule 11bis, 7 April 2006 ("*Mejakić* Appeal Decision"), para. 60.
[16] *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case under Rule 11bis, 17 May 2005 ("*Stanković* 11*bis* Decision"), para. 32; *Mejakić* Appeal Decision, para. 48; *Ljubičić* Appeal Decision, para. 48.
[17] *Stanković* Appeal Decision, para. 34; *Prosecutor v. Savo Todović*, Case No. IT-97-25/1-AR11*bis*.2, Decision on Savo Todović's Appeals against Decision on Referral under Rule 11bis, 4 September 2006, para. 99.

accorded the rights set out in Article 20 of the Tribunal's Statute ("Statute").[18]

5. The Trial Chamber has the discretion to decide whether to refer a case to a national jurisdiction and the Appeals Chamber will only intervene if the Trial Chamber's decision was based on a discernible error.[19] As the Appeals Chamber has previously stated:

> An appellant must show that the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of its discretion, gave weight to irrelevant considerations, failed to give sufficient weight to relevant considerations, or made an error as to the facts upon which it has exercised its discretion; or that its decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[20]

III. PRELIMINARY MATTERS

6. First, the Appeals Chamber must determine whether to grant Munyakazi's request for leave to file his Response late.[21] Under Rule 116(A) of the Rules, the Appeals Chamber may grant a motion for extension of time if good cause is shown, and it may also "recognize, as validly done any act done after the expiry of a time limit".[22] Counsel for Munyakazi submits that although the Appeal Brief was filed on Friday, 27 June 2008, he only received it on Monday, 30 June 2008 due to its late transmission on Friday. Counsel therefore filed his response 10 days after this date.[23] The records indicate that the Appeal Brief was indeed served upon Munyakazi on 30 June 2008.[24] The Appeals Chamber considers that in this instance Munyakazi has shown good cause for the late filing. It therefore recognizes the Response as validly filed and will consider the submissions therein.

7. Second, the Appeals Chamber notes that on 11 August 2008, Rwanda submitted additional

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[18] *The Prosecutor v. Wenceslas Munyeshyaka*, Case No. ICTR-2005-87-I, Decision on the Prosecutor's Request for the Referral of Wenceslas Munyeshyaka's Indictment to France, 20 November 2007, para. 21; *Stanković* 11*bis* Decision, para. 55; *Prosecutor v. Zeljko Mejakić et al*., Case No. IT-02-65-PT, Decision on Prosecutor's Request for Referral of Case pursuant to Rule 11*bis*, 20 July 2005, para. 68.
[19] *Bagaragaza* Appeal Decision, para. 9. *See also Ljubičić* Appeal Decision, para. 6.
[20] *Bagaragaza* Appeal Decision, para. 9. *See also Ljubičić* Appeal Decision, para. 6.
[21] Munyakazi makes this request both in the Response (*see* para. 2), and also in the Motion for Extension of Time.
[22] *See* Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005, para. 5. *See also The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-A, Decision on Muvunyi's Request for Consideration of Post-Hearing Submissions, 18 June 2008 ("Muvunyi Decision"), para. 4; *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Order Concerning the Filing of the Notice of Appeal, 22 March 2007, p. 3; *Mikaeli Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Order Concerning the Filing of the Notice of Appeal, 22 February 2006, p. 3.
[23] Response, para. 2; Motion for Extension of Time, para. 3.
[24] Proof of Service – Arusha, indicating that the Appeal Brief was served upon Munyakazi and his Counsel on 30 June 2008.

confidential material relating to its *Amicus* Brief filed on 28 July 2008.[25] Munyakazi opposed the filing of this material, arguing that as a non-party, Rwanda was not entitled to file it, and that even if it were a party, it would have to apply for leave to present such evidence pursuant to Rule 115 of the Rules. Munyakazi further submitted that allowing the filing of additional documents would cause undue delay in the appeal proceedings.[26] The Appeals Chamber considers that Rwanda was given a time limit in which to file an *amicus curiae* brief and finds that it has not shown good cause for filing the additional material without having sought prior leave to do so. The Appeals Chamber therefore declines to consider this additional material.

IV. GROUND OF APPEAL 1: APPLICABLE PUNISHMENT

8. In its Rule 11*bis* Decision, the Trial Chamber held that it was satisfied that the Abolition of Death Penalty Law abolishes the death penalty, and replaces it in all previous legislative texts with either "life imprisonment" or "life imprisonment with special provisions". Accordingly, the Trial Chamber accepted that the death penalty will not be imposed in Rwanda, and noted that this was consistent with Rule 11*bis*(C) of the Rules.[27]

9. The Trial Chamber recalled the submissions of the Prosecution and Rwanda that the Transfer Law[28] was the applicable law for Rule 11*bis* transfer cases, under which law the highest penalty was life imprisonment. The Trial Chamber further noted Munyakazi's submission that, if convicted, he would in fact be subject to Article 4 of the Abolition of Death Penalty Law,[29] pursuant to which he could face life imprisonment with special provisions, meaning life imprisonment in isolation.[30] The Trial Chamber observed that neither the Prosecution nor Rwanda provided any satisfactory information to rebut the Defence submission on this point,[31] and found, to its concern, that Munyakazi would be subject to life imprisonment in isolation, if convicted in Rwanda.[32]

10. In reaching this conclusion, the Trial Chamber examined which law, and thus which punishment, would apply to Munyakazi if he were convicted in Rwanda. The Trial Chamber

[25] *See* Filing of an Additional Material in the 11*bis* Appeal of Yussuf Munyakazi, 11 August 2008.
[26] *See* Defence Response to the Additional Material Filed in the Rule 11*bis* Appeal, paras. 2-5.
[27] Rule 11*bis* Decision, para. 24.
[28] Organic Law No. 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and From Other States ("Transfer Law").
[29] Organic Law No. 2007 of 25 July 2007 Relating to the Abolition of the Death Penalty ("Abolition of the Death Penalty Law").
[30] Rule 11*bis* Decision, para. 19.
[31] Rule 11*bis* Decision, paras. 28, 29, 32.

recalled that Article 25 of the Transfer Law provides that that law will prevail over any other laws in the event of inconsistency. The Trial Chamber found that, in any event, there was no inconsistency between the Transfer Law and the Abolition of Death Penalty Law. In this regard, the Trial Chamber noted that Article 3 of the Abolition of Death Penalty Law replaces the death penalty with either "life imprisonment" or "life imprisonment with special provisions",[33] whilst Article 5 provides that "life imprisonment with special provisions" attaches to certain crimes, including genocide, crimes against humanity, torture and murder.[34] Accordingly, the Trial Chamber reasoned, the Abolition of Death Penalty Law does not prescribe a sentence which is inconsistent with the Transfer Law; rather, the Abolition of Death Penalty Law specifies the circumstances in which the sentence of life imprisonment with special provisions applies.[35] Finally, the Trial Chamber noted that, in any event, Article 9 of the Abolition of Death Penalty Law provides that all provisions inconsistent with that law are repealed, thereby repealing the earlier Transfer Law with regard to sentencing.[36]

11. The Trial Chamber then considered that, in light of its finding that Munyakazi, if convicted, would be sentenced to life imprisonment in isolation, it was necessary to examine whether this sentence would be consistent with internationally recognised standards.[37] The Trial Chamber noted that the established jurisprudence and the observations of human rights bodies indicated that imprisonment in isolation is an exceptional measure which, if applied, must be both necessary and proportionate, and incorporate certain minimum safeguards.[38] The Trial Chamber observed that it was not aware of any such safeguards in Rwandan law,[39] and concluded that, in the absence of such safeguards, the penalty structure was inadequate, and referral must be denied.[40]

12. The Prosecution submits that the Trial Chamber erred in law by holding that Rwanda's penalty structure, and, in particular, the possibility of life imprisonment in solitary confinement, does not accord with internationally recognized standards and with the requirements of international law.[41] The Prosecution argues specifically that the Trial Chamber erred in relying on the Abolition

[32] Rule 11*bis* Decision, para. 25. The Appeals Chamber notes that the Trial Chamber was not always consistent in its findings, stating at paragraph 28 that a transferred accused "could" be subject to life imprisonment, while paragraphs 29 and 32 indicate that a transferred accused "would" be subject to life imprisonment.
[33] Rule 11*bis* Decision, paras. 24, 26, fn. 46.
[34] Rule 11*bis* Decision, para. 26.
[35] Rule 11*bis* Decision, para. 26.
[36] Rule 11*bis* Decision, para. 27.
[37] Rule 11*bis* Decision, para. 29.
[38] Rule 11*bis* Decision, para. 30.
[39] Rule 11*bis* Decision, para. 31.
[40] Rule 11*bis* Decision, para. 32.
[41] Notice of Appeal, paras. 1-4; Appeal Brief, paras. 4-16; Reply, paras. 5-8.

of Death Penalty Law, whereas the law applicable to Munyakazi is the Transfer Law.[42] It contends that the two laws set out separate and independent legal regimes, and that the Transfer Law, as the *lex specialis*, is the only law applicable to such cases.[43] It further submits that the Trial Chamber erred by holding that the Abolition of Death Penalty Law repeals the Transfer Law, arguing that the Abolition of Death Penalty Law expressly identifies the laws it affects, but makes no mention of the Transfer Law, and that, in any event, a subsequent general statute cannot be construed as repealing an earlier *lex specialis*.[44]

13. Munyakazi responds that the Trial Chamber did not err in concluding that the Abolition of Death Penalty Law also applied to transfer cases, and thus that the penalty of life imprisonment in isolation would be applicable to such cases.[45] He submits that the relevance of the Abolition of Death Penalty Law is in relation to sentencing, as the Transfer Law does not prescribe any sentences, and argues that for the offences for which Munyakazi is charged, the sentence is prescribed by the Abolition of Death Penalty Law.[46] He submits that, at the least, the relationship between the two laws is unclear and thus that it would not be contrary to the laws of Rwanda to sentence him to life imprisonment with special provisions, and that the Trial Chamber had no basis on which to hold otherwise.[47]

14. In its *Amicus* Brief, Rwanda submits that because Article 25 of the Transfer Law provides that the provisions of the Transfer Law shall prevail over any other law for transfer cases, and the preamble to the Abolition of Death Penalty Law cites the legislation affected by the law, but does not mention the Transfer Law, the sentence of life imprisonment with no special provisions is the maximum possible punishment for transfer cases.[48] Rwanda also submits that it has prepared a statement stating this to be the scope of the law, and giving the assurance that no person transferred from the Tribunal would be sentenced to solitary confinement in Rwanda. Rwanda submits that this statement can be relied upon by Munyakazi and will be taken into account by Rwandan courts.[49] Rwanda also draws attention to the fact that the Rwandan Supreme Court is currently seized of a constitutional challenge to the provision in the Abolition of Death Penalty Law regarding solitary confinement.[50] Finally, Rwanda submits that in the event that the Appeals Chamber would consider

[42] Notice of Appeal, para. 3; Appeal Brief, paras. 4-16.
[43] Notice of Appeal, para. 3; Appeal Brief, paras. 5-10.
[44] Notice of Appeal, para. 4; Appeal Brief, paras. 4-16.
[45] Response, para. 3.
[46] Response, para. 6.
[47] Response, paras. 9, 10.
[48] Rwanda *Amicus* Brief, para. 10.
[49] Rwanda *Amicus* Brief, para. 11. The statement is appended to the Rwanda *Amicus* Brief as Annex 2.
[50] Rwanda *Amicus* Brief, para. 12, referring to *Tubarimo Aloys v. The Government*, Case. No. RS/INCONST/Pén. 0002/08/CS, 29 August 2008. The decision in this case was in fact rendered on 29 August 2008. The Rwandan Supreme

this an obstacle to transfer, Rwanda would, pursuant to Article 96 of its Constitution, seek an authentic interpretation from Parliament of the Transfer Law and whether solitary confinement was intended for transfer cases, which interpretation would be binding on Rwandan courts.[51]

15. Munyakazi responds that the statement provided by Rwanda is not itself law and does not change the law as enacted by the legislature. He further contends that the statement is evidence that Rwanda could have presented during the referral proceedings but did not, and should therefore not be considered.[52] He submits that the fact that Rwanda felt it necessary to issue this statement is proof that the law is ambiguous, and, as such, that it is possible for a Rwandan court to impose a sentence of life imprisonment with special provisions to a transfer case.[53]

16. The Appeals Chamber considers that it is unclear how these two laws may be interpreted by Rwandan courts. It would be plausible to construe the Transfer Law, which states in Article 25 that its provisions shall prevail in the event of inconsistencies with any other relevant legislation, as the *lex specialis* for transfer cases, and thus as prevailing over the more general Abolition of Death Penalty Law. Moreover, as the Abolition of Death Penalty Law sets out the laws that it affects, and does not mention the Transfer Law, a plausible interpretation would be that it does not repeal any provisions of the Transfer Law. This interpretation would mean that the maximum punishment that could be imposed by a Rwandan court in a transfer case would be life imprisonment.

17. On the other hand, the Abolition of Death Penalty Law was adopted after the Transfer Law, and could be viewed as *lex posterior*. The Abolition of Death Penalty Law could therefore be construed as prevailing over the Transfer Law and thus as allowing the possibility of imposing life imprisonment with isolation in transfer cases. In addition, although the Abolition of Death Penalty Law does not explicitly mention the Transfer Law, it provides in Article 9 that "all legal provisions contrary to this Organic Law are hereby repealed", which could be interpreted as including those provisions in the Transfer Law that are inconsistent with it. Finally, it would be possible to argue also that the laws are not in fact inconsistent, and the Abolition of Death Penalty Law could be construed as providing elaboration of the sentencing regime established in the Transfer Law.

18. Thus far, no authoritative interpretation of the relationship between these two laws exists. Rwanda appends a declaration to its *Amicus* Brief to the effect that the Abolition of Death Penalty

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Court declined to consider the constitutionality of Article 4 of the Abolition of Death Penalty law, which provides for the penalty of solitary confinement, until such time as legislation which governs the execution of this provision is enacted into law.

[51] Rwanda *Amicus* Brief, para. 13.

[52] Response to *Amicus* Brief, para. 3.3.

[53] Response to *Amicus* Brief, para. 3.3.

Law does not and was not intended to govern the Transfer Law in any respect, and providing the assurance that no person transferred from the Tribunal would be sentenced to serve life imprisonment with solitary confinement. While Rwandan courts may take note of this statement, it is not binding on them, and they are free to adopt an alternative interpretation of these laws. Rwanda has also indicated that it can, as a further measure, seek an authentic interpretation of the Transfer Law from Parliament. However, as such an interpretation has not yet been obtained, the Appeals Chamber cannot take this into consideration in assessing whether the Trial Chamber erred in its conclusion about the interpretation of these laws as they currently stand.

19. The Appeals Chamber considers that it is not up to the Trial Chamber to determine how these laws could be interpreted or which law could be applied by Rwandan courts in transfer cases. For the reasons provided above, the Appeals Chamber is of the view that it would be possible for courts in Rwanda to interpret the relevant laws either to hold that life imprisonment with special provisions is applicable to transfer cases, or to hold that life imprisonment without special provisions is the maximum punishment.

20. Since there is genuine ambiguity about which punishment provision would apply to transfer cases, and since, therefore, the possibility exists that Rwandan courts might hold that a penalty of life imprisonment in isolation would apply to such cases, pursuant to the Abolition of Death Penalty Law, the Appeals Chamber finds no error in the Trial Chamber's conclusion that the current penalty structure in Rwanda is not adequate for the purposes of transfer under Rule 11*bis* of the Rules.

21. In light of the above, the Appeals Chamber dismisses this ground of appeal.

V. GROUND OF APPEAL 2: JUDICIAL INDEPENDENCE

22. The Trial Chamber held that it was concerned that the trial of Munyakazi for genocide and other serious violations of international law in Rwanda by a single judge in the first instance may violate his right to be tried before an independent tribunal.[54] The Trial Chamber also concluded that despite the procedural safeguards guaranteeing judicial independence in Rwandan law, in practice, sufficient guarantees against outside pressure were lacking.[55] It found that past actions of the Rwandan government, including its interrupted cooperation with the Tribunal following a dismissal of an indictment and release of an appellant, and its negative reaction to foreign judges for indicting former members of the Rwandan Patriotic Front ("RPF") demonstrated that there was a tendency by

[54] Rule 11*bis* Decision, para. 39.
[55] Rule 11*bis* Decision, para. 40.

the government to pressure the judiciary, and that there was a real risk that a single judge would not be able to resist this pressure.[56] The Trial Chamber held that this situation was exacerbated by the fact that a single judge's factual findings cannot be reviewed by the Supreme Court unless there has been a miscarriage of justice.[57]

23. The Prosecution submits that the Trial Chamber erred in law and fact by concluding that Rwanda does not respect the independence of the judiciary and that the composition of the High Court of Rwanda does not accord with the right to be tried by an independent tribunal and the right to a fair trial.[58] It argues that the Trial Chamber erred by concluding that the composition of the High Court by a single judge is incompatible with fair trial guarantees of Munyakazi for violations of international humanitarian law.[59] It also contends that the Trial Chamber's conclusion that a single judge sitting in Rwanda would be particularly susceptible to external pressure is misdirected in law, and that alleged pressure on Rwanda's judiciary was unsupported by the evidence.[60] The Prosecution also submits that the Trial Chamber's conclusion that Rwanda's legal framework lacks sufficient guarantees for judges is misdirected, and that its conclusions in relation to the review power of Rwanda's Supreme Court are erroneous.[61]

24. Munyakazi responds that the Trial Chamber was correct to distinguish between capital cases and genocide cases, and to hold that trial by a single judge in a case of genocide may violate his right to be tried before an independent tribunal.[62] He also contends that the question of whether a trial before a single judge would violate his right to a fair trial must be assessed given the particular circumstances of Rwanda.[63] Munyakazi also submits that the Trial Chamber did consider the statutory provisions guaranteeing the independence of the judiciary, but found that it could not rely on these alone, and provides examples of interference in the judiciary by the Government.[64] He therefore submits that it was not unreasonable for the Trial Chamber to find that there might be a risk of interference in his trial if his case were transferred to Rwanda.[65]

25. In its *Amicus* Brief, Rwanda submits that there are various procedural safeguards in place to

[56] Rule 11*bis* Decision, paras. 40-48, referring to the reaction of the Rwandan government to the decision in *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19, Decision, 3 November 1999 ("*Barayagwiza* Decision"), and its condemnation of Judge Bruguière of France for issuing a report investigating the shooting of President Habyarimana's plane, and Judge Arieu of Spain for issuing an indictment against forty high-ranking RPF officers.
[57] Rule 11*bis* Decision, para. 48.
[58] Notice of Appeal, para. 6; Appeal Brief, paras. 18, 19; Reply, paras. 9-11.
[59] Notice of Appeal, para. 7; Appeal Brief, paras. 18, 19.
[60] Notice of Appeal, paras. 8, 9; Appeal Brief, paras. 20-25.
[61] Notice of Appeal, para. 12; Appeal Brief, paras. 26-29.
[62] Response, para. 15.
[63] Response, para. 16.
[64] Response, paras. 17, 18.

guarantee the independence of its judiciary, and that Rwanda will ensure that its most experienced judges are assigned to the first transfer case.[66] It also draws attention to the findings of the Trial Chambers in the *Kanyarukiga* and *Hategekimana* cases that necessary guarantees are in place for an impartial trial, that the single judge composition of the High Court cannot be a bar to transferring cases and that the conduct of trials in Rwanda to date has not called into question the competence of the Rwandan judiciary and provides no basis to refuse transfers.[67] Munyakazi responds by citing several instances of undue influence on or interference with the judiciary in Rwanda, and submits that these dangers are greatly enhanced in trials for crimes such as genocide.[68]

26. While the Appeals Chamber shares the Trial Chamber's concern about the fact that politically sensitive cases, such as genocide cases, will be tried by a single judge, it is nonetheless not persuaded that the composition of the High Court by a single judge is as such incompatible with Munyakazi's right to a fair trial. The Appeals Chamber recalls that international legal instruments, including human rights conventions, do not require that a trial or appeal be heard by a specific number of judges to be fair and independent.[69] The Appeals Chamber also notes that the Opinion of the Consultative Council of European Judges, which the Trial Chamber cites in support of its finding,[70] is recommendatory only.[71] There is also no evidence on the record in this case that single judge trials in Rwanda, which commenced with judicial reforms in 2004, have been more susceptible to outside interference or pressure, particularly from the Rwandan Government, than previous trials involving panels of judges.

27. The Appeals Chamber also finds that the Trial Chamber erred in considering that Munyakazi's right to a fair trial would be further compromised as a result of the limited review

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[65] Response, para. 18.
[66] *Amicus* Brief, paras. 14, 15.
[67] *Amicus* Brief, para. 16, citing *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008 ("*Kanyarukiga* 11*bis* Decision"), paras. 34-42 and *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11*bis*, Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to the Republic of Rwanda, 6 June 2008 ("*Hategekimana* 11*bis* Decision"), paras. 38-46.
[68] Response to *Amicus* Brief, paras. 4.1-4.3. The Appeals Chamber notes, however, that these examples are derived from the UMOCO article, which the Appeals Chamber has found to be inadmissible in these proceedings. *See supra* fn. 14.
[69] International Covenant on Civil and Political Rights (adopted 19 December, 1966, entered into force 23 March 1976) 999 UNTS 171 ("ICCPR"), Articles 19, 20; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 ("ACHPR"), Article 7. Rwanda ratified the ICCPR on 16 April 1975 and the ACHPR on 15 July 1983.
[70] Rule 11*bis* Decision, para. 47.
[71] Opinion No. 6 (2004) of the Consultative Council of European Judges (CCJE) to the Attention of the Committee of Ministers of Fair Trial Within a Reasonable Time and Judge's Role in Trials Taking into Account Alternative Means of Dispute Settlement, CCJE (2004) OP No. 6, 22-24 November 2004, para. 61, referring to Recommendation No. R (87) 18 of the Committee of Ministers of Member States Concerning the Simplification of Criminal Justice (Adopted by the Committee of Ministers on 17 September 1987 at the 410th Meeting of the Ministers' Deputies), para. III.d.2.

powers of the Supreme Court. Article 16 of the Transfer Law provides that appeals may be heard on an error on a question of law invalidating the decision or an error of fact which has occasioned a miscarriage of justice. This is not an unusual standard of review in appellate proceedings; it is in fact the applicable standard before this Tribunal.[72] There was also no information before the Trial Chamber that would allow it to conclude that the Supreme Court could not re-examine witnesses or make its own findings of fact.

28. Further, the Appeals Chamber finds that the Trial Chamber erred in considering that there was a serious risk of government interference with the judiciary in Rwanda. The Trial Chamber primarily based its conclusion on Rwanda's reaction to Jean-Bosco Barayagwiza's successful appeal concerning the violation of his rights, and the reactions of the Rwandan government to certain indictments issued in Spain and France.[73] However, the Appeals Chamber recalls that the *Barayagwiza* Decision was issued nine years ago. It notes that the Tribunal has since acquitted five persons, and that Rwanda has not suspended its cooperation with the Tribunal as a result of these acquittals. The Appeals Chamber also observes that the Trial Chamber did not take into account the continued cooperation of the Rwandan government with the Tribunal.[74] The Appeals Chamber also considers that the reaction of the Rwandan government to foreign indictments does not necessarily indicate how Rwanda would react to rulings by its own courts, and thus does not constitute a sufficient reason to find that there is a significant risk of interference by the government in transfer cases before the Rwandan High Court and Supreme Court.

29. The only other information referred to by the Trial Chamber in support of its findings relating to the independence of the Rwandan judiciary was the 2007 United States State Department Report cited by the ICDAA in its *amicus curiae* brief.[75] However, this report states only in very

[72] Article 24(1) of the Statute. *See also Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgement, 7 July 2006, para. 7, quoting *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases No. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, para. 11 (citations omitted) and para. 8, quoting *Prosecutor v. Radislav Krsti}*, Case No. IT-98-33-A, Judgement, para. 40 (citations omitted); *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 5. *See* further *Mikaeli Muhimana v. The Prosecutor*, Case No. ICTR-96-13-A, Judgement, 21 May 2007, paras. 7, 8; *Prosecutor v. Milomir Staki}*, Case No. IT-97-24-A, Judgement, 22 March 2006, para. 8; *Prosecutor v. Mitar Vasiljević* Case No. IT-98-32-A, Judgement, 25 February 2004, para. 6.

[73] Rule 11*bis* Decision, paras. 41-46.

[74] The Prosecutor of the Tribunal indicated to the United Nations Security Council on 17 June 2008 that "Rwanda continues to cooperate effectively with the Tribunal". UN Doc. S/PV.5697, p. 15 and UN Doc. S/PV.5796, p. 11. President Byron also indicated to the United Nations Security Council on 17 June 2008 that "Rwanda has continued to cooperate with the Tribunal by facilitating a steady flow of witnesses from Kigali to Arusha". UN Doc. S/PV.5697, p. 10.

[75] Rule 11*bis* Decision, para. 48, fn. 89, referring to Brief of Amicus Curiae, International Criminal Defence Attorneys Association (ICDAA) Concerning the Request for Referral of the Accused Yussuf Munyakazi to Rwanda pursuant to Rule 11*bis* of the *Rules of Procedure and Evidence* ("ICDAA *Amicus* Brief"), para. 8, citing Country US State Department's Report on Human Practices – 2006, submitted to the United States Congress by Secretary of State

general terms that there are constraints on judicial independence, and "that government officials had sometimes attempted to influence individual cases, primarily in *gacaca* cases".[76] The Trial Chamber did not cite any other information supporting its findings relating to the independence of the judiciary, and, notably, did not refer to any information demonstrating actual interference by the Rwandan government in any cases before the Rwandan courts. Moreover, other evidence submitted by the *amicus curiae* during the referral proceedings concerning interference with the judiciary primarily involved *gacaca* cases, rather than the High Court or Supreme Court, which will adjudicate the transfer cases, and failed to mention any specific incidents of judicial interference.[77] The Appeals Chamber therefore finds that, based on the record before it, no reasonable Trial Chamber would have concluded that there was sufficient risk of government interference with the Rwandan judiciary to warrant denying the Prosecution's request to transfer Munyakazi to Rwanda.

30. Finally, the Appeals Chamber finds that the Trial Chamber erred in failing to take into account the availability of monitoring and revocation procedures under Rule 11*bis*(D)(iv) and (F) of the Rules.[78] The Appeals Chamber notes that the Prosecution has approached the African Commission on Human and People's Rights ("African Commission"), which has undertaken to monitor the proceedings in transfer cases, and monitors could inform the Prosecutor and the Chamber of any concerns regarding the independence, impartiality or competence of the Rwandan judiciary. The Appeals Chamber notes that the African Commission is an independent organ established under the African Charter on Human and Peoples' Rights and it has no reason to doubt that the African Commission has the necessary qualifications to monitor trials. The Appeals Chamber finds that the Trial Chamber erred in failing to consider this in its assessment.

31. For the foregoing reasons, the Appeals Chamber grants this ground of appeal, and will consider the effect of this in the Conclusion.

Condoleeza Rice, released by the Bureau of Democracy, Human Rights and Labor, March 6, 2007 ("U.S. State Department Report 2007").

[76] ICDAA *Amicus* Brief, para. 8, citing U.S. State Department Report 2007.

[77] The *amicus curiae* brief submitted by HRW refers to interviews with 25 high-ranking Rwandan judicial officials stating that the courts were not independent, but provides no information about the basis for this view, or any cases of actual attempts to interfere with the judiciary. *See* Brief of Human Rights Watch as Amicus Curiae in Opposition to Rule 11*bis* Transfer, 17 March 2008 ("HRW *Amicus* Brief"), para. 51.

[78] *See* Notice of Appeal, paras. 21-24; Appeal Brief, paras. 40-42; Reply, paras. 13, 14, discussed *infra*, para. 46. *See Stanković* Appeal Decision, where the Appeals Chamber held at paragraph 52 that it was satisfied that the monitoring procedures and the revocation mechanism under Rule 11*bis*(F) "was a reasonable variable for the Referral Bench to have included in the Rule 11*bis* equation". *See also Janković* Appeal Decision, paras. 56, 57.

VI. GROUND OF APPEAL 3: AVAILABILITY AND PROTECTION OF WITNESSES

32. The Trial Chamber expressed its concern that under current conditions in Rwanda, despite the guarantees in Rwandan law of the right of Munyakazi to obtain the attendance of, and to examine witnesses for his case under the same conditions as witnesses against him, including provisions for the assistance and protection of witnesses, it was likely that these rights would be violated.[79] The Trial Chamber therefore concluded that it was not convinced that Munyakazi's fair trial right relating to the attendance of witnesses can be guaranteed in Rwanda at present.[80] With respect to witnesses in Rwanda, the Trial Chamber found that Munyakazi would have difficulty in securing witnesses to testify due to their fear of harassment, arrest and detention, or that an indictment would be issued against them.[81] The Trial Chamber also expressed serious concerns about the operation of the Rwandan witness protection program.[82] It therefore found that it would be unlikely that Defence witnesses residing within Rwanda would feel secure enough to testify in transferred cases.[83] The Trial Chamber noted that most Defence witnesses reside outside Rwanda and expressed its concern that they would fear intimidation, threats and arrest.[84] The Trial Chamber was also concerned that there was no evidence of steps taken by Rwanda to secure the attendance or evidence of witnesses from abroad, or the cooperation of other states for the purposes of video-link testimony.[85] The Trial Chamber found that, in any event, the availability of video-link facilities was not a completely satisfactory solution to obtaining the testimony of witnesses residing outside Rwanda.[86]

33. The Prosecution submits that the Trial Chamber erred in both law and fact by holding that under current conditions in Rwanda, Munyakazi's fair trial right to obtain the attendance of, and to examine, Defence witnesses under the same conditions as witnesses called by the Prosecution, cannot be guaranteed.[87] The Prosecution contends that the Trial Chamber's conclusion that Munyakazi would experience difficulties in securing witnesses due to their fear of harassment, arrest and detention was generalized and not substantiated by evidence.[88] The Prosecution also submits that the Trial Chamber's conclusions that most of Munyakazi's witnesses would come from

[79] Rule 11*bis* Decision, para. 59.
[80] Rule 11*bis* Decision, para. 66.
[81] Rule 11*bis* Decision, paras. 60, 61.
[82] Rule 11*bis* Decision, para. 62.
[83] Rule 11*bis* Decision, para. 62.
[84] Rule 11*bis* Decision, para. 63.
[85] Rule 11*bis* Decision, para. 64.
[86] Rule 11*bis* Decision, para. 64.
[87] Notice of Appeal, paras. 14-20; Appeal Brief, paras. 30-39; Reply, paras. 10-12.

outside Rwanda and that they are unwilling on reasonable grounds to come to Rwanda to testify were unsubstantiated.[89] It also submits that the Trial Chamber failed to give sufficient weight to Rwanda's legal framework, and argues that it was irrelevant for the Trial Chamber to take account of the alleged absence of steps taken by Rwanda to secure the attendance and/or evidence of witnesses from abroad.[90] The Prosecution further submits that the Trial Chamber erred with respect to its conclusions relating to the inadequacies of Rwanda's witness protection program.[91]

34. Munyakazi responds that the Trial Chamber was entitled to rely on the information contained in the submitted *amicus curiae* briefs, without requiring the *amicus curiae* to bring the persons it interviewed in support of these reports to court for cross-examination.[92] He submits that it was not unreasonable for the Trial Chamber to conclude, based on the evidence submitted by the *amicus curiae* and by Munyakazi, that there are threats to the safety and security of Defence witnesses that would prevent him from receiving a fair trial in Rwanda.[93]

35. In its *Amicus* Brief, Rwanda submits that the Trial Chamber failed to consider the substantial steps that it has undertaken to ensure the hearing of witnesses and the presentation of evidence, including measures to ensure witness protection and safety.[94] It submits that the Trial Chamber did not consider the extensive reliance placed by the Tribunal on Rwanda and its national witness programme in securing and protecting witnesses for trials before the Tribunal.[95] It also draws attention to Article 14 of the Transfer Law which contains unprecedented provisions for securing the attendance of witnesses from abroad, and submits that Rwanda has taken positive steps to compel witnesses to testify, including mutual assistance arrangements.[96] Rwanda further points to the availability of video-link testimony and witness protection measures for witnesses testifying in Rwanda.[97]

36. Munyakazi responds that while Rwanda may have assisted in facilitating the appearance of Prosecution witnesses before the Tribunal, it has not done so with respect to defence witnesses.[98] He also presents information about defence witnesses who have been harassed upon their return to

[88] Notice of Appeal, para. 17; Appeal Brief, para. 32 .
[89] Notice of Appeal, para. 18; Appeal Brief, para. 33; Reply, para. 12.
[90] Appeal Brief, paras. 34, 35.
[91] Notice of Appeal, para. 19; Appeal Brief, para. 37; Reply, para. 10.
[92] Response, paras. 20-24.
[93] Response, para. 26.
[94] Rwanda *Amicus* Brief, para. 17.
[95] Rwanda *Amicus* Brief, paras. 18-20.
[96] Rwanda *Amicus* Brief, paras. 22, 23.
[97] Rwanda *Amicus* Brief, paras. 24, 25.
[98] Response to *Amicus* Brief, para. 5.1

Rwanda, or forced to flee Rwanda after testifying before the Tribunal.[99] Munyakazi also submits that Rwandans who are living abroad as refugees and constitute the majority of the witnesses expected to testify for his Defence, will not be able to testify in Rwanda without losing their refugee status, and cannot be compelled to testify.[100] He indicates that investigators can verify that the prospective Defence witnesses interviewed both within and outside Rwanda are fearful of testifying for the Defence in Rwanda.[101]

A. Witnesses within Rwanda

37. The Appeals Chamber considers that there was sufficient information before the Trial Chamber of harassment of witnesses testifying in Rwanda, and that witnesses who have given evidence before the Tribunal experienced threats, torture, arrests and detentions, and, in some instances, were killed.[102] The Trial Chamber noted with particular concern the submission from HRW that at least eight genocide survivors were murdered in 2007, including persons who had, or intended, to testify in genocide trials.[103] There was also information before the Trial Chamber of persons who refused, out of fear, to testify in defence of people they knew to be innocent.[104] The Trial Chamber further noted that some defence witnesses feared that, if they testified, they would be indicted to face trial before the *Gacaca* courts, or accused of adhering to "genocidal ideology".[105] The Appeals Chamber observes that the information available to the Trial Chamber demonstrates that regardless of whether their fears are well-founded, witnesses in Rwanda may be unwilling to testify for the Defence as a result of the fear that they may face serious consequences, including threats, harassment, torture, arrest, or being killed. It therefore finds that the Trial Chamber did not err in concluding that it was unlikely that Defence witnesses would feel secure enough to testify in a transferred case.

38. The Trial Chamber further held that there were concerns with respect to the witness protection program in Rwanda.[106] The Appeals Chamber notes that no judicial system can guarantee absolute witness protection.[107] However, it is not persuaded that the Trial Chamber erred

[99] Response to *Amicus* Brief, paras. 5.2, 5.3.
[100] Response to *Amicus* Brief, para. 5.5.
[101] Response to *Amicus* Brief, para. 5.5.
[102] HRW *Amicus* Brief, paras. 89-102; ICDAA *Amicus* Brief, paras. 83, 85. The Appeals Chamber also notes the case of *Aloys Simba v. The Prosecutor*, where the Trial Chamber found that the Rwandan authorities had interfered with Defence Witness HBK, resulting in his refusal to testify. *See Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement, para. 47, referring to *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Judgement, paras. 49-50.
[103] HRW *Amicus* Brief, para. 96.
[104] HRW *Amicus* Brief, para. 37.
[105] Rule 11*bis* Decision, para. 61, referring to HRW *Amicus* Brief, paras. 30-40.
[106] Rule 11*bis* Decision, para. 62.
[107] *Janković* Appeal Decision, para. 49.

in finding that Rwanda's witness protection service currently lacks resources, and is understaffed. The Appeals Chamber agrees with the Prosecution that the fact that the witness protection service is presently administered by the Office of the Prosecutor General and that threats of harassment are reported to the police does not necessarily render the service inadequate. However, it finds that, based on the information before it, the Trial Chamber did not err in finding that witnesses would be afraid to avail themselves of its services for this reason.[108]

39. The Appeals Chamber therefore dismisses this sub-ground of appeal.

B. Witnesses outside Rwanda

40. The Appeals Chamber finds that the Trial Chamber did not err in accepting Munyakazi's assertion that most of its witnesses reside outside Rwanda, as this is usual for cases before the Tribunal, and is supported by information from HRW.[109] The Appeals Chamber also finds that there was sufficient information before the Trial Chamber that, despite the protections available under Rwandan law, many witnesses residing outside Rwanda would be afraid to testify in Rwanda.[110] It therefore finds that the Trial Chamber did not err in concluding, based on information before it, that despite the protections available in Rwandan law, many witnesses residing abroad would fear intimidation and threats.

41. With respect to Rwanda's ability to compel witnesses to testify, the Appeals Chamber notes that Rwanda has several mutual assistance agreements with states in the region and elsewhere in Africa, and that agreements have been arranged with other states as part of Rwanda's cooperation with the Tribunal and in the conduct of its domestic trials.[111] Further, the Appeals Chamber notes

[108] ICDAA *Amicus* Brief, para. 87; HRW *Amicus* Brief, para. 87.
[109] *See* HRW *Amicus* Brief, para. 38. *See also* footnote 16 of the Response, citing the example of *The Prosecutor v. Simeon Nchamihigo*, Case No. ICTR-01-63, where 91% of the defence witnesses came from abroad, *The Prosecutor v. André Ntagerura*, Case No. ICTR-96-10**,** where 100% of the defence witnesses came from abroad, and *The Prosecutor v. Samuel Imanishimwe*, Case No. ICTR-97-36, where 100% of the defence witnesses were from abroad.
[110] *See* HRW *Amicus* Brief, para. 104, indicating that in interviews with two dozen Rwandans living abroad, no one was willing to travel to Rwanda to testify for the defence. *See also* the statement by the Rwandan Minister of Justice regarding the immunity for witnesses granted under Article 14 of the Transfer Law, cited in the HRW *Amicus* Brief at para. 39, and quoted by the Trial Chamber in para. 61 of the Rule 11*bis* Decision. The Appeals Chamber finds that this statement, which according to HRW, was widely circulated in the diaspora, may contribute to the unwillingness of witnesses residing outside of Rwanda to return to Rwanda to testify. However, the Appeals Chamber finds that the Trial Chamber referred to this quote out of context, as it cited it to demonstrate that the Government would condone the arrests of witnesses who had testified for the Tribunal after their return to Rwanda. The Minister was in fact speaking about the immunity guaranteed under Article 14 of the Transfer Law to witnesses testifying in transfer cases. Moreover, the Trial Chamber discusses these arrests in the same paragraph as it discusses genocidal ideology, thus implying that defence witnesses who were arrested upon returning to Rwanda after their testimony were arrested for harbouring genocidal ideology. There is no indication that this was the case, and the Minister's statement did not relate to genocidal ideology.
[111] Rwanda *Amicus* Brief, para. 23. Rwanda is a party to the agreement of Mutual Legal Assistance in Criminal Matters of the East Africa Police Chiefs Organisation with many states in the region and elsewhere including Kenya, Uganda,

that United Nations Security Council Resolution 1503, calling on all states to assist national jurisdictions where cases have been transferred, provides a clear basis for requesting and obtaining cooperation.[112] It therefore finds that the Trial Chamber erred in holding that Rwanda had not taken any steps to secure the attendance or evidence of witnesses from abroad, or the cooperation of other states.

42. The Appeals Chamber considers that Rwanda has established that video-link facilities are available, and that video-link testimony would likely be authorized in cases where witnesses residing outside Rwanda genuinely fear to testify in person. However, it is of the opinion that the Trial Chamber did not err in finding that the availability of video-link facilities is not a completely satisfactory solution to the testimony of witnesses residing outside Rwanda, given that it is preferable to hear direct witness testimony, and that it would be a violation of the principle of the equality of arms if the majority of Defence witnesses would testify by video-link while the majority of Prosecution witnesses would testify in person.[113]

43. Considering the totality of the circumstances, although the Appeals Chamber finds that the Trial Chamber erred in holding that Rwanda had not taken any steps to secure the attendance or evidence of witnesses from abroad, or the cooperation of other states, it dismisses this sub-ground of appeal.

C. Conclusion

44. For the reasons already provided under Ground 2 of this decision,[114] the Appeals Chamber considers that the Trial Chamber erred in not taking into account the monitoring and revocation provisions of Rule 11*bis*(D)(iv) and (F) of the Rules, and the prospect of monitoring by the African Commission, in its assessment of the availability and protection of witnesses.[115] However, the

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Tanzania, Burundi, Djibouti, Eritrea, Seychelles and Sudan, and has a Mutual Legal Assistance Protocol with states under the Convention Establishing the Economic Community of the Great Lakes Countries (CEPGL). Rwanda has also negotiated an extradition Memorandum of Understanding with the United Kingdom, and it is cooperating with many justice systems including those of New Zealand, Finland, Denmark and Germany.

[112] Security Council Resolution 1503 states at paragraph 1 that the Security Council "[*c*]*alls* on the international community to assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY and the ICTR [...]". S/RES/1503 (2003). *See Stanković* Appeal Decision, paragraph 26, where the Appeals Chamber approved of the Trial Chamber's consideration of Security Council Resolution 1503 and interpreted this paragraph of the resolution as implicitly including cooperation with respect to witnesses.

[113] Rule 11*bis* Decision, para. 65.

[114] *See supra* para. 30. *See also Stanković* Appeal Decision, where the Appeals Chamber held at paragraph 52 that it was satisfied that the monitoring procedures and the revocation mechanism under Rule 11(F) *bis* "was a reasonable variable for the Referral Bench to have included in the Rule 11*bis* equation". *See also Janković* Appeal Decision, paras. 56, 57.

[115] *See Stanković* Appeal Decision, where the Appeals Chamber held at paragraph 52 that it was satisfied that the monitoring procedures and the revocation mechanism under Rule 11(F) *bis* "was a reasonable variable for the Referral Bench to have included in the Rule 11*bis* equation". *See also Janković* Appeal Decision, paras. 56, 57.

Appeals Chamber finds that this failure did not invalidate the Trial Chamber's findings on the availability and protection of witnesses.

45. In light of the above, the Appeals Chamber finds that the Trial Chamber did not err in concluding that Munyakazi's right to obtain the attendance of, and to examine, Defence witnesses under the same conditions as witnesses called by the Prosecution, cannot be guaranteed at this time in Rwanda. The Appeals Chamber therefore dismisses this ground of appeal.

VII. GROUND OF APPEAL 4: FAILURE TO TAKE INTO ACCOUNT RELEVANT CONSIDERATIONS

46. The Prosecution submits that the Trial Chamber erred in law and fact by not taking into account or not giving sufficient weight to relevant considerations submitted before it, including safeguards in Rwanda's law for the facilitation of the defence, immunity and safe passage for defence counsel and defence witnesses, the monitoring of proceedings in Rwanda by the African Commission, and the redress of revocation of the order of referral under Rule 11*bis*(F) of the Rules in the event of Rwanda's non-compliance with its obligations.[116] Munyakazi responds that the Trial Chamber did consider the safeguards provided under the Rwandan legal system, but still concluded that given the current conditions in Rwanda, they were inadequate to guarantee a fair trial.[117] He contends that the Trial Chamber's omission to refer to the monitoring proceedings and the remedy of revocation provided for in Rule 11*bis*(F) of the Rules were harmless.[118]

47. The Appeals Chamber finds that the Trial Chamber did take into account the safeguards in Rwanda's law for the facilitation of the defence, including immunity and safe passage for defence counsel and witnesses. The Trial Chamber explicitly considered Articles 13 and 14 of the Transfer Law which address the assistance and protection of witnesses, including defence witnesses.[119] The Trial Chamber considered the provisions in Rwandan law relating to measures put into place to facilitate witness protection and safety, but nevertheless came to the conclusion that, under the current conditions in Rwanda, these laws were inadequate to guarantee witness protection.[120] The Trial Chamber did not explicitly consider the provisions of the Transfer Law relating to the immunity and safe passage of defence counsel, but as it made no finding that Munyakazi might not receive a fair trial due to impediments to the Defence ability to travel and conduct investigations,

[116] Notice of Appeal, paras. 21-24; Appeal Brief, paras. 40-42; Reply, paras. 13, 14.
[117] Response, para. 27.
[118] Response, para. 28.
[119] Rule 11*bis* Decision, paras. 53, 54, 59 and fn. 120.
[120] Rule 11*bis* Decision, para. 59.

the Appeals Chamber does not consider that it was required to do so. The Appeals Chamber therefore finds that the Trial Chamber did consider and give adequate weight to the safeguards in Rwandan law for the facilitation of the defence, and therefore did not commit any error in this regard.

48. The Appeals Chamber therefore dismisses this sub-ground of appeal.

49. The Appeals Chamber has addressed the failure of the Trial Chamber to consider the monitoring of proceedings in Rwanda by the African Commission, and the redress of revocation of the order of referral under Rule 11*bis*(F) of the Rules in the event of Rwanda's non-compliance with its obligations in its consideration of Grounds 2 and 3.[121]

VIII. CONCLUSION

50. The Appeals Chamber has granted Ground 2 of the Appeal, finding that the Trial Chamber erred in holding that Rwanda does not respect the independence of the judiciary and that the composition of the courts in Rwanda does not accord with the right to be tried by an independent tribunal and the right to a fair trial. However, it has dismissed the remaining grounds of appeal, which relate to fundamental matters concerning whether Munyakazi's right to obtain the attendance of, and to examine, Defence witnesses under the same conditions as witnesses called by the Prosecution, can be guaranteed at this time in Rwanda and whether the penalty structure in Rwanda is adequate for the purposes of transfer under Rule 11*bis* of the Rules. Consequently, despite granting Ground 2 of the Appeal, the Appeals Chamber finds that the Trial Chamber did not err in denying the Prosecution's request to refer Munyakazi's case to Rwanda.

IX. DISPOSITION

51. For the foregoing reasons, the Appeals Chamber,

GRANTS Ground 2 of the Appeal;

DISMISSES the remainder of the Appeal; and

UPHOLDS the Trial Chamber's decision to deny the referral of the case to Rwanda.

[121] *See supra* paras. 30, 44.

Judge Fausto Pocar
Presiding

Dated this 8th day of October 2008,
at The Hague, The Netherlands.

[Seal of the Tribunal]

ANNEX I

UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Fausto Pocar, Presiding** **Judge Mohamed Shahabuddeen** **Judge Mehmet Güney** **Judge Liu Daqun** **Judge Andrésia Vaz**
Registrar:	**Mr. Adama Dieng**
Decision of:	**30 October 2008**

THE PROSECUTOR

v.

Gaspard KANYARUKIGA

Case No. ICTR-2002-78-R11bis

DECISION ON THE PROSECUTION'S APPEAL AGAINST DECISION ON REFERRAL UNDER RULE 11*bis*

Counsel for Gaspard Kanyarukiga

Mr. Ernest Midagu Bahati
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Mr. Hassan Bubacar Jallow
Mr. Bongani Majola
Mr. Alex Obote-Odora
Mr. Richard Karegyesa
Mr. Neville Weston
Ms. Beatrice Chapaux
Mr. Ignacio Tredici

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an appeal filed by the Prosecution ("Appeal")[1] pursuant to Rule 11*bis*(H) of the Tribunal's Rules of Procedure and Evidence ("Rules") against a decision by the Trial Chamber designated under Rule 11*bis* of the Rules denying its request to refer the case of Gaspard Kanyarukiga ("Kanyarukiga") to the Republic of Rwanda ("Rwanda").[2]

I. BACKGROUND

2. Kanyarukiga is charged with genocide, or alternatively, with complicity in genocide, and extermination as a crime against humanity.[3] On 7 September 2007, the Prosecution requested the referral of his case to Rwanda pursuant to Rule 11*bis* of the Rules.[4] Kanyarukiga responded on 16 November 2007, opposing the referral.[5] On 2 October 2007, the President of the Tribunal designated a Chamber under Rule 11*bis* to consider whether to grant the Prosecution's request for referral.[6] The Trial Chamber granted leave to Rwanda, the Kigali Bar Association, the International Criminal Defence Attorneys Association ("ICDAA"), and Human Rights Watch ("HRW") to appear as *amici curiae*.[7] On 6 June 2008, the Trial Chamber denied the Prosecution's request for referral of Kanyarukiga's case to Rwanda.[8]

3. The Prosecution appealed against the Rule 11*bis* Decision, filing its Notice of Appeal on 23 June 2008 and its Appeal Brief on 8 July 2008. Kanyarukiga filed his Response on 18 July 2008,[9]

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[1] Prosecutor's Notice of Appeal (Rule 11*bis* (H)), 23 June 2008 ("Notice of Appeal"); Prosecutor's Appeal Brief (Rule 11*bis* (H)), 8 July 2008 ("Appeal Brief").
[2] Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008 ("Rule 11*bis* Decision").
[3] Amended Indictment, 14 November 2007.
[4] Prosecutor's Request for the Referral of the Case of Gaspard Kanyarukiga to Rwanda Pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 7 September 2007.
[5] *Réponse de la Défense à la requête du Procureur portant transfert de l'Accusé Gaspard Kanyarukiga au Rwanda*, 16 November 2007. *See also* Prosecutor's Reply to "*Réponse de la Défense à la requête du Procureur portant transfert de l'Accusé Gaspard Kanyarukiga au Rwanda*", 5 December 2007.
[6] Designation of Trial Chamber for the Referral of the Case of Gaspard Kanyarukiga to Rwanda, 2 October 2007.
[7] Decision on the Request of the Republic of Rwanda for Leave to Appear as *Amicus Curiae*, 9 November 2007; Decision on *Amicus Curiae* Request by the International Criminal Defence Attorneys Association (ICDAA), 22 February 2008; Decision on the *Amicus Curiae* Request by the Kigali Bar Association, 22 February 2008; Decision on Defence Request to Grant *Amicus Curiae* Status to Four Non-Governmental Associations, 22 February 2008; Decision on *Amicus Curiae* Request by Human Rights Watch, 29 February 2008.
[8] Rule 11*bis* Decision, p. 30.
[9] Defense Brief in Response to the Prosecutor's Appeal Brief, 18 July 2008 ("Response"). *See also Corrigendum du mémoire de la Défense en réponse à l'appel interjeté par le Procureur*, 29 July 2008. Kanyarukiga initially filed a response to the Notice of Appeal. *See Réponse de la Défense à la demande du Procureur tendant à solliciter la*

and the Prosecution replied on 22 July 2008.[10] Kanyarukiga filed two motions requesting permission to file additional evidence,[11] both of which the Appeals Chamber dismissed on 1 September 2008.[12] Rwanda requested permission to file an *amicus curiae* brief on 11 August 2008,[13] which the Appeals Chamber granted on 1 September 2008.[14] Rwanda filed its brief on 10 September 2008,[15] and Kanyarukiga responded to it on 15 September 2008.[16]

II. APPLICABLE LAW

4. Rule 11*bis* of the Rules allows a designated Trial Chamber to refer a case to a competent national jurisdiction for trial if it is satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. In assessing whether a state is competent within the meaning of Rule 11*bis* of the Rules to accept a case from the Tribunal, a designated Trial Chamber must consider whether it has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure.[17] The penalty structure within the state must provide an appropriate punishment for the offences for which the accused is charged,[18] and conditions of detention must accord with internationally recognized standards.[19] The Trial Chamber must also consider whether the accused will receive a fair trial, including whether the accused will

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certification d'appel dans l'affaire Procureur c/ Kanyarukiga Gaspard, 27 June 2008. However, the Appeals Chamber declared it invalid. *See* Order, 9 July 2008. The Appeals Chamber notes that in his Response, Kanyarukiga makes submissions on several issues that were not the subject of the Prosecution's appeal, including the issue of pardon and commutation of sentence (para. 20), the issue of double jeopardy (paras. 21-24) and the issue of trial before a single judge (paras. 42-49). The Prosecution objects that Kanyarukiga's submissions on these issues should be disregarded, given that Kanyarukiga has not filed an appeal, and that these issues are not engaged in the present appeal. The Appeals Chamber agrees and will not consider these submissions.

[10] Prosecutor's Reply to "*Mémoire de la Défense en réponse à l'appel du Procureur* (Article 11bis RPP)", 22 July 2008 ("Reply").

[11] Defence Appeal Motion Seeking Leave to Present Additional Evidence (*Rule 115 of the Rules of Procedure and Evidence*), 18 July 2008; Defence Extremely Urgent Addendum to Defence Appeal Motion Seeking Leave to Present Additional Evidence, 1 August 2008.

[12] Decision on Request to Admit Additional Evidence of 18 July 2008, 1 September 2008; Decision on Request to Admit Additional Evidence of 1 August 2008, 1 September 2008.

[13] Request of the Republic of Rwanda for Permission to File an *Amicus Curiae* Brief Concerning the Prosecutor's Appeal of the Denial the by [*sic*] Trial Chamber of the Request for Referral of the Case of Gaspard Kanyarukiga to Rwanda Pursuant to Rule 11 *bis* of the Rules, 11 August 2008.

[14] Decision on Request from the Republic of Rwanda for Permission to File an *Amicus Curiae* Brief, 1 September 2008. *See also* Corrigendum, 3 September 2008.

[15] *Amicus Curiae* Brief on Behalf of the Government of Rwanda, 10 September 2008 ("Rwanda *Amicus* Brief").

[16] Defence Response to *Amicus Curiae* Brief on behalf of the Government of Rwanda, 15 September 2008 ("Response to *Amicus* Brief"). The Appeals Chamber notes that Kanyarukiga appended to his response a HRW report from July 2008 entitled "Law and Reality: Progress in Judicial Reform in Rwanda" ("HRW Report"). The Appeals Chamber notes that it previously declined to admit this report as additional evidence under Rule 115 of the Rules. *See* Decision on Request to Admit Evidence of 1 August 2008, 1 September 2008. It will therefore not consider the HRW Report.

[17] *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11*bis,* Decision on the Prosecutor's Appeal against Decision on Referral under Rule 11*bis*, 9 October 2008 ("*Munyakazi* Appeal Decision") para. 4, fn. 15, sources cited therein.

[18] *Munyakazi* Appeal Decision, para. 4, fn. 16, sources cited therein.

[19] *Munyakazi* Appeal Decision, para. 4, fn. 17, sources cited therein.

be accorded the rights set out in Article 20 of the Tribunal's Statute ("Statute").[20]

5. The Trial Chamber has the discretion to decide whether to refer a case to a national jurisdiction and the Appeals Chamber will only intervene if the Trial Chamber's decision was based on a discernible error.[21] As the Appeals Chamber has previously stated:

> An appellant must show that the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of its discretion, gave weight to irrelevant considerations, failed to give sufficient weight to relevant considerations, or made an error as to the facts upon which it has exercised its discretion; or that its decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[22]

III. GROUND OF APPEAL 1: APPLICABLE PUNISHMENT

6. In its Rule 11*bis* Decision, the Trial Chamber held that it was satisfied that the death penalty would not be imposed on an accused transferred to Rwanda pursuant to Rule 11*bis* of the Rules, since Article 21 of the Transfer Law[23] excludes capital punishment in relation to referral cases[24] and since the Abolition of the Death Penalty Law[25] abolishes the death penalty and replaces it with either "life imprisonment" or "life imprisonment with special provisions".[26]

7. The Trial Chamber further noted Kanyarukiga's submission that, if convicted, he would in fact be subject to Article 4 of the Abolition of Death Penalty Law, pursuant to which he could face life imprisonment with special provisions, meaning life imprisonment in isolation. It also recalled the submissions of the Prosecution and Rwanda contesting that punishment of life imprisonment with special provisions is applicable under the Transfer Law.[27] The Trial Chamber held that the relationship between the Abolition of Death Penalty Law and the Transfer Law was unclear, and that it was not aware of any jurisprudence in Rwanda concerning the relationship between the two laws.[28] It therefore found that although the two laws could be interpreted to the effect that life imprisonment with special provisions does not apply within the field of application of the Transfer Law, there was a risk that Kanyarukiga, if transferred and convicted, might be subject to

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[20] *Munyakazi* Appeal Decision, para. 4, fn. 18, sources cited therein.
[21] *Munyakazi* Appeal Decision, para. 5, fn. 19, sources cited therein.
[22] *Munyakazi* Appeal Decision, para. 5 citing *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-AR11*bis,* Decision on Rule 11*bis* Appeal, 30 August 2006, para. 9.
[23] Organic Law No. 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and From Other States ("Transfer Law").
[24] Rule 11*bis* Decision, paras. 22, 25.
[25] Organic Law No. 31/2007 of 25 July 2007 Relating to the Abolition of the Death Penalty ("Abolition of Death Penalty Law").
[26] Rule 11*bis* Decision, para. 25, fn. 41.
[27] Rule 11*bis* Decision, para. 94.
[28] Rule 11*bis* Decision, para. 96.

imprisonment in isolation.[29]

8. The Prosecution submits that the Trial Chamber erred in relying on the Abolition of Death Penalty Law, when the law applicable to Kanyarukiga is the Transfer Law.[30] It contends that the two sets of laws set out separate and independent legal regimes, and that the Transfer Law, as the *lex specialis*, is the only law applicable to such cases.[31] The Prosecution further argues that the Trial Chamber erred in the exercise of its discretion when, having found that it is not the competent authority to decide in any binding way on the application of Rwandan law and that the legal position regarding the application of solitary confinement to the accused is unclear, it failed to conclude that Rwandan courts would interpret Rwandan law in accordance with the fair trial rights of the accused.[32]

9. Kanyarukiga responds that the Transfer Law is linked to the Abolition of Death Penalty Law, and that it is the latter law which sets the maximum sentence that can be imposed instead of the death penalty, which is either life imprisonment or life imprisonment with special provisions. He submits that the courts in Rwanda could therefore resort to either option were he to be sentenced to life imprisonment.[33] He contends that the Trial Chamber correctly found that it is unclear which Rwandan law would be applied, and argues that in such a situation the Trial Chamber was correct to deny the request for transfer.[34]

10. In its *Amicus* Brief, Rwanda submits that because there was no provision for the death penalty in the Transfer Law, life imprisonment with special provisions was not incorporated into the Transfer Law by virtue of Article 3 of the Abolition of Death Penalty Law.[35] Rwanda therefore submits that the sentence of life imprisonment with no special provisions is the maximum possible punishment for transfer cases.[36] Rwanda also draws attention to the recent Rwandan Supreme Court decision on the constitutionality of the punishment of solitary confinement, although it notes that the Supreme Court declined to consider the constitutionality of Article 4 paragraph 2 of the Abolition of Death Penalty Law, which provides for the penalty of solitary confinement, until such time as legislation which governs the execution of this provision is enacted into law.[37] Rwanda

[29] Rule 11*bis* Decision, para. 96.
[30] Notice of Appeal, para. 2; Appeal Brief, paras. 13-24.
[31] Notice of Appeal, para. 2; Appeal Brief, paras. 13-24.
[32] Notice of Appeal, para. 3; Appeal Brief, paras. 25-32.
[33] Response, paras. 16, 17.
[34] Response, paras. 24-26.
[35] Rwanda *Amicus* Brief, para. 6.
[36] Rwanda *Amicus* Brief, para. 5.
[37] Rwanda *Amicus* Brief, paras. 8, 9. *Tubarimo Aloys v. The Government*, Case. No. RS/INCONST/Pén. 0002/08/CS, 29 August 2008 ("*Tubarimo Aloys* Decision"). The English translation of the decision is attached to Rwanda's *Amicus*

further indicates that it has now submitted a formal request to Parliament pursuant to Article 96 of the Rwandan Constitution for an authentic interpretation of the sentencing provisions of the Transfer Law, which interpretation would be binding on Rwandan courts.[38]

11. Kanyarukiga responds that despite Rwanda's assurances, there has thus far been no legal confirmation that life imprisonment in isolation would not be a punishment applicable to transfer cases, and that the ambiguity about which legal regime applies remains.[39] He submits further that the recent Supreme Court case and the letter from the Minister of Internal Security indicate that Rwanda has no intention of abolishing solitary confinement as a penalty.[40]

12. In *Munyakazi*, the Appeals Chamber already ruled that it is unclear how these two laws will be interpreted by the Rwandan courts,[41] which could construe them as either holding that imprisonment with special provisions is applicable to transfer cases, or that life imprisonment without special provisions is the maximum punishment.[42] There are no reasons to depart from these findings. Indeed, it would be plausible to construe the Transfer Law, which states in Article 25 that its provisions shall prevail in the event of inconsistencies with any other relevant legislation, as the *lex specialis* for transfer cases, and thus as prevailing over the more general Abolition of Death Penalty Law.[43] Moreover, as the Abolition of Death Penalty Law sets out the laws that it affects, and does not mention the Transfer Law, a plausible interpretation would be that it does not repeal any provision of the Transfer Law. This interpretation would mean that the maximum punishment that could be imposed by a Rwandan court in a transfer case would be life imprisonment. [44]

13. On the other hand, the Abolition of Death Penalty Law was adopted after the Transfer Law, and could be viewed as *lex posterior*.[45] The Abolition of Death Penalty Law therefore could be construed as prevailing over the Transfer Law and thus as allowing the possibility of imposing life

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Brief as Annex 1. The Supreme Court held that the imposition of periods of solitary confinement is not *per se* unlawful, but must be implemented in accordance with international standards and proper safeguards. Legislation governing the implements of solitary confinement has not yet entered into force. The Supreme Court therefore held that it could not repeal Article 4 paragraph 2 "before the law governing the execution of this sentence [of solitary confinement] comes into force, which will make it clear, whether solitary confinement contravenes the Constitution". *See* para. 36 of the English translation of the *Tubarimo Aloys* Decision. Rwanda indicates that such legislation is in the process of being enacted, as confirmed in a letter from the Minister of Internal Security, attached to Rwanda's *Amicus* Brief. *See* Rwanda *Amicus* Brief, para. 9 and Annex 2.

[38] Rwanda *Amicus* Brief, para. 7. Rwanda indicates that it is in a position to have this request tabled at the next sitting of Parliament which will commence at the end of September 2008, should this course of action be required.

[39] Response to *Amicus* Brief, paras. 13, 30.

[40] Response, paras. 26, 27.

[41] *Munyakazi* Appeal Decision, para. 16.

[42] *Munyakazi* Appeal Decision, para. 19.

[43] *Munyakazi* Appeal Decision, para. 16.

[44] *Munyakazi* Appeal Decision, para. 16.

[45] *Munyakazi* Appeal Decision, para. 17.

imprisonment in isolation in transfer cases.[46] In addition, although the Abolition of Death Penalty Law does not explicitly mention the Transfer Law, it provides in Article 9 that "all legal provisions contrary to this Organic Law are hereby repealed", which could be interpreted as including those provisions in the Transfer Law that are inconsistent with it.[47] Finally, it would be possible to consider that the laws are not in fact inconsistent, and the Abolition of Death Penalty Law could be construed as providing elaboration of the sentencing regime established in the Transfer Law.[48]

14. Thus far, no authoritative interpretation of the relationship between these two laws exists.[49] Rwanda indicated that it has now sought an authentic interpretation of the Transfer Law from Parliament. However, as such an interpretation has not been issued yet, the Appeals Chamber cannot take this into consideration in assessing whether the Trial Chamber erred in its conclusion about the interpretation of these laws.[50]

15. The Appeals Chamber further recognizes that the punishment of solitary confinement may constitute a violation of international standards if not applied as an exceptional measure which is necessary, proportionate, restricted in time and includes minimum safeguards.[51] However, it observes that there was no information before the Trial Chamber that Rwandan law provides for such safeguards.[52]

16. Since there is genuine ambiguity about which punishment provision would apply to transfer cases,[53] and since, therefore, the possibility exists that Rwandan courts might hold that a penalty of life imprisonment in isolation would apply to such cases, pursuant to the Abolition of Death Penalty Law,[54] the Appeals Chamber finds no error in the Trial Chamber's conclusion that the current penalty structure in Rwanda is not adequate for the purposes of transfer under Rule 11*bis* of the

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[46] *Munyakazi* Appeal Decision, para. 17.
[47] *Munyakazi* Appeal Decision, para. 17.
[48] *Munyakazi* Appeal Decision, para. 17.
[49] *Munyakazi* Appeal Decision, para. 18.
[50] *Munyakazi* Appeal Decision, para. 18.
[51] *See Ramirez Sanchez v. France*, European Court of Human Rights, Grand Chamber (GC), App. No. 59450/00, Judgement, 4 July 2006, paras. 121, 136, 145; Inter-American Court of Human Rights: *Case of Castillo Petruzzi et al. v. Peru*, Judgement (Merits, Reparations and Costs), 30 May 1999, Series C, No. 52, paras. 194-199; *Case of Miguel Castro-Castro Prison v. Peru,* Judgement, 25 November 2006, Series C, No. 160, para. 315; *Case of García Asto and Ramirez Rojas*, Judgement, November 25 2005, Series C, No. 137, para. 221; *Case of Raxacó Reyes*, Judgement, 15 September 2005, Series C, No. 133, para. 95; *Case of Fermín Ramírez*, Judgement of 20 June 2005, Series C, No. 126, para. 118. Concluding Observations of the Human Rights Committee: Denmark, 31 October 2000, UN Doc. CCPR/CO/70/DNK; UN Committee against Torture (CAT), Conclusions and Recommendations of the Committee against Torture: Japan, 3 August 2007, UN Doc. CAT/C/JPN/CO/1, para. 18. The Trial Chamber noted in the Rule 11*bis* Decision that "it is common ground that prolonged solitary confinement may constitute a violation of Article 7 of the ICCPR and other instruments prohibiting torture and inhuman and degrading treatment or punishment". The Trial Chamber further found that the parties did not address this issue. *See* Rule 11*bis* Decision, para. 95 and fn. 130.
[52] *See Tubarimo Aloys* Decision, *supra* fn. 37.
[53] *Munyakazi* Appeal Decision, para. 20.

Rules.

17. In light of the above, the Appeals Chamber dismisses this ground of appeal.

IV. GROUND OF APPEAL 2: RIGHT TO A FAIR TRIAL

18. The Prosecution submits that the Trial Chamber erred in law and fact by holding that under current conditions in Rwanda, Kanyarukiga's right to a fair trial cannot be guaranteed. In particular, it argues that the Trial Chamber erred in finding that the working conditions for the Defence may be difficult, so that, taken together with other factors, this would have a bearing on the fairness of the trial.[55] It also contends that the Trial Chamber erred in finding that the Defence might face problems in obtaining witnesses residing in Rwanda because they will be afraid to testify, that the Defence will not be able to call witnesses residing outside Rwanda to the extent and in the manner that will ensure a fair trial, and in finding that the monitoring system put in place will not solve the problems relating to availability and protection of witnesses.[56]

A. Working Conditions of the Defence

19. The Trial Chamber observed that while there have been instances of harassment, threats and arrest of lawyers representing accused charged with genocide, these relate to proceedings before the ordinary courts.[57] The Trial Chamber held that if such situations occur after transfer under Rule 11*bis* of the Rules, the Defence will have an explicit legal basis under Article 15 of the Transfer Law to bring this to the attention of the Rwandan High Court or Supreme Court, and that if the Defence team is prevented from carrying out its work effectively, this would be addressed by the monitoring mechanism and did not prevent the referral from taking place.[58] While finding that other alleged impediments feared by the Defence were formulated too generally and did not prevent the referral from taking place, the Trial Chamber accepted that many ICTR defence teams have been unable to obtain documents from Rwandan authorities or have received them only after considerable time, and that there are examples of defence counsel having difficulties meeting detainees in Rwanda.[59] The Trial Chamber held that such incidents are not sufficient in and of themselves to prevent transfer under Rule 11*bis* of the Rules, but that together with other factors, they show that the working conditions for the Defence might be difficult, which might have a

[54] *Munyakazi* Appeal Decision, para. 20.
[55] Notice of Appeal, paras. 6, 7; Appeal Brief, paras. 35-41.
[56] Notice of Appeal, paras. 8-21; Appeal Brief, paras. 42-69.
[57] Rule 11*bis* Decision, para. 61.
[58] Rule 11*bis* Decision, para. 61.
[59] Rule 11*bis* Decision, para. 62.

bearing on the fairness of the trial.[60]

20. The Prosecution submits that the Trial Chamber erred in finding that the factors identified demonstrated that working conditions for the Defence may be difficult. It submits that, as the Trial Chamber found in relation to cases of harassment and threats, the Defence could raise its concerns pertaining to obtaining documents or visiting detainees to the attention of the High Court or Supreme Court, and that if the problems persisted, the remedies of monitoring and revocation would act as safeguards.[61] It also submits that the considerable acquittal rate for genocide cases in Rwanda, which was noted by the Trial Chamber, would suggest that the working conditions in Rwanda are amenable to defence teams.[62] Neither Rwanda nor Kanyarukiga directly addresses this issue in their briefs.

21. The Appeals Chamber notes that it is unclear how the mechanisms of monitoring and revocation under the Rules would constitute sufficient safeguards for the defence with regard to obtaining documents in a timely manner and visiting detainees. The Appeals Chamber further notes that Article 15 of the Transfer Law, while ensuring Defence Counsel and staff the right to enter and move freely within Rwanda and freedom from search, seizure, arrest or detention in the performance of their legal duties, is silent on the issues of obtaining documents from the Rwandan authorities or visiting detainees. Article 13(4) of the Transfer Law, on the other hand, does provide the right of the Accused to adequate time and facilities to prepare his defence, which could constitute the basis for seeking a remedy before the Rwandan courts. As the Trial Chamber did not make any specific finding that such issues could not be so remedied, however, the Appeals Chamber finds no error in the Trial Chamber's conclusion that defence teams have experienced impediments in obtaining documents from the Rwandan authorities and in meeting witnesses. The Appeals Chamber considers that these obstacles, whilst not sufficient in and of themselves to prevent referral of a case to Rwanda under Rule 11*bis*, do indicate that working conditions for the defence may be difficult in Rwanda, which in turn has a bearing on the fairness of the trial.

22. Accordingly, and in light of the findings below, the Appeals Chamber dismisses this sub-ground of appeal.

[60] Rule 11*bis* Decision, para. 62.
[61] Appeal Brief, paras. 39, 40.
[62] Appeal Brief, para. 41.

B. Availability and Protection of Witnesses

1. Witnesses within Rwanda

23. The Trial Chamber held that the submissions before it did not demonstrate that Rwandan judicial officials would disregard witness protection orders, nor that the Rwandan witness protection service would be unable to provide adequate protection due to lack of resources.[63] Although it noted that submissions showed that there have been instances of harassment of witnesses, it did not find that witnesses would, in general, face risks by testifying in referral proceedings.[64] The Trial Chamber observed that the fact that the witness protection service is administered by the Office of the Prosecutor General and that threats of harassment are reported to the police does not necessarily render that service inadequate, but expressed concern that this may reduce the willingness of some potential defence witnesses to avail themselves of its services or to testify.[65] It also held that it could not exclude that some potential defence witnesses in Rwanda may refrain from testifying because of fear of being accused of harbouring "genocidal ideology".[66] Considering the totality of these factors, the Trial Chamber found that Kanyarukiga may face problems in obtaining witnesses residing in Rwanda because they will be afraid to testify, and that this may affect the fairness of the trial.[67]

24. The Prosecution contends that the Trial Chamber's conclusion that the Defence would experience difficulties in securing witnesses on behalf of Kanyarukiga due to their fear of harassment, arrest and detention was speculative, vague and not substantiated by evidence.[68] The Prosecution also submits that the considerable acquittal rate noted by the Trial Chamber would suggest that defence witnesses have testified without difficulties.[69] The Prosecution further submits that the Trial Chamber erred with respect to its conclusions relating to the inadequacies of Rwanda's witness protection program.[70] Kanyarukiga responds that the Trial Chamber correctly relied upon the information provided by the *amici curiae*, which demonstrated that he would face problems in calling witnesses to testify on his behalf.[71]

25. In its *Amicus* Brief, Rwanda submits that the Trial Chamber failed to consider the

[63] Rule 11*bis* Decision, paras. 66, 67.
[64] Rule 11*bis* Decision, para. 69.
[65] Rule 11*bis* Decision, para. 70.
[66] Rule 11*bis* Decision, para. 72.
[67] Rule 11*bis* Decision, para. 73.
[68] Notice of Appeal, paras. 8, 12; Appeal Brief, paras. 47, 48.
[69] Appeal Brief, para. 49.
[70] Notice of Appeal, paras. 10, 11; Appeal Brief, paras. 44, 45.
[71] Response, paras. 33-35.

substantial steps that it has undertaken to ensure the hearing of witnesses and the presentation of evidence, including measures to ensure witness protection and safety. It submits that these measures and mechanisms have proven effective in practice with ICTR cases in which Rwanda has assisted the Tribunal, and in trials before the Rwandan courts.[72] Kanyarukiga responds by citing instances in which witnesses have been harassed upon their return to Rwanda or forced to flee Rwanda after testifying before the Tribunal.[73]

26. The Appeals Chamber considers that there was sufficient information before the Trial Chamber of harassment of witnesses testifying in Rwanda, and that witnesses who have given evidence before the Tribunal experienced threats, torture, arrests and detentions, and, in some instances, were killed.[74] There was also information before the Trial Chamber of persons who refused, out of fear, to testify in defence of people they knew to be innocent.[75] The Trial Chamber further noted that some defence witnesses feared that, if they testified, they would be indicted to face trial before the *Gacaca* courts, or accused of adhering to "genocidal ideology".[76] The Appeals Chamber observes that the information available to the Trial Chamber demonstrates that regardless of whether their fears are well-founded, witnesses in Rwanda may be unwilling to testify for the Defence as a result of the fear that they may face serious consequences, including threats, harassment, torture, arrest, or even murder.[77] It therefore finds that the Trial Chamber did not err in concluding that Kanyarukiga might face problems in obtaining witnesses residing in Rwanda because they would be afraid to testify.

27. The Appeals Chamber agrees with the Trial Chamber's conclusion that the fact that the Rwandan witness protection service is administered by the Office of the Prosecutor General and that threats of harassment are reported to the police does not necessarily render it inadequate.[78] However, it finds that, based on the information before it,[79] the Trial Chamber did not err in finding that witnesses would be afraid to avail themselves of its services for these reasons.

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[72] Rwanda *Amicus* Brief, para. 10.
[73] Response to *Amicus* Brief, paras. 34, 35. In para. 33 of his Response to the *Amicus* Brief, Kanyarukiga also refers to statements from the HRW Report, which the Appeals Chamber has found to be inadmissible in these proceedings. *See* Decision on Request to Admit Evidence of 1 August 2008, 1 September 2008.
[74] Brief of Human Rights Watch as *Amicus Curiae* in Opposition to Rule 11 *bis* Transfer, 27 February 2008 ("HRW *Amicus* Brief"), paras. 89-102; Brief of *Amicus Curiae*, International Criminal Defence Attorneys Association (ICDAA) Concerning the Request for Referral of the Accused Gaspard Kanyarukiga to Rwanda pursuant to Rule 11*bis* of the *Rules of Procedure and Evidence* ("ICDAA *Amicus* Brief"), paras. 87, 89. *See also Munyakazi* Appeal Decision, para. 37.
[75] HRW *Amicus* Brief, para. 37.
[76] Rule11*bis* Decision, para. 72, referring to HRW *Amicus* Brief, paras. 30-40.
[77] *See also Munyakazi* Appeal Decision, para. 37.
[78] *See also Munyakazi* Appeal Decision, para. 38.
[79] ICDAA *Amicus* Brief, para. 85; HRW *Amicus* Brief, para. 87.

2. Witnesses outside Rwanda

28. The Trial Chamber noted the provisions of Article 14 of the Transfer Law, and took note of Rwanda's statement that the provisions on safe conduct of witnesses would be observed in all proceedings involving transfer cases.[80] However, it held that it was persuaded by the submissions of the Defence, HRW and ICDAA that many Rwandans in the diaspora will be afraid to testify in Rwanda.[81] It held that as most of Kanyarukiga's witnesses reside outside Rwanda, it would undermine the fairness of the trial if Kanyarukiga would be unable to call a sufficient number of witnesses to present an effective defence.[82] The Trial Chamber was also concerned that there was no evidence of steps taken by Rwanda to secure the attendance or evidence of witnesses from abroad, such as concluding conventions on mutual assistance.[83] It found that in any event, the availability of video-link facilities was not a completely satisfactory solution to obtaining the testimony of witnesses residing outside Rwanda and raised concerns with respect to the principle of equality of arms.[84] The Trial Chamber therefore concluded that it was not satisfied that Kanyarukiga would be able to call witnesses residing outside Rwanda to the extent and in a manner which would ensure a fair trial if his case were transferred to Rwanda.[85]

29. The Prosecution submits that the Trial Chamber erred in accepting that witnesses residing outside Rwanda will be afraid to testify in Rwanda. It also claims that the Trial Chamber's conclusion that most of Kanyarukiga's witnesses would come from outside Rwanda and that they would be unwilling on reasonable grounds to come to Rwanda to testify is unsubstantiated.[86] Additionally, it submits that the Trial Chamber failed to give sufficient consideration to Rwanda's legal framework, and argues that it erred by placing undue emphasis on whether Rwanda has powers to enforce mutual cooperation.[87] Kanyarukiga responds that the Trial Chamber correctly relied upon the information provided by the *amici curiae*, which demonstrated that he would face problems in calling witnesses to testify on his behalf.[88] Kanyarukiga also submits that the vast majority of his witnesses expressed fear of going to Rwanda to testify.[89]

30. In its *Amicus* Brief, Rwanda submits that the Trial Chamber failed to consider the

[80] Rule 11*bis* Decision, paras. 74, 75.
[81] Rule 11*bis* Decision, para. 75.
[82] Rule 11*bis* Decision, para. 76.
[83] Rule 11*bis* Decision, para. 77.
[84] Rule 11*bis* Decision, paras. 78-80.
[85] Rule 11*bis* Decision, para. 81.
[86] Notice of Appeal, para. 18; Appeal Brief, para. 33; Reply, para. 12.
[87] Appeal Brief, paras. 34, 35.
[88] Response, paras. 33-35.

substantial steps that have been undertaken by Rwanda to ensure the hearing of witnesses, the presentation of evidence as well as the success of its national witness programme in securing and protecting witnesses for trials before the Tribunal.[90] It also draws attention to the steps Rwanda has taken to ensure that witnesses can be compelled to testify, including its mutual assistance arrangements.[91] Rwanda further points to the availability of video-link testimony as well as witness protection measures for witnesses testifying in Rwanda.[92]

31. The Appeals Chamber finds that the Trial Chamber did not err in accepting Kanyarukiga's assertion that most of his witnesses reside outside Rwanda, as this is usual for cases before the Tribunal,[93] and is supported by information from HRW.[94] The Appeals Chamber also finds that there was sufficient information before the Trial Chamber that, despite the protections available under Rwandan law, many witnesses residing outside Rwanda would be afraid to testify in Rwanda.[95] It therefore finds that the Trial Chamber did not err in concluding, based on the information before it, that despite the protections available in Rwandan law, it was not satisfied that Kanyarukiga would be able to call witnesses residing outside Rwanda to the extent and in a manner which would ensure a fair trial if the case were transferred to Rwanda.

32. With respect to Rwanda's ability to compel witnesses to testify, the Appeals Chamber recalls its finding in *Munyakazi* that Rwanda has several mutual assistance agreements with states in the region and elsewhere in Africa, and that agreements have been negotiated with other states as part of Rwanda's cooperation with the Tribunal and in the conduct of its domestic trials.[96] It therefore finds that the Trial Chamber erred in holding that Rwanda had not taken any steps to

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[89] However, this assertion is based on affidavits of investigators, which the Appeals Chamber declared inadmissible in these proceedings. *See* Decision on Request to Admit Additional Evidence of 18 July 2008, 1 September 2008.
[90] Rwanda *Amicus* Brief, para. 10, referring to the *amicus curiae* brief it submitted in *The Prosecutor v. Yussuf Munyakazi*. *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11bis*, Amicus Curiae* Brief on Behalf of the Government of Rwanda, 28 July 2008 ("Rwanda *Amicus* Brief (*Munyakazi*)").
[91] Rwanda *Amicus* Brief, para. 10, referring to Rwanda *Amicus* Brief (*Munyakazi*), paras. 22, 23.
[92] Rwanda *Amicus* Brief, para. 10.
[93] *Munyakazi* Appeal Decision, para. 40.
[94] *See* HRW *Amicus* Brief, para. 38.
[95] *See* HRW *Amicus* Brief, para. 10, indicating that in interviews with two dozen Rwandans living abroad, no one was willing to travel to Rwanda to testify for the defence. *See also* the statement by the Rwandan Minister of Justice regarding immunity for witnesses granted pursuant to Article 14 of the Transfer Law, cited in the HRW *Amicus* Brief at para. 39, and quoted by the Trial Chamber in fn. 107 of the Rule 11*bis* Decision. The Appeals Chamber finds that this statement, which according to HRW, was widely circulated in the diaspora, may contribute to the unwillingness of witnesses residing outside of Rwanda to return to Rwanda to testify. *See also Munyakazi* Appeal Decision, para. 40.
[96] *Munyakazi* Appeal Decision, para. 41. *See* Rwanda *Amicus* Brief, para. 10, referring to Rwanda *Amicus* Brief (*Munyakazi*), para. 23. Rwanda is a party to the agreement of Mutual Legal Assistance in Criminal Matters of the East Africa Police Chiefs Organisation with many states in the region and elsewhere including Kenya, Uganda, Tanzania, Burundi, Djibouti, Eritrea, Seychelles and Sudan, and has a Mutual Legal Assistance Protocol with states under the Convention Establishing the Economic Community of the Great Lakes Countries (CEPGL). Rwanda has also negotiated an extradition Memorandum of Understanding with the United Kingdom, and it is cooperating with many justice systems including those of New Zealand, Finland, Denmark and Germany.

conclude conventions on mutual assistance in criminal matters that would make it difficult to secure the attendance of witnesses. Further, the Appeals Chamber reiterates that United Nations Security Council Resolution 1503, calling on all states to assist national jurisdictions where cases have been referred, provides a clear basis for requesting and obtaining cooperation.[97] The Trial Chamber took note of the Resolution, but concluded that it was not convinced that it would be in itself sufficient to ensure the availability of Defence witnesses.[98] Given the finding made above as to the likely difficulty that Kanyarukiga would face in bringing witnesses outside Rwanda to testify in view of the genuine fear they harbour, the Appeals Chamber agrees with the Trial Chamber.

33. The Appeals Chamber considers that Rwanda has established that video-link facilities are available, and that video-link testimony would likely be authorized in cases where witnesses residing outside Rwanda genuinely fear to testify in person. However, the Appeals Chamber is of the opinion that the Trial Chamber did not err in finding that the availability of video-link facilities is not a completely satisfactory solution with respect to the testimony of witnesses residing outside Rwanda, given that it is preferable to hear direct witness testimony,[99] and that it would be a violation of the principle of the equality of arms if the majority of Defence witnesses would testify by video-link while the majority of Prosecution witnesses would testify in person.[100]

34. The Appeals Chamber finds that while the Trial Chamber erred in holding that Rwanda had not taken any steps to conclude conventions on mutual assistance in criminal matters, the totality of circumstances indicate that the Trial Chamber was correct in concluding that Kanyarukiga would still face significant difficulties in securing the attendance of witnesses who reside outside Rwanda to the extent and in a manner which would jeopardize his right to a fair trial.

3. Conclusion

35. The Appeals Chamber therefore finds that, in light of the above, the Trial Chamber did not err in holding, based on the information before it, that if the case were to be transferred to Rwanda, Kanyarukiga might face difficulties in obtaining witnesses residing within Rwanda because they would be afraid to testify, and that he would not be able to call witnesses residing outside Rwanda,

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[97] *Munyakazi* Appeal Decision, para. 41. Security Council Resolution 1503 states at paragraph 1 that the Security Council "[*c*]*alls* on the international community to assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY and the ICTR [...]", S/RES/1503 (2003). *See Stanković* Appeal Decision, para. 26, where the Appeals Chamber approved of the Trial Chamber's consideration of Security Council Resolution 1503 and interpreted this paragraph of the resolution as implicitly including cooperation with respect to witnesses.
[98] Rule 11*bis* Decision, fn. 109.
[99] *See also Munyakazi* Appeal Decision, para. 42.
[100] Rule 11*bis* Decision, paras. 79, 80. *See also Munyakazi* Appeal Decision, para. 42.

to the extent and in a manner that would ensure a fair trial. The Appeals Chamber therefore dismisses this sub-ground of appeal.

C. Monitoring

36. The Prosecution and Rwanda submit that the Trial Chamber erred in failing to give sufficient weight to the monitoring of proceedings in Rwanda by the African Commission on Human and People's Rights ("African Commission") and the remedy of revocation, which they argue sufficiently protect Kanyarukiga's right to a fair trial.[101] Kanyarukiga does not address this submission.

37. The Trial Chamber considered the monitoring provisions under Rule 11*bis*(D)(iv) of the Rules, and took note of the fact that the Prosecution had approached the African Commission, which has undertaken to monitor the proceedings in referral cases, and found that it had no reason to doubt that the African Commission had the necessary qualifications to monitor trials.[102] It found that the suggested monitoring system was satisfactory and took it into account in its deliberations to dismiss several of the objections against transfer.[103] Nonetheless, it held that monitoring would not solve the problems relating to the availability and protection of witnesses.[104] Further, the Trial Chamber considered the remedy of revocation under Rule 11*bis*(F) of the Rules and noted that Article 20 of the Transfer Law obliges Rwanda to promptly surrender an accused to the ICTR if a referral order is revoked.[105]

38. The Appeals Chamber finds that the Trial Chamber considered and gave sufficient weight to the information concerning the proposed monitoring system and the remedy of revocation. It further agrees that, while the African Commission indeed has the necessary qualifications to monitor trials,[106] these procedures and remedies would not necessarily solve the current problems related to the availability and protection of witnesses. Furthermore, the Appeals Chamber notes that both the decision to send monitors and the right to request a Trial Chamber to consider revocation lie within the sole discretion of the Prosecution.[107] Therefore, the Accused would not be able himself to trigger the operation of these "remedies". The Appeals Chamber thus finds no error in the Trial Chamber's conclusion in this regard.

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[101] Notice of Appeal, paras. 20, 21; Appeal Brief, paras. 65-69; Rwanda *Amicus* Brief, para. 11.
[102] Rule 11*bis* Decision, para. 100.
[103] Rule 11*bis* Decision, para. 103.
[104] Rule 11*bis* Decision, para. 103.
[105] Rule 11*bis* Decision, para. 102.
[106] *Munyakazi* Appeal Decision, para. 30.
[107] Rule 11*bis* (D) (iv) and (F) of the Rules.

39. The Appeals Chamber therefore dismisses this sub-ground of appeal.

V. DISPOSITION

For the foregoing reasons, the Appeals Chamber,

DISMISSES the Appeal; and

UPHOLDS the Trial Chamber's decision to deny the referral of the case to Rwanda.

Done in English and French, the English text being authoritative.

Done this 30th day of October 2008,
at The Hague, The Netherlands.

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Judge Fausto Pocar
Presiding

[Seal of the International Tribunal]

ANNEX J

UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Theodor Meron, Presiding** **Judge Patrick Robinson** **Judge Mehmet Güney** **Judge Andrésia Vaz** **Judge Carmel Agius**
Registrar:	**Mr. Adama Dieng**
Decision of:	**16 December 2011**

JEAN UWINKINDI

v.

THE PROSECUTOR

Case No. ICTR-01-75-AR11bis

DECISION ON UWINKINDI'S APPEAL AGAINST THE REFERRAL OF HIS CASE TO RWANDA AND RELATED MOTIONS

Counsel for Jean Uwinkindi:

Mr. Claver Sindayigaya

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James J. Arguin
Mr. George Mugwanya
Ms. Inneke Onsea
Mr. Abdoulaye Seye
Mr. François Nsanzuwera

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seised of an appeal filed by Mr. Jean Uwinkindi[1] against the 28 June 2011 decision of the Referral Chamber designated under Rule 11*bis* ("Referral Chamber").[2]

I. BACKGROUND

2. According to the Indictment, Mr. Uwinkindi was a pastor of the Kayenzi Pentecostal Church located in Nyamata Sector, Kanzenze Commune, Kigali-Rural Prefecture, and the "President of a self-styled 'Security Committee'" at the church.[3] He is charged before the Tribunal with genocide and extermination as a crime against humanity, principally related to alleged attacks at his church, area roadblocks, Rwankeri Cellule, Kayenzi hill, the Cyugaro swamps, and the Kanzenze communal offices.[4]

3. On 28 June 2011, the Referral Chamber ordered that Mr. Uwinkindi's case be referred to the authorities of the Republic of Rwanda for trial before the High Court of Rwanda ("High Court").[5] On 13 July 2011, Mr. Uwinkindi filed his Notice of Appeal. On 14 July 2011, the Pre-Appeal Judge granted Mr. Uwinkindi an extension of time to file his appeal brief within 15 days of the filing of the Kinyarwanda translation of the Impugned Decision.[6] In addition, considering the length of the Impugned Decision and the complexity of the issues on appeal, the Pre-Appeal Judge authorized Mr. Uwinkindi and the Prosecution to exceed the word limits for the Appeal Brief and Response Brief, respectively, by 6,000 words.[7]

4. Mr. Uwinkindi filed his Appeal Brief on 8 September 2011. On 15 September 2011, the Pre-Appeal Judge granted the Prosecution a 10-day extension of time to respond.[8] The Prosecution filed

[1] Defence Notice of Appeal Against the Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, 13 July 2011 ("Notice of Appeal"); Defence Appeal Brief Against the Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, 8 September 2011 ("Appeal Brief").
[2] *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011 ("Impugned Decision").
[3] *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-I, Amended Indictment, 23 November 2010 ("Indictment"), para. 3.
[4] Indictment, p. 1, paras. 7-17.
[5] Impugned Decision, p. 57 (disposition).
[6] Decision on Request for Translation and Extension of Time, 14 July 2011, para. 6.
[7] Decision on Request for Extension of Word Limit, 5 September 2011, pp. 1, 2.
[8] Decision on the Prosecution's Request for an Extension of Time to File Its Response Brief, 15 September 2011, pp. 1, 2.

its Response Brief on 28 September 2011.[9] Mr. Uwinkindi filed his Reply Brief on 4 October 2011.[10]

II. PRELIMINARY MATTERS

A. Motion to Expunge

5. In the Impugned Decision, the Referral Chamber requested the Government of Rwanda to report to the President of the Tribunal, within 60 days of the decision, on "the progress of the study commissioned by the Rwandan Minister of Justice regarding Article 13 of the Rwandan Constitution and any consequential action, including amendment thereto, contemplated by Rwanda."[11] Article 13 relates to the criminalization in Rwanda of "revisionism, negationism and trivialization of genocide."[12] On 22 August 2011, the Prosecutor General of Rwanda filed his report with the President of the Tribunal.[13]

6. On 25 August 2011, Mr. Uwinkindi filed a motion seeking to expunge portions of the Report that, in his view, exceeded the scope of the Referral Chamber's request for information related to Article 13 of the Rwandan Constitution.[14] In particular, Mr. Uwinkindi objects to portions of the Report relating, *inter alia*, to: proposed legislation regarding foreign judges participating in domestic trials; the African Union's endorsement of Rwanda as an appropriate venue for the prosecution of the former President of Chad, Hissène Habré; and the extradition of a Rwandan national from Norway for trial in Rwanda.[15] Mr. Uwinkindi requests leave to respond to information in the Report relating to actions taken with respect to Article 13 of the Rwandan Constitution.[16] The Prosecution opposes the Motion to Expunge.[17]

7. The Appeals Chamber recalls that an appeal from a decision rendered under Rule 11*bis* of the Rules of Procedure and Evidence of the Tribunal ("Rules") "shall be heard expeditiously on the

[9] Prosecutor's Response Brief, 28 September 2011 ("Response Brief").
[10] Defence Reply to the Prosecutor's Response Brief to the Defence Appeal Brief Against the Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, 4 October 2011 ("Reply Brief").
[11] Impugned Decision, p. 59 (disposition).
[12] Impugned Decision, para. 95, *citing* Article 13 of the Rwandan Constitution.
[13] *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-R11*bis*, Letter dated 19 August 2011 from Mr. Martin Ngoga, Prosecutor General of the Republic of Rwanda, to Hon. Khalida Rachid Khan, President of the Tribunal, 22 August 2011 ("Report").
[14] Defence Extremely Urgent Motion to Expunge from the Record Submissions by the Government of Rwanda Made Beyond the Scope of the Referral Chamber's Request, 25 August 2011 ("Motion to Expunge").
[15] Motion to Expunge, paras. 8-11, 15.
[16] Motion to Expunge, paras. 13-15.
[17] Prosecutor's Opposition to Defence Extremely Urgent Motion to Expunge from the Record Submissions by the Government of Rwanda Allegedly Made Beyond the Scope of the Referral Chamber's Request, 26 August 2011, paras. 5-12. Mr. Uwinkindi did not file a reply.

basis of the *original record* of the Trial Chamber."[18] The Appeals Chamber notes that the Report was filed after the issuance of the Impugned Decision. Thus, it was neither part of the Referral Chamber's original record, nor was it considered by the Referral Chamber in reaching the Impugned Decision. In addition, neither party has sought to admit the Report as additional evidence pursuant to Rule 115 of the Rules. The Appeals Chamber, therefore, will not consider it in determining the appeal.[19] As a result, there is no need to expunge any part of the Report from the case file or to allow Mr. Uwinkindi to respond to it.[20]

8. For the foregoing reasons, Mr. Uwinkindi's Motion to Expunge is denied.

B. Motion for Hearing

9. On 16 September 2011, Mr. Uwinkindi requested the Appeals Chamber to allow oral submissions in this appeal.[21] He notes that the parties jointly agreed that an oral hearing would have been beneficial in the first instance, but that "[t]he issue was simply ignored" by the Referral Chamber.[22] According to Mr. Uwinkindi, oral argument is warranted given the extensive record, the complexity of the appeal, and the historic nature of the referral.[23] The Prosecution does not oppose the request to the extent that the Appeals Chamber may deem oral submissions useful for the consideration of this appeal.[24]

10. Rule 117(A) of the Rules provides that an appeal of a decision taken under Rule 11*bis* of the Rules "may be determined entirely on the basis of written briefs."[25] The Appeals Chamber recalls that the word limits for the parties' briefs have been extended to account for the complexity of the appeal.[26] The Appeals Chamber is satisfied that the written briefs and the original record before the Referral Chamber form an adequate basis for the consideration of this appeal.

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[18] Rule 117(A) of the Rules (emphasis added).
[19] *See Prosecutor v. Radovan Stankovi}*, Case No. IT-96-23/2-AR11*bis*.1, Decision on Rule 11*bis* Referral, 1 September 2005 ("*Stankovi}* Appeal Decision"), para. 37; *Prosecutor v. Gojko Jankovi}*, Case No. IT-96-23/2-AR11*bis*.2, Decision on Rule 11*bis* Referral, 15 November 2005 ("*Jankovi}* Appeal Decision"), para. 73; *Prosecutor v. Paško Ljubičić}*, Case No. IT-00-41-AR11*bis*.1, Decision on Appeal Against Decision on Referral Under Rule 11*bis*, 4 July 2006, para. 26. *See also Karemera et al. v. The Prosecutor*, Case No. ICTR 98-44-AR73.16, Decision on Appeal Concerning the Severance of Matthieu Ngirumpatse, 19 June 2009, para. 23.
[20] *Cf. Jean-Baptiste Gatete v. The Prosecutor*, Case No. ICTR-00-61-A, Decision on Motion to Expunge Documents from the Appeal Case File, 19 August 2011, paras. 5, 6.
[21] Defence Request for an Oral Hearing, 16 September 2011 ("Motion for Hearing"), para. 11.
[22] Motion for Hearing, para. 7.
[23] Motion for Hearing, paras. 8-10.
[24] Prosecutor's Response to the "Defence Request for an Oral Hearing", 23 September 2011, para. 4. Mr. Uwinkindi did not file a reply.
[25] *See also* Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 8 December 2006 ("Practice Direction on the Filing of Written Submissions"), paras. 4-7.
[26] *See supra* para. 3; *infra* para. 16.

11. For the foregoing reasons, Mr. Uwinkindi's Motion for Hearing is denied.

C. Request to Exceed Word Limit of Reply Brief and Prosecution's Motion to Strike

12. In his Reply Brief, Mr. Uwinkindi sought leave to exceed the word limit of his Reply Brief to the present length of 5,420 words.[27] In support of his request, Mr. Uwinkindi referred to the length of the Impugned Decision, the complexity of the appeal, and the Pre-Appeal Judge's prior extension of the word limits for the parties' Appeal and Response Briefs.[28] In the alternative, he requested leave to withdraw his Reply Brief and re-file it in compliance with the 3,000 word limit.[29]

13. The Prosecution requested the Appeals Chamber to strike the Reply Brief because it was filed out of time without a showing of good cause, and because Mr. Uwinkindi failed to request an extension of the word limit prior to filing his brief.[30] The Prosecution submits that "Mr. Uwinkindi's lax approach towards the governing Practice Directions should not be tolerated."[31]

14. In response, Mr. Uwinkindi requests that the Motion to Strike be denied in its entirety.[32] He acknowledges that his Reply Brief was filed out of time, but notes that it was late by only two hours and nine minutes, and that this delay did not impact the overall consideration of this appeal.[33] Mr. Uwinkindi recalls the complexity of the issues on appeal, the prior extension of word limits by the Pre-Appeal Judge, and the limited period of time in which he had to file his Reply Brief.[34] Mr. Uwinkindi submits that he intended to file his Reply Brief on time and that "Ŧiğt was only at the very last minute the Defence team realised it would need an extremely limited amount of extra time to complete the task before it."[35] He further notes that on the day of the filing, communication between members of his Defence team was difficult, in part because team members were located in various cities.[36] Mr. Uwinkindi asserts that the Prosecution's proposed remedy for the minimal delay is "disproportionate and draconian."[37] With respect to the extension of word limits, Mr. Uwinkindi submits that, given the short deadline for filing a reply, it was impractical to request the

[27] Reply Brief, paras. 1-5. The Appeals Chamber observes that in his request, Mr. Uwinkindi refers to his Reply Brief as comprising 5,420 words, while the final word count at the end of the Reply Brief indicates that it contains only 5,365 words. *See* Reply Brief, p. 17.
[28] Reply Brief, paras. 3-5.
[29] Reply Brief, para. 6.
[30] Prosecutor's Motion to Strike Reply Brief, 4 October 2011 ("Motion to Strike"), paras. 1-7. *See also* Prosecutor's Reply to Defence Response to the Prosecutor's Motion to Strike Reply Brief, 7 October 2011 ("Reply: Motion to Strike"), paras. 1-9.
[31] Motion to Strike, para. 6. *See also* Reply: Motion to Strike, paras. 7, 8.
[32] Response to the Prosecutor's Motion to Strike Reply Brief, 6 October 2011 ("Response: Motion to Strike"), para. 18.
[33] Response: Motion to Strike, paras. 6, 12-13.
[34] Response: Motion to Strike, paras. 9, 11.
[35] Response: Motion to Strike, para. 11.
[36] Response: Motion to Strike, para. 11.
[37] Response: Motion to Strike, para. 8.

extension in advance.[38] He contends that he made the request in the most practicable manner by placing it in the body of the Reply Brief.[39]

15. In accordance with paragraph 7 of the Practice Direction on the Filing of Written Submissions, a party has four days from the filing of the response brief in which to file a reply. In addition, a reply is limited to 3,000 words.[40] Mr. Uwinkindi concedes that his Reply Brief was filed out of time and exceeds the word limit, and that it therefore does not comply with the relevant Practice Directions. The Appeals Chamber may, nonetheless, "recognize as validly done any act done after the expiration of a time-limit so prescribed."[41] In addition, it may allow a party to exceed the word limit where a party seeks advance authorization and demonstrates exceptional circumstances for the oversized filing.[42]

16. The Appeals Chamber recalls that the Pre-Appeal Judge has previously recognized the complexity of this appeal and has, as a result, allowed the parties extensions of time and word limits with respect to their Appeal and Response Briefs.[43] In these circumstances, the Appeals Chamber is satisfied that good cause exists for Mr. Uwinkindi's brief delay in filing his Reply Brief, which had no impact on the consideration of this appeal. Furthermore, although Mr. Uwinkindi should have sought approval in advance for his oversized filing, the Appeals Chamber is satisfied that the filing should be allowed in view of the previous extension of word limits, the absence of oral argument, and the complexity of the issues raised on appeal.

17. For the foregoing reasons, the Appeals Chamber grants Mr. Uwinkindi's requests to recognize his Reply Brief as validly filed and to accept the oversized filing. The Prosecution's Motion to Strike is denied.

D. Motion to File an *Amicus Curiae* Brief

18. On 29 November 2011, the International Criminal Defence Attorneys Association ("ICDAA") filed a request to file an *amicus curiae* brief in connection with Mr. Uwinkindi's present appeal.[44] The ICDAA requests leave to appear as *amicus curiae* based on its "recognized

[38] Response: Motion to Strike, paras. 16, 17.
[39] Response: Motion to Strike, paras. 16, 17.
[40] *See* Practice Direction on the Filing of Written Submissions, para. 8; Practice Direction on the Length of Briefs and Motions on Appeal, 8 December 2006 ("Practice Direction on the Length of Briefs"), para. C(2)(c).
[41] Practice Direction on the Filing of Written Submissions, para. 19.
[42] Practice Direction on the Length of Briefs, para. C(5).
[43] *See supra* paras. 3, 4.
[44] Request for Permission to File an *Amicus Curiae* Brief by the International Criminal Defence Attorneys Association (ICDAA), Concerning Defence Appeal of the Referral Chamber's Referral of the Case of Jean-Bosco [*sic*] Uwinkindi to Rwanda Pursuant to Rule 11*bis* of the Rules, 29 November 2011 ("Motion to File an *Amicus Curiae* Brief").

expertise on fair trial requirements for persons charged with international crimes."[45] Specifically, the ICDAA seeks to: make submissions on the Prosecutor General's Report; present "new material" that became available after it made its submissions before the Referral Chamber; and elaborate on its earlier submissions.[46]

19. Pursuant to Rule 74 of the Rules, the Appeals Chamber "may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to appear before it and make submissions on any issue specified by the Chamber." The Appeals Chamber is not convinced that granting leave to the ICDAA to present submissions before the Appeals Chamber in this case would assist in the consideration of the appeal. As explained above, the Appeals Chamber will not consider the Prosecutor General's Report.[47] Moreover, the ICDAA's proposed discussion of "new material" is vague and unconvincing as to its relevance to the proper determination of this appeal, and the ICDAA's original submissions before the Referral Chamber are already part of the record.

20. For the foregoing reasons, the Motion to File an *Amicus Curiae* Brief is denied.

III. APPEAL

21. Mr. Uwinkindi advances 14 grounds of appeal against the Impugned Decision.[48] In this decision, the Appeals Chamber considers Mr. Uwinkindi's submissions that the Referral Chamber erred in its assessment of: (i) the burden and standard of proof (Ground 1);[49] (ii) the cumulative impact of the various breaches of his right to a fair trial (Ground 2);[50] (iii) the conditions of detention (Ground 3);[51] (iv) the principle of *non bis in idem* (Ground 4);[52] (v) the application of

[45] Motion to File an *Amicus Curiae* Brief, para. 21. The ICDAA submits that it is an international non-governmental organization with recognized expertise in the field of international criminal justice and the rule of law. *See* Motion to File an *Amicus Curiae* Brief, paras. 3-11. The ICDAA further notes that it has been granted *amicus curiae* status in several cases before the Tribunal, and that it was granted *amicus curiae* status before the Referral Chamber in this case. *See* Motion to File an *Amicus Curiae* Brief, paras. 12-17.
[46] Motion to File an *Amicus Curiae* Brief, paras. 17, 18, 28, 35. The Prosecution filed a response to the Motion to File an *Amicus Curiae* Brief on 12 December 2011. *See* Prosecutor's Response to "Request for Permission to File an *Amicus Curiae* Brief by the International Criminal Defence Attorneys Association (ICDAA) Concerning Defence Appeal of the Referral Chamber's Referral of the Case of Jean-Bosco Uwinkindi to Rwanda Pursuant to Rule 11*bis* of the Rules", 12 December 2011 ("Prosecutor's Response to Motion to File an *Amicus Curiae* Brief"). In view of the urgency of Mr. Uwinkindi's appeal, the Appeals Chamber has not considered this response and thus there is no need to await a reply. In so doing, the Appeals Chamber is satisfied that no prejudice has been suffered by either the Prosecution or the ICDAA.
[47] *See supra* para. 7.
[48] In his Notice of Appeal, Mr. Uwinkindi advances 16 grounds of appeal. *See* Notice of Appeal, paras. 4-64. However, in his Appeal Brief, Mr. Uwinkindi states that he is no longer pursuing his Fifth and Seventh Grounds of Appeal. *See* Appeal Brief, paras. 23, 28. *See also* Notice of Appeal, paras. 14-17, 22.
[49] Notice of Appeal, paras. 4-6; Appeal Brief, paras. 1-5.
[50] Notice of Appeal, para. 7; Appeal Brief, para. 6.
[51] Notice of Appeal, para. 8; Appeal Brief, paras. 7-9.
[52] Notice of Appeal, paras. 9-13; Appeal Brief, paras. 10-22.

Article 59 of the Rwandan Code of Criminal Procedure ("RCCP") (Ground 6);[53] (vi) the availability and protection of witnesses (Grounds 8-10);[54] (vii) the right to an effective defence (Ground 11);[55] (viii) the independence and impartiality of the judiciary (Grounds 12-14);[56] and (ix) the mechanisms for monitoring and revocation (Grounds 15 and 16).[57]

A. Applicable Law

22. Rule 11*bis* of the Rules allows a designated trial chamber to refer a case to a competent national jurisdiction for trial if it is satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. In assessing whether a State is competent within the meaning of Rule 11*bis* of the Rules to accept a case from the Tribunal, a designated trial chamber must consider whether the State in question has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure.[58] The penalty structure within the State must provide an appropriate punishment for the offences for which the accused is charged, and conditions of detention must accord with internationally recognized standards.[59] The trial chamber must also consider whether the accused will receive a fair trial, including whether the accused will be accorded the rights set out in Article 20 of the Tribunal's Statute ("Statute").[60]

23. The trial chamber has the discretion to decide whether to refer a case to a national jurisdiction, and the Appeals Chamber will only intervene if the trial chamber's decision was based on a discernible error.[61] To demonstrate such error, an appellant must show that the trial chamber: misdirected itself either as to the legal principle to be applied or as to the law which is relevant to the exercise of its discretion; gave weight to irrelevant considerations; failed to give sufficient weight to relevant considerations; made an error as to the facts upon which it has exercised its discretion; or reached a decision that was so unreasonable and plainly unjust that the Appeals

[53] Notice of Appeal, paras. 18-21; Appeal Brief, paras. 24-27.
[54] Mr. Uwinkindi advances two separate grounds related to the availability of defence witnesses and one ground in connection with the witness protection program. *See* Notice of Appeal, paras. 23-46; Appeal Brief, paras. 29-63.
[55] Notice of Appeal, para. 47; Appeal Brief, paras. 64-68.
[56] Mr. Uwinkindi advances three separate but related grounds concerning his line of defence, the independence and impartiality of the Rwandan judiciary, and the deteriorating "political climate" in Rwanda. *See* Notice of Appeal, paras. 48-55; Appeal Brief, paras. 69-80.
[57] In his Appeal Brief, Mr. Uwinkindi presents his Fifteenth and Sixteenth Grounds of Appeal together. *See* Appeal Brief, paras. 81-114. *See also* Notice of Appeal, paras. 56-64.
[58] *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis*, 4 December 2008 ("*Hategekimana* Appeal Decision"), para. 4; *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-02-78-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis*, 30 October 2008 ("*Kanyarukiga* Appeal Decision"), para. 4. *See also The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis*, 9 October 2008 ("*Munyakazi* Appeal Decision"), para. 4.
[59] *Hategekimana* Appeal Decision, para. 4; *Kanyarukiga* Appeal Decision, para. 4; *Munyakazi* Appeal Decision, para. 4.
[60] *Hategekimana* Appeal Decision, para. 4; *Kanyarukiga* Appeal Decision, para. 4; *Munyakazi* Appeal Decision, para. 4.
[61] *Hategekimana* Appeal Decision, para. 5; *Kanyarukiga* Appeal Decision, para. 5; *Munyakazi* Appeal Decision, para. 5.

Chamber is able to infer that the trial chamber must have failed to exercise its discretion properly.[62]

B. Burden and Standard of Proof (Ground 1)

24. Mr. Uwinkindi challenges the Referral Chamber's application of the burden and standard of proof in determining whether he will receive a fair trial upon the transfer of his case to Rwanda.[63] In particular, he argues that the Referral Chamber failed to address which party bears the burden of proof.[64] In Mr. Uwinkindi's opinion, "principle and common sense" dictate that the burden rests squarely on the Prosecution.[65] Mr. Uwinkindi submits that, by failing to expressly note that the Prosecution bears the burden of proof, there exists a risk that the Referral Chamber placed an inappropriate burden on the Defence "to adduce evidence that [he] will *not* receive a fair trial in Rwanda."[66]

25. Furthermore, Mr. Uwinkindi contends that the language of Rule 11*bis*(C) of the Rules sets a high standard of proof for referral, namely that a chamber must be satisfied that an accused *will* receive a fair trial.[67] According to Mr. Uwinkindi, this means that the Prosecution must "exclude any real possibility that any of [his] fair trial rights might be breached."[68] Mr. Uwinkindi argues that the Referral Chamber applied a lower threshold and, in support of his assertion, highlights several passages in the Impugned Decision where the language suggests that the Referral Chamber determined it need only be satisfied that Mr. Uwinkindi would likely receive a fair trial.[69]

26. In sum, Mr. Uwinkindi asserts that the Impugned Decision should be reversed because the Referral Chamber failed to satisfy itself that the "Prosecut[ion] had adduced sufficient evidence to exclude any possibility that is more than merely fanciful of a breach of any of [his] fair trial rights."[70]

27. The Prosecution responds that the Referral Chamber correctly applied the standard of proof in determining that the accused *will* receive a fair trial and correctly placed the burden of proof on

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[62] *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-AR11*bis*, Decision on Rule 11*bis* Appeal, 30 August 2006, para. 9. *See also Hategekimana* Appeal Decision, para. 5; *Kanyarukiga* Appeal Decision, para. 5; *Munyakazi* Appeal Decision, para. 5.
[63] Appeal Brief, paras. 1-5. *See also* Reply Brief, paras. 8-14.
[64] Appeal Brief, para. 1.
[65] Appeal Brief, para. 1.
[66] Appeal Brief, para. 1.
[67] Appeal Brief, para. 2.
[68] Appeal Brief, para. 3. *See also* Appeal Brief, paras. 2, 5; Reply Brief, para. 9.
[69] Appeal Brief, para. 4, *citing* Impugned Decision, paras. 99, 102, 103, 132, 196, 223-225.
[70] Appeal Brief, para. 5. *See also* Appeal Brief, para. 115.

the Prosecution.[71] It further contends that the Referral Chamber did not require Mr. Uwinkindi to demonstrate that he would *not* receive a fair trial in Rwanda.[72]

28. The Appeals Chamber is not convinced that the Referral Chamber erred in failing to address the issue of which party bears the burden of proof, or that it placed an inappropriate burden on the Defence in this respect. In its submissions, the Prosecution acknowledged that it bore the burden of proof to demonstrate that Mr. Uwinkindi's trial in Rwanda will be fair.[73] The Appeals Chamber considers that, in cases where the Prosecution requests referral, it bears the burden of proof to demonstrate that the conditions set out in Rule 11*bis* of the Rules are met. However, the Appeals Chamber recalls that a designated trial chamber may also rely on any information and orders it reasonably finds necessary in determining whether the proceedings following the transfer will be fair.[74] A review of the Impugned Decision as a whole reflects that the Referral Chamber correctly regarded the burden of proof as falling on the Prosecution and also acted within its discretion in relying on other information or its own orders to satisfy itself that Mr. Uwinkindi's trial in Rwanda will be fair.

29. With regard to Mr. Uwinkindi's claim that the Referral Chamber failed to apply the correct standard of proof, the Appeals Chamber considers that the language identified by Mr. Uwinkindi as equivocal must be viewed in the context of the entire decision.[75] In this respect, the Appeals Chamber notes that the Referral Chamber demonstrated awareness of the applicable standard[76] and clearly concluded that "the case of the Accused, if referred, will be prosecuted consistent with internationally recognised fair trial standards enshrined in the Statute of this Tribunal and other human rights instruments."[77] In reaching this conclusion, the Referral Chamber also considered that the monitoring mechanism is a means of ensuring that the fair trial rights of Mr. Uwinkindi will be respected.[78] Accordingly, the Appeals Chamber can identify no error in the Referral Chamber's application of the relevant standard of proof for referral.

30. Consequently, the Appeals Chamber dismisses Mr. Uwinkindi's First Ground of Appeal.

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[71] Response Brief, paras. 8-17.
[72] Response Brief, para. 10.
[73] Response Brief, para. 10.
[74] *Stankovi}* Appeal Decision, para. 50. *See also* Impugned Decision, para. 16.
[75] *See Stankovi}* Appeal Decision, para. 28.
[76] Impugned Decision, para. 15.
[77] Impugned Decision, para. 223.
[78] Impugned Decision, para. 223.

C. Cumulative Impact of Fair Trial Rights Concerns (Ground 2)

31. Mr. Uwinkindi submits that the Referral Chamber identified numerous difficulties in relation to holding his trial in Rwanda, and determined that each, individually, would not result in an unfair trial.[79] Mr. Uwinkindi contends, however, that the Referral Chamber erred in failing to consider whether the cumulative effect of these various concerns would impact the fairness of his trial.[80] The Prosecution responds that because Mr. Uwinkindi has failed to identify any individual error, there can be no cumulative error.[81]

32. Although the Referral Chamber examined the question of whether Mr. Uwinkindi will receive a fair trial by considering issues individually, the Appeals Chamber considers that the Referral Chamber also reached its conclusions in the Impugned Decision based upon the totality of the evidence and arguments before it.[82] The Appeals Chamber recalls that a trial chamber has the obligation to provide a reasoned opinion, but is not required to articulate its reasoning in detail.[83] Although the Referral Chamber did not expressly discuss the cumulative impact of its various concerns, it is reasonable to assume in the circumstances of this case that the Referral Chamber took this into account. Moreover, beyond asserting that the Referral Chamber did not assess their cumulative impact, Mr. Uwinkindi's submissions fail to demonstrate how these concerns, taken together, could render his trial unfair.

33. Consequently, the Appeals Chamber dismisses Mr. Uwinkindi's Second Ground of Appeal.

D. Conditions of Detention (Ground 3)

34. Mr. Uwinkindi submits that the Referral Chamber erred in assessing the conditions of his possible detention in Rwanda.[84] Specifically, Mr. Uwinkindi argues that the Referral Chamber failed to properly consider his submissions relating to the conditions of detention.[85] He further argues that the Referral Chamber wrongly relied on the existence of a custom-built facility at the Kigali Central Prison, despite undisputed evidence that this facility will close in the coming

[79] Appeal Brief, para. 6, *citing* Impugned Decision, paras. 31, 32, 39, 86-88, 90, 95, 100, 110, 111, 131, 159, 160.
[80] Appeal Brief, para. 6.
[81] Response Brief, para. 151.
[82] *See* Impugned Decision, para. 222 ("Upon assessment of the submissions of the parties and the *amici curiae*, the Chamber has concluded that the case of this Accused should be referred to the authorities of the Republic of Rwanda for his prosecution before the competent national court for charges brought against him by the Prosecutor in the Indictment.").
[83] *See, e.g.*, *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement, 27 November 2007, para. 152.
[84] Appeal Brief, paras. 7-9.
[85] Appeal Brief, para. 8.

months.[86] Moreover, Mr. Uwinkindi submits that Rule 11*bis* of the Rules does not provide for the Tribunal's monitoring of detention conditions.[87] Even if monitoring were permitted, he submits that the Referral Chamber erred in finding that it could rely on monitoring to satisfy itself of the adequacy of the detention conditions, without specifying how monitoring reports could lead to an effective remedy for any reported abuse.[88] Mr. Uwinkindi further claims that after the end of the Tribunal's mandate, monitoring safeguards will no longer exist.[89]

35. The Prosecution responds that the Referral Chamber reasonably determined that Mr. Uwinkindi will be detained in appropriate conditions if his case is referred to Rwanda.[90]

36. The Appeals Chamber finds no evidence to suggest that the Referral Chamber failed to take proper account of Mr. Uwinkindi's submissions concerning the conditions of detention in Rwanda. The Referral Chamber expressly noted his submission that "if convicted in Rwanda, the Accused would, in practice, be detained under conditions that fall far below internationally recognised minimum standards" and he could be subjected to "existing inhuman living conditions."[91] Mr. Uwinkindi's mere references to his submissions before the Referral Chamber,[92] without further elaboration, are insufficient to substantiate his argument on appeal,[93] and do not demonstrate that the Referral Chamber committed a discernible error.

37. The Appeals Chamber recalls that, in assessing the conditions of detention, a designated trial chamber should ascertain whether the laws governing detention incorporate relevant international standards regarding the treatment of prisoners.[94] In this respect, the Appeals Chamber notes that, in assessing the conditions of detention in Rwanda, the Referral Chamber discussed the guarantee in the Transfer Law[95] that any person transferred would be detained in accordance with the minimum standards of detention adopted by United Nations General Assembly Resolution 43/173, and that

[86] Appeal Brief, para. 8.
[87] Appeal Brief, para. 9.
[88] Appeal Brief, para. 8.
[89] Appeal Brief, para. 9.
[90] Response Brief, paras. 34-45.
[91] Impugned Decision, para. 54 (internal quotations omitted).
[92] *See* Appeal Brief, para. 8.
[93] *See Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-07-91-A, Judgement, 15 March 2010 ("*Nshogoza* Appeal Judgement"), para. 18; *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4-A, Judgement, 23 July 2009 ("*Haraqija and Morina* Appeal Judgement"), para. 26.
[94] *See Jankovi}* Appeal Decision, paras. 74, 75.
[95] The Appeals Chamber observes that there are two laws relevant to the transfer of cases from the Tribunal to Rwanda. The first law was adopted in March 2007. *See* Organic Law No 11/2007 of 16/03/2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States ("2007 Transfer Law"). Certain provisions of the 2007 Transfer Law were modified in May 2009. *See* Organic Law No 03/2009/OL. of 26/05/2009 Modifying and Complementing the Organic Law No 11/2007 of 16/03/2007 Concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and Other States ("2009 Amendment"). The Appeals Chamber will refer to these provisions collectively as the "Transfer Law".

the detention would be subject to monitoring by a representative of the Tribunal or the International Committee of the Red Cross.[96] Mr. Uwinkindi has not demonstrated that the Referral Chamber's consideration of this legal framework was a discernible error.

38. With respect to the monitoring of the detention conditions, the Appeals Chamber finds Mr. Uwinkindi's assertions unpersuasive. The Appeals Chamber recalls that the conditions of detention are a relevant consideration in assessing the fairness of domestic criminal proceedings.[97] Thus, it was within the inherent authority of the Referral Chamber to extend the monitoring to this aspect of the referral of his case.[98] Mr. Uwinkindi's challenge to the effectiveness of this monitoring by referring to the finite mandate of the Tribunal fails to account for the role that the International Residual Mechanism for Criminal Tribunals ("Residual Mechanism") will play in ensuring oversight of referred cases.[99] Moreover, the Appeals Chamber is not satisfied that the Referral Chamber erred in not identifying the measures that would be taken if it received a report of mistreatment, as such measures could only be determined in a specific context.

39. The Appeals Chamber considers Mr. Uwinkindi's assertions with regard to the Referral Chamber's reliance on the existence of the Kigali Central Prison to be equally unpersuasive. The Referral Chamber heard submissions from the Prosecution that "Rwanda's detention facilities located at Kigali and Mpanga meet international standards"[100] and expressly noted that the Mpanga prison facilities were currently housing convicted persons from the Special Court for Sierra Leone.[101] Therefore, even if the Kigali facility were to close, the Referral Chamber had a reasonable basis to conclude that another acceptable facility in accordance with international standards would be made available. Accordingly, Mr. Uwinkindi has not demonstrated that the Referral Chamber erred in examining the conditions of detention.

40. Consequently, Mr. Uwinkindi's Third Ground of Appeal is dismissed.

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[96] Impugned Decision, para. 58. *See also* 2007 Transfer Law, art. 23.
[97] *Stankovi}* Appeal Decision, para. 34.
[98] *See Stankovi}* Appeal Decision, para. 50 ("The question, then, is how much authority the Referral Bench has in satisfying itself that the accused will receive a fair trial. In the view of the Appeals Chamber, the answer is straightforward: whatever information the Referral Bench reasonably feels it needs, and whatever orders it reasonably finds necessary, are within the Referral Bench's authority so long as they assist the Bench in determining whether the proceedings following the transfer will be fair.").
[99] *See* Impugned Decision, p. 59 (disposition) ("NOTES that upon the conclusion of the mandate of the Tribunal, all obligations of the parties, the monitors and Rwanda will be subject to the directions of the International Residual Mechanism for Criminal Tribunals.").
[100] Impugned Decision, para. 52 (internal citation omitted).
[101] Impugned Decision, n. 63.

E. *Non Bis In Idem* (Ground 4)

41. Mr. Uwinkindi submits that the Referral Chamber erred in concluding that the principle of *non bis in idem* would not be violated if his case were referred to Rwanda for trial.[102] Specifically, Mr. Uwinkindi notes that he has already been convicted *in absentia* by two *Gacaca* courts, and asserts that the Referral Chamber failed to address his argument that even though the *Gacaca* convictions *appeared* to have been vacated, they in fact had not been lawfully vacated.[103] In this respect, Mr. Uwinkindi asserts that in order for the Referral Chamber to find that there are no *non bis in idem* concerns, it must be satisfied, based on the Prosecution's submissions and after addressing his arguments, that the *Gacaca* convictions have been lawfully overturned.[104] In addition, Mr. Uwinkindi contends that the Referral Chamber failed to consider the domestic prosecution of Mr. Léonidas Nshogoza for corruption and genocide denial in the context of its analysis of Rwanda's respect for the *non bis in idem* principle.[105] In particular, Mr. Uwinkindi notes that the Referral Chamber appeared to recognize this case as an example of the violation of this principle, but addressed it only in the context of the impartiality of the judiciary.[106]

42. The Prosecution responds that the Referral Chamber reasonably concluded that the principle of *non bis in idem* would not be violated in the event of Mr. Uwinkindi's transfer because his convictions by the *Gacaca* courts had been lawfully vacated.[107]

43. The Appeals Chamber observes that in the Impugned Decision, the Referral Chamber noted that it "has observed closely the chain of events relating to the vacation of the Gacaca convictions against ŦMr. Uwinkindiğ"[108] and concluded that those convictions had been vacated.[109] The Appeals Chamber is satisfied that it was within the discretion of the Referral Chamber to accept that the convictions had been vacated by the relevant *Gacaca* appellate courts. In reaching this conclusion, the Appeals Chamber considers that Mr. Uwinkindi has not demonstrated that the Referral Chamber failed to consider whether these convictions were lawfully vacated. Mr. Uwinkindi's references to submissions made before the Referral Chamber, without further elaboration,[110] are insufficient to demonstrate error on appeal.[111]

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[102] Appeal Brief, paras. 10-22. *See also* Reply Brief, paras. 15-21.
[103] Appeal Brief, paras. 11-15.
[104] Appeal Brief, para. 13.
[105] Appeal Brief, paras. 16-19.
[106] Appeal Brief, paras. 17-19, 21.
[107] Response Brief, paras. 18-29.
[108] Impugned Decision, para. 31. *See also* Impugned Decision, n. 43.
[109] Impugned Decision, para. 35.
[110] Appeal Brief, para. 13.

44. The Appeals Chamber also considers unpersuasive Mr. Uwinkindi's assertions with regard to the domestic prosecution of Mr. Nshogoza. The Appeals Chamber notes that the Referral Chamber discussed the case of Mr. Nshogoza generally in its analysis of the *non bis in idem* principle but did not appear to make any specific conclusions about whether it was an example of the violation of the principle in Rwanda.[112] The Appeals Chamber notes that the Referral Chamber based its conclusion that the *non bis in idem* principle would not be violated on the vacation of the *Gacaca* court convictions and the existence of the monitoring mechanism.[113] On appeal, Mr. Uwinkindi has not shown how the prosecution of Mr. Nshogoza in Rwanda violates the principle of *non bis in idem*.

45. Consequently, the Appeals Chamber dismisses Mr. Uwinkindi's Fourth Ground of Appeal.

F. Article 59 of the Rwandan Code of Criminal Procedure (Ground 6)

46. Article 59 of the RCCP provides that "[p]ersons against whom the Prosecution has evidence to suspect that they were involved in the commission of an offence cannot be heard as witnesses."[114] The Referral Chamber identified six reasons why this provision was problematic:

> First, it is not clear that this provision would permit the Accused to testify in his own Defence. Second, as this provision allows the exclusion of a witness'[s] evidence on the suspicion of the prosecutor rather than a legal ground, it violates the principle of the presumption of innocence. Third, the law provides no indication that the judge may override the prosecutor's indications that a witness may have participated in an offence. Fourth, the law does not specify the type of "offence" that might warrant exclusion of a witness. Fifth, because this provision could be applied in an arbitrary manner by the prosecutor, it could have a chilling impact on the willingness of defence witnesses to testify. Finally, this article may be detrimental not only to the interests of the defence but to those of the prosecution, as many of the cases before this Tribunal rely to varying extents on the testimony of accomplice witnesses.[115]

47. Despite these concerns, the Referral Chamber observed that Article 13(10) of the Transfer Law[116] guaranteed the right of an accused "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him or her, and that Article 25 of the Transfer Law states that in the event of an inconsistency between the Transfer Law and any other

[111] *See Nshogoza* Appeal Judgement, para. 18; *Haraqija and Morina* Appeal Judgement, para. 26.
[112] Impugned Decision, paras. 34, 35.
[113] *See* Impugned Decision, para. 35.
[114] Impugned Decision, para. 36 (internal citation omitted). *See also* Law No 13/2004 of 17/5/2004 Relating to the Code of Criminal Procedure, O.G. Special No of 30/07/2004, art. 59.
[115] Impugned Decision, para. 39.
[116] The Referral Chamber refers to Article 13(9) of the Transfer Law. *See* Impugned Decision, para. 40. The Appeals Chamber notes that this is a reference to the original text of the 2007 Transfer Law; however, Article 13 of the 2007 Transfer Law was amended by Article 2 of the 2009 Amendment. In light of this amendment, the relevant fair trial right guarantee mentioned by the Referral Chamber was changed to Article 13(10).

law, the provisions of the Transfer Law will prevail."[117] Accordingly, the Referral Chamber was "confident" that Article 59 of the RCCP would not be applied in any referred case.[118]

48. Mr. Uwinkindi submits that the Referral Chamber erred in finding that the combined operation of Articles 13(10) and 25 of the Transfer Law provides reasonable assurance that Article 59 of the RCCP would not be applied in his transfer case. He contends that the provisions of the Transfer Law are insufficient to overcome the impact of Article 59 of the RCCP on his right to a fair trial because, *inter alia*, the two instruments are not inconsistent.[119]

49. The Prosecution responds that the Referral Chamber reasonably determined that Article 59 of the RCCP would not be applied in a referred case because the primacy of the Transfer Law guarantees the right of the defence to obtain and examine witnesses under the same conditions as prosecution witnesses.[120] The Prosecution further contends that Article 59 of the RCCP does not "in practice" prevent the accused or accomplices from testifying.[121] In particular, it notes that the Kigali Bar Association confirmed that, in Rwanda, "accused persons have been testifying in their own defence and calling witnesses, including accomplices, to refute allegations against them."[122] In addition, the Prosecution observes that witnesses disqualified from testifying under Article 59 of the RCCP "can still be heard as a court informer, although his or her evidence has to be supported by other evidence."[123]

50. The parties do not dispute that, on its face, Article 59 of the RCCP could bar the presentation of evidence by an accused or any defence witnesses who are suspected of involvement in an offence.[124] The Appeals Chamber notes, however, that the Referral Chamber interpreted Article 59 of the RCCP as being inconsistent with Article 13(10) of the Transfer Law and therefore inapplicable in any case transferred to Rwanda by the Tribunal pursuant to Article 25 of the Transfer Law. Implicit in this ruling is the Referral Chamber's conclusion that, in light of the Transfer Law, Mr. Uwinkindi would not be precluded from presenting the evidence of a witness suspected of involvement in an offence or presenting evidence on his own behalf. In this respect, the Appeals Chamber recalls that the Rules of the Tribunal guarantee an accused the right to appear

[117] Impugned Decision, para. 40.
[118] Impugned Decision, para. 40.
[119] Appeal Brief, paras. 24-27. *See also* Reply Brief, paras. 22, 23.
[120] Response Brief, paras. 30-32.
[121] Response Brief, para. 33.
[122] Response Brief, para. 33 (internal citation omitted).
[123] Response Brief, para. 33.
[124] *See* Reply Brief, paras. 22, 23; Response Brief, para. 33.

as a "witness" in his own defence.[125] It further notes that parties before the Tribunal are permitted to, and do, rely on accomplice witnesses or other witnesses who are suspected of being involved in the commission of crimes.[126]

51. The Appeals Chamber observes that the Transfer Law is not as clear as it could be in relation to the right of all parties to present evidence of witnesses without limitation in any referred case, and notes that Article 59 of the RCCP is ambivalent as to whether the proscription it contains applies equally to witnesses called by prosecutors in Rwanda. The Appeals Chamber is nonetheless satisfied that it was within the discretion of the Referral Chamber to conclude that Article 59 of the RCCP would not be applied in any referred case and that the Transfer Law guaranteed the accused the requisite fair trial rights with regard to the presentation of witness evidence.

52. In reaching this conclusion, the Appeals Chamber takes specific note of the provisions ordered by the Referral Chamber for monitoring the case,[127] and recalls that, should the interpretation of the Transfer Law set forth herein be proven incorrect, the Tribunal in any event retains the right to revoke the reference of this case to the Rwandan courts. In this respect, the Appeals Chamber notes that although the Referral Chamber requested the African Commission on Human and Peoples' Rights ("ACHPR") to monitor the referred case and submit reports every three months after its initial report,[128] nothing in the Impugned Decision precludes the ACHPR from making more frequent or interim reports, as appropriate. In this context, the Appeals Chamber considers that the submission of monitoring reports on a monthly basis is warranted until the President of the Tribunal or Residual Mechanism decides otherwise. The Appeals Chamber is confident that, should there be any violation of Mr. Uwinkindi's fair trial rights, including Mr. Uwinkindi's rights to call witnesses and to testify on his own behalf, it would be reported forthwith and a request for revocation of the referral would be made immediately.

53. Consequently, the Appeals Chamber dismisses Mr. Uwinkindi's Sixth Ground of Appeal.

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[125] Rule 85(C) of the Rules. *See also Prosecutor v. Vidoje Blagojevi} and Dragan Joki}*, Case No. IT-02-60-A, Judgement, 9 May 2007, para. 27; *Prosecutor v. Stanislav Gali}*, Case No. IT-98-29-A, Judgement, 30 November 2006, paras. 19, 22.
[126] *See* Impugned Decision, para. 39. *Cf. Siméon Nchamihigo v. The Prosecutor*, Case No. ICTR-01-63-A, Judgement, 18 March 2010, paras. 42-48.
[127] *See infra* paras. 77-85.
[128] Impugned Decision, pp. 58, 59 (disposition). *See also* Impugned Decision, paras. 213, 214.

G. Availability and Protection of Witnesses (Grounds 8, 9, and 10)

54. Mr. Uwinkindi submits that the Referral Chamber erred in its assessment of the ability of the defence to secure the attendance of witnesses inside and outside of Rwanda.[129] In particular, he argues that the Referral Chamber improperly analyzed the legitimacy of witness fears rather than limiting its analysis to an assessment of the likelihood that the accused will be able to call defence witnesses under the same conditions as prosecution witnesses.[130]

55. With respect to witnesses inside Rwanda, Mr. Uwinkindi contends that the Referral Chamber mistakenly relied on "misleading" evidence that defence witnesses have appeared before the High Court in other trials without facing subsequent prosecution or threats to illustrate the likelihood that defence witnesses will appear at his trial.[131] Given the difficulties faced by witnesses who have testified for the defence in several Tribunal cases and the particular fears of being prosecuted for genocide or genocide ideology in connection with their testimony, Mr. Uwinkindi asserts that the Referral Chamber's failure to acknowledge his submissions that "the High Court has not presided over a single genocide case at first instance" amounts to an error in law.[132] He also submits that the Referral Chamber erred in assessing the High Court's ability to compel testimony pursuant to Article 50 of the RCCP by failing to appreciate that this provision relates to pre-trial and investigative activities, not court proceedings.[133]

56. Mr. Uwinkindi further argues that the Referral Chamber erred in placing excessive weight on the immunity provided for defence witnesses from prosecution for genocide and genocide denial under the Transfer Law, while failing to consider the witnesses' broader fears, such as possible torture, disappearance, murder, loss of survivor benefits, or reprisal against family members.[134] Moreover, he contends that, even with guarantees of immunity from prosecution, the Referral Chamber failed to appreciate that defence witnesses' lack of faith in the Rwandan Government's assurances would deter them from testifying.[135] He also argues that the Referral Chamber failed to consider that the ability of the Rwandan Government to prosecute contempt may be used to circumvent other immunities.[136]

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[129] Appeal Brief, paras. 29-63. *See also* Reply Brief, paras. 24-37.
[130] Appeal Brief, paras. 30, 35, 42, 50; Reply Brief, paras. 33, 34.
[131] Appeal Brief, para. 29.
[132] Appeal Brief, paras. 29, 33-36.
[133] Appeal Brief, para. 37.
[134] Appeal Brief, paras. 34-36, 38-40, 48, 49.
[135] Appeal Brief, paras. 31, 35, 36, 42.
[136] Appeal Brief, paras. 45-47; Reply Brief, paras. 36, 37.

57. With regard to witnesses outside Rwanda, Mr. Uwinkindi submits that the Referral Chamber erred in failing to consider the discouraging effect on defence witnesses' appearances that results from travel arrangements being facilitated by a unit of the national prosecuting authority,[137] and that his witnesses abroad are refugees, who would lose asylum status if they returned to Rwanda to testify.[138] He contends that the use of alternative means for securing defence evidence is insufficient to overcome the unwillingness of witnesses to testify because, *inter alia*: it would place him at a disadvantage in presenting his case; the witnesses would still be afraid to appear due to repercussions to family members living in Rwanda; and the Referral Chamber failed to assess whether video-link facilities were available in many of the countries where his potential witnesses are located.[139]

58. Moreover, Mr. Uwinkindi contends that the Referral Chamber erred in finding that Rwanda's witness protection programme provides an adequate protection framework for defence witnesses inside and outside the country because defence witnesses would be unwilling to avail themselves of the services of the new Witness Protection Unit because of the need to apply for its assistance through the Office of the Prosecutor General.[140] He further notes that evidence suggests that the unit is not yet operational, and argues that the related monitoring programme does not possess the powers necessary to provide sufficient assurances to witnesses.[141]

59. The Prosecution responds that the Referral Chamber reasonably concluded that Rwanda will provide for the availability and protection of defence witnesses.[142] It submits that Mr. Uwinkindi fails to demonstrate any discernible error in the Referral Chamber's findings regarding the availability of witnesses, arguing, *inter alia*, that the Referral Chamber's assessment properly: considered witness concerns beyond the fear of prosecution and arrest in connection with their testimony;[143] and relied on the plain text of the Transfer Law's immunity provisions and complementary "positive developmentFsğ" in Rwandan laws and witness protection services as demonstrating Rwanda's commitment to protecting defence witnesses.[144] In addition, the Prosecution contends that, notwithstanding several mistaken citations, the Referral Chamber reasonably considered the High Court's ability to secure the attendance of defence witnesses in

[137] Appeal Brief, paras. 32, 40, 41.
[138] Appeal Brief, para. 51.
[139] Appeal Brief, paras. 52-58.
[140] Appeal Brief, paras. 59-63.
[141] Appeal Brief, paras. 59-63.
[142] Response Brief, paras. 46-95.
[143] Response Brief, paras. 48, 53, 64.
[144] Response Brief, paras. 54-63, 65-70.

genocide cases that were not trials in the first instance, and the availability of a compulsory process to compel witness testimony under Article 50 of the RCCP.[145]

60. The Prosecution further submits that the Referral Chamber properly assessed Rwanda's witness protection services and use of alternative means of securing defence witness testimony.[146] It argues that the Referral Chamber correctly found the establishment of the Witness Protection Unit as part of the judiciary to be a "positive step in closing the perceived Ƒproblemsğ identified in earlier Rule 11*bis* proceedings."[147] The Prosecution also argues that Mr. Uwinkindi presents merely speculative challenges to the use of alternative means for securing defence witness testimony, and fails to show discernible error in the Referral Chamber's consideration of the "specific and concrete steps" Rwanda has taken to amend its laws to bolster logistical and technological support for these alternatives.[148]

61. The Appeals Chamber observes that, in assessing the availability of defence witness testimony, the Referral Chamber correctly noted that its role was not to determine whether the witnesses' fears were well-founded, but instead to focus on the likelihood that Mr. Uwinkindi will be able to secure their appearance on his behalf under the same conditions as those testifying against him.[149] The Appeals Chamber further considers that the Referral Chamber emphasized the need for adequate legal safeguards to address the subjective fears that might discourage witnesses from testifying,[150] and demonstrated awareness of the range of fears expressed by Mr. Uwinkindi's potential defence witnesses about appearing at a trial in Rwanda. In particular, the Referral Chamber noted that most witnesses feared prosecution under Rwanda's genocide ideology law, while others feared that they would be killed, abducted, transferred to prisons away from their families, or persecuted in prison as a repercussion for their testimony, or that their family members would be subjected to retaliation.[151]

62. The Appeals Chamber considers that the Referral Chamber acted within its discretion in finding that the recent amendments to relevant laws and enhancements to witness protection services constitute sufficient assurances to address defence witnesses' concerns and to help secure their appearance. Notably, with regard to securing witnesses' appearances, the Referral Chamber considered: (i) defence and *amicus curiae* submissions indicating past cases in which defence

[145] Response Brief, paras. 71-75.
[146] Response Brief, para. 79.
[147] Response Brief, paras. 76-87 (internal citations omitted).
[148] Response Brief, paras. 88-95 (internal citations omitted).
[149] Impugned Decision, paras. 85, 90.
[150] Impugned Decision, para. 103.
[151] Impugned Decision, paras. 88-90.

witnesses have been subjected to prosecutions, intimidation, and actual or threatened violent reprisals for testifying; and (ii) previous findings by the Appeals Chamber in Rule 11*bis* decisions confirming fear of these consequences as obstacles to securing defence witness testimony.[152] Despite the similarity between the concerns expressed by defence witnesses in this case and those in previous referral cases, the Referral Chamber acted within its discretion in finding it "logical to assume that with the amendments made to Ŧthe Transfer Lawğ regarding witness immunity, the creation of a new witness protection programme, and the safeguards imposed by the Chamber on Rwanda," the Appeals Chamber's previous findings that witnesses may be unwilling to testify are "no longer a compelling reason for denying referral."[153]

63. The Appeals Chamber further considers that, in making its finding on the availability of witnesses, the Referral Chamber noted the safeguards in Rwandan law to facilitate the attendance of witnesses living in Rwanda. In particular, it considered that enhanced immunities provided for defence witnesses under the recently amended Transfer Law would likely allay witnesses' expressed unwillingness to testify for fear of prosecution under Rwanda's genocide denial laws.[154] The Referral Chamber also considered the 36 genocide cases in which defence witnesses have testified before the High Court as evidence of defendants' ability to secure the attendance of his or her witnesses.[155] Although Mr. Uwinkindi correctly notes that the High Court did not in fact conduct these trials in the first instance,[156] the Appeals Chamber sees no error in the Referral Chamber's reliance on the underlying fact that the trials occurred. The fact that fewer witnesses testified for the defence than for the prosecution "alone does not indicate the lack of Ŧağ fair trial for the Accused."[157] Significantly, the Referral Chamber further considered the obligation of witnesses in Rwanda to testify and the ability to compel witness testimony,[158] and recognized that

[152] Impugned Decision, paras. 99, 100.
[153] Impugned Decision, para. 100.
[154] Impugned Decision, paras. 94, 95. *See also* Impugned Decision, para. 90. Mr. Uwinkindi's unsupported contention that contempt prosecutions would be used to circumvent this immunity is mere speculation and is dismissed.
[155] Impugned Decision, para. 100.
[156] *See* Response Brief, paras. 71-73. *See also The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11*bis*, Republic of Rwanda's Response to a 6 June 2011 Order to Provide Further Information Regarding 36 Genocide Cases at the High Court, 21 June 2011, paras. 3-43.
[157] Impugned Decision, para. 97.
[158] Impugned Decision, para. 104. Although the Referral Chamber cited an incorrect legal provision in this respect, the Appeals Chamber notes that Articles 54, 55, and 57 of the RCCP provide a compulsory process and sanctions for the failure of witnesses to appear. *See* Article 54 of the RCCP ("A public prosecutor can summon by using written notice, summons to appear or warrant bringing by force, any person he or she thinks has some important information to give. The summoned person is given a copy of the summoning document. Witnesses are summoned through the administrative organs, by using court bailiffs or security organs although they can as well appear voluntarily. Any person summoned in accordance with the law is obliged to appear. Persons who, by the nature of their trade or profession, are custodians of secrets are exempted from testifying as regards those secrets."); Article 55 of the RCCP ("A public prosecutor can issue a warrant to bring by force any witness who has defaulted to appear. Any witness who is legally summoned and fails to appear without any lawful reason, or who refuses to discharge the obligation of testifying can be handed over to court without any further formalities. A witness who defaults to appear after being

Rwanda has concluded a number of mutual legal assistance agreements, which would facilitate obtaining the testimony of witnesses abroad.[159]

64. The Referral Chamber acted within the scope of its discretion in relying on the existence of such a legal framework as a primary basis for determining whether an accused will be able to secure the attendance of reluctant witnesses.[160] The Appeals Chamber has previously held that a designated trial chamber could reasonably deny referral notwithstanding the existence of this framework, largely due to the specific finding that the accused may face difficulties in securing the attendance of witnesses to the extent that it would jeopardize his right to a fair trial.[161] However, it is equally within the discretion of a trial chamber to find that the ability to compel testimony is a factor which can be taken into account in addressing the subjective fears of defence witnesses. The Appeals Chamber is satisfied that the Referral Chamber had a reasonable basis to conclude that Mr. Uwinkindi will be able to secure the attendance of witnesses.

65. Moreover, the Appeals Chamber is not satisfied that Mr. Uwinkindi has demonstrated that the Referral Chamber erred in concluding that protective measures for witnesses are *prima facie* guaranteed. The Referral Chamber considered the existence of witness protection services, including a service administered by the Office of the Prosecutor General and a new witness protection unit created for referred cases under the auspices of the Rwandan judiciary, as increasing the likelihood that defence witnesses will appear.[162] Although the Referral Chamber raised some concerns about the involvement of the Office of the Prosecutor General in obtaining the assistance of the judiciary's witness protection services, in the view of the Appeals Chamber, the Referral Chamber reasonably concluded that the recent improvements in Rwandan witness protection services "may go some distance in guaranteeing that witness safety will be monitored directly by the Rwandan judiciary" and that this factor, coupled with Tribunal-appointed monitors, would address witness protection concerns that may arise.[163]

66. The Appeals Chamber notes, however, that the existence of witness protection services and a regime for obtaining compulsory process is not necessarily a panacea for securing the testimony

summoned for the second time or who, after being called by warrant to bring him or her by force advances legitimate reasons is absolved from punishment."); Article 57 of the RCCP ("A witness who fails to appear to testify without advancing any justifiable excuse after being summoned in accordance with the law or refuses to take an oath or to testify after being ordered to do so can be sentenced to a maximum punishment of one month and a fine which does not exceed fifty thousand francs (50.000) or one of them. If need be, public force can order his or her arrest following a warrant to bring him or her by force issued by a public prosecutor charged with investigation of the case.").

[159] Impugned Decision, para. 108. *See also Hategekimana* Appeal Decision, para. 25.

[160] *Cf. Stankovi}* Appeal Judgement, para. 26.

[161] *See Hategekimana* Appeal Decision, paras. 22-25, 30.

[162] Impugned Decision, paras. 128-131.

of defence witnesses who have obtained refugee status in countries outside Rwanda. It would be unreasonable to require refugees, for whom a well-founded fear of persecution upon returning to Rwanda has been determined, to appear as witnesses in Rwanda before the High Court. The Referral Chamber considered, however, that the Transfer Law allows for alternative methods of obtaining testimony from witnesses abroad: by deposition, video-link, or a judge sitting in a foreign jurisdiction.[164] Given the variety of alternative means available under the Transfer Law for securing such testimony, the Appeals Chamber is not convinced that the Referral Chamber committed a discernible error by failing to determine whether video-link was technically feasible in each of the countries where Mr. Uwinkindi's potential witnesses are located.

67. The Appeals Chamber further notes that it would be a violation of the principle of equality of arms if the majority of defence witnesses appeared by means substantially different from those for the Prosecution.[165] However, the Appeals Chamber notes that Mr. Uwinkindi has not identified how many of his potential witnesses might fall into this category or that it constitutes a sufficiently significant part of his possible evidence. It cannot be said that hearing a portion of evidence from either party by alternative means *per se* amounts to a violation of an accused's rights. The relevant inquiry is a fact-based assessment that is best left to a chamber with a fully developed record as to the nature of the evidence against the accused, and with specific knowledge of the nature of the proposed defence case and the relevant sources of evidence.

68. Consequently, the Appeals Chamber dismisses Mr. Uwinkindi's Eighth, Ninth, and Tenth Grounds of Appeal.

H. Right to an Effective Defence (Ground 11)

69. Mr. Uwinkindi submits that the Referral Chamber erred in finding that he would be able to mount an effective defence in the event that his case were referred to Rwanda.[166] In particular, Mr. Uwinkindi argues that the Referral Chamber lacked sufficient evidence to conclude that there were reasonable funds available for the conduct of his trial.[167] Mr. Uwinkindi further submits that the Referral Chamber erred in failing to conclude that "the Rwandan regime tends in practice to intimidate and silence the defence in high profile genocide cases".[168] He notes the Referral Chamber's acknowledgement that working conditions in Rwanda are difficult and that there is

[163] Impugned Decision, paras. 131, 132. *Contra Munyakazi* Appeal Decision, para. 37.
[164] *See* Impugned Decision, paras. 109, 112, 113.
[165] *See Munyakazi* Appeal Decision, para. 42.
[166] Appeal Brief, paras. 64-68.
[167] Appeal Brief, paras. 64, 65.
[168] Appeal Brief, para. 68.

evidence of harassment and threats against lawyers.[169] Against this backdrop, Mr. Uwinkindi contends that the Referral Chamber erred in relying on the guarantees of the Transfer Law alone to allay its concerns that the right to an effective defence may not be guaranteed.[170]

70. The Prosecution responds that the Referral Chamber correctly determined that Mr. Uwinkindi's right to an effective defence will be secured in Rwanda.[171] It contends that the Referral Chamber acted within the bounds of established Rule 11*bis* jurisprudence, and properly accepted Rwanda's assurances with respect to the sufficiency of its funds.[172] It further asserts that Mr. Uwinkindi's assertions regarding the alleged lack of funds are speculative, and that he improperly fails to consider that additional funds can be made available to him if necessary to secure effective legal representation after the transfer of his case.[173]

71. The Appeals Chamber recalls that a Referral Chamber must "satisfŦyğ itself that the State would supply defence counsel to accused who cannot afford their own representation" and is "not obligated Ŧ…ğ to itemize the provisions of the ŦState'sğ budget" once it has learned there is financial support for that representation.[174] The Referral Chamber explicitly noted that: the Transfer Law guarantees an indigent accused the right to legal aid;[175] Rwanda has budgeted funds for this purpose;[176] and this was all that the Referral Chamber was required to consider in finding that Mr. Uwinkindi would be guaranteed adequate representation.[177] The Appeals Chamber can also identify no error in the Referral Chamber's reliance on the provisions of the Transfer Law in addressing Mr. Uwinkindi's concerns related to the difficulties of working in Rwanda.[178]

72. Consequently, the Appeals Chamber dismisses Mr. Uwinkindi's Eleventh Ground of Appeal.

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[169] Appeal Brief, paras. 66, 68. Mr. Uwinkindi illustrates this harassment in part by pointing to the prosecution of Mr. Léonidas Nshogoza. *See* Appeal Brief, para. 68.
[170] Appeal Brief, para. 67.
[171] Response Brief, paras. 96-107.
[172] Response Brief, para. 99.
[173] Response Brief, paras. 97, 101-105, 107.
[174] *See Stankovi}* Appeal Decision, para. 21.
[175] Impugned Decision, para. 135, *citing* Article 13(6) of the Transfer Law.
[176] Impugned Decision, para. 141.
[177] Impugned Decision, para. 144.
[178] *See* Impugned Decision, paras. 152-161. The Appeals Chamber notes that the examples cited by Mr. Uwinkindi are not related to trials conducted in accordance with the Transfer Law and its accompanying immunities and protections. The Appeals Chamber further considers that Mr. Uwinkindi's suggestion that the Transfer Law would not be applied in practice is purely speculative and is dismissed. *See* Appeal Brief, paras. 67, 68.

I. Independence and Impartiality of the Judiciary (Grounds 12, 13, and 14)

73. Mr. Uwinkindi submits that the Referral Chamber erred in assessing the independence and impartiality of the Rwandan judiciary.[179] In particular, he contends that the Government of Rwanda has a firm policy of aggressively prosecuting anyone who attempts to "rewrite" the history of the genocide, and that it has a record of interfering with the judiciary.[180] Mr. Uwinkindi submits that, given the political sensitivity of his line of defence, namely to argue that the mass graves found near the Kayenzi Pentecostal Church were of Hutu victims of the Rwandan Patriotic Front,[181] and the significance of his case as the first referral from the Tribunal to Rwanda,[182] the risk of intimidation of witnesses and interference in his case is particularly high.[183] He further argues that the Referral Chamber erred in refusing to examine evidence of the deteriorating political climate in Rwanda and how this may further impact the independence and impartiality of the judiciary.[184]

74. The Prosecution responds that the Referral Chamber correctly concluded that Mr. Uwinkindi will be able to pursue his line of defence.[185] It further submits that Mr. Uwinkindi's unsubstantiated allegations of executive interference in the judiciary fail to rebut the presumption of the judges' impartiality,[186] and that the Referral Chamber reasonably distinguished Mr. Uwinkindi's case from the "handful of high profile political or politically sensitive cases" in which the defence and *amici* suspected executive interference.[187]

75. The Appeals Chamber notes that, in examining the independence and impartiality of the Rwandan judiciary, the Referral Chamber extensively examined the relevant legal framework and its operation in practice, including, *inter alia*, applicable international law, the competence and qualification of judges, and allegations of corruption.[188] The Referral Chamber acknowledged that there were individual cases of external influence and corruption, but found that there was no evidence to suggest that they were cases similar to Mr. Uwinkindi's.[189] The Appeals Chamber can identify no error in this approach. Furthermore, the Appeals Chamber notes that the Referral Chamber was aware of Mr. Uwinkindi's proposed line of defence,[190] and acted within its discretion

[179] Appeal Brief, paras. 69-80.
[180] Appeal Brief, para. 70. *See also* Appeal Brief, para. 75.
[181] *See* Impugned Decision, para. 162.
[182] Appeal Brief, para. 75.
[183] Appeal Brief, paras. 71-73, 76.
[184] Appeal Brief, para. 80. *See also* Reply Brief, paras. 38-40.
[185] Response Brief, paras. 108-112.
[186] Response Brief, paras. 113-134.
[187] Response Brief, para. 119 (internal quotations omitted). *See also* Response Brief, paras. 120-131.
[188] Impugned Decision, paras. 170-196.
[189] Impugned Decision, paras. 185, 196.
[190] Impugned Decision, para. 162.

in finding that he would be able to pursue his line of defence in view of the immunity provisions in the Transfer Law and the impartiality and independence of Rwandan judges.[191] Mr. Uwinkindi fails to support his contention that his case is uniquely susceptible to interference. Finally, Mr. Uwinkindi has failed to point to any evidence of the purported "deteriorating political climate" in Rwanda or to substantiate its connection to his case, and thus he has not demonstrated on appeal any error in the Referral Chamber's failure to take this factor into account.

76. Consequently, the Appeals Chamber dismisses Mr. Uwinkindi's Twelfth, Thirteenth, and Fourteenth Grounds of Appeal.

J. Monitoring and Revocation (Grounds 15 and 16)

77. In the Impugned Decision, the Referral Chamber found that "it would be in the interest of justice to ensure that there is an adequate system of monitoring in place if this case is to be transferred to Rwanda."[192] The Referral Chamber took note that the ACHPR, an independent organ established under the African Charter on Human and Peoples' Rights, had expressed an interest in monitoring proceedings at the cost of the Tribunal or the Residual Mechanism, and, given the ACHPR's experience, it concluded that the ACHPR would be a "trustworthy agency" to monitor the proceedings in this case in Rwanda.[193] Accordingly, it requested the Registrar of the Tribunal to appoint the ACHPR as a monitor for Mr. Uwinkindi's trial in Rwanda and to make arrangements to that effect.[194]

78. The Referral Chamber requested the ACHPR, *inter alia*, "to appoint at least two or more experienced professionals who will conduct full-time monitoring of the proceedings" and to "submit a regular report every three months on the status of proceedings to the President through the Registrar upon commencement of the trial and until the completion of the trial and the appellate process for the Accused and through to the enforcement of sentence, if any."[195]

79. The Referral Chamber further noted the possibility of revocation of the referral under Rule 11*bis*(F) of the Rules, but considered it "a remedy of last resort" given its possible impact on Mr. Uwinkindi's right to an expeditious trial.[196] The Referral Chamber considered that it would be the duty of the trial monitors to make an appropriate request, if necessary, to the President of the

[191] Impugned Decision, paras. 166, 167.
[192] Impugned Decision, para. 208.
[193] Impugned Decision, para. 219. *See also* Impugned Decision, paras. 210-213.
[194] Impugned Decision, para. 221. *See also* Impugned Decision, p. 57 (disposition).
[195] Impugned Decision, para. 213. *See also* Impugned Decision, pp. 57, 58 (disposition).
[196] Impugned Decision, para. 217.

Tribunal through the Registrar.[197] The Referral Chamber also expressly granted Mr. Uwinkindi standing to bring perceived violations of his rights to the attention of the Tribunal and to seek appropriate orders, including revocation.[198]

80. Mr. Uwinkindi submits that the Referral Chamber erred in relying on the possibility of the monitoring of his case and revocation of the referral as guarantees that his trial in Rwanda will be fair.[199] Mr. Uwinkindi submits that the Referral Chamber lacked sufficient evidence of the ACHPR's willingness and ability to engage in the type and scope of monitoring envisioned and ordered by the Referral Chamber,[200] and exceeded its authority in so ordering, given that the ACHPR is an independent international body not subject to the Tribunal's jurisdiction.[201] He also contends that the Referral Chamber placed excessive weight on the ACHPR monitoring mechanism in its evaluation of his right to a fair trial under Rule 11*bis* of the Rules.[202]

81. Mr. Uwinkindi further argues that the Referral Chamber "effectively excludFedğ" the viability of invoking the remedy of revocation by characterizing it as a remedy of last resort.[203] Moreover, Mr. Uwinkindi submits that the procedures for invoking it are insufficient, given, *inter alia*, that he: (i) does not speak either English or French; (ii) is not provided with an option to view the monitoring reports submitted by the ACHPR; and (iii) lacks direct standing to make an application for revocation, and the Referral Chamber's assumption that the ACHPR will do so on his behalf fails to appreciate the ACHPR's role as a neutral trial monitor, not his advocate.[204]

82. The Prosecution responds that the Referral Chamber did not err in fashioning robust monitoring and revocation mechanisms.[205] In particular, the Prosecution states that the Referral Chamber had the discretion to order the ACHPR to conduct the monitoring and specify the scope of its monitoring duties, based on its authority to require monitoring under Rule 11*bis*(D)(iv) of the

[197] Impugned Decision, para. 219.
[198] Impugned Decision, p. 59 (disposition).
[199] Appeal Brief, paras. 81-114. *See also* Reply Brief, paras. 41-53.
[200] Appeal Brief, paras. 82-90.
[201] Appeal Brief, paras. 86, 87.
[202] Appeal Brief, paras. 91-102.
[203] Appeal Brief, para. 104. *See also* Appeal Brief, paras. 103, 105-109.
[204] Appeal Brief, paras. 107, 110-113.
[205] Response Brief, paras. 135-150.

Rules.[206] It further argues that Mr. Uwinkindi fails to demonstrate any error in the Referral Chamber's characterization and application of the revocation remedy to his case.[207]

83. The Appeals Chamber finds no error in the Referral Chamber relying to a considerable degree on the monitoring mechanism it had fashioned in ensuring that Mr. Uwinkindi's trial will be fair and, if not, that proceedings would be revoked.[208] The Appeals Chamber recalls that a designated trial chamber has the discretion to order monitoring, and that it may take such a mechanism into account in concluding that the trial will be fair.[209] Moreover, the Appeals Chamber considers that a trial chamber has the authority to dictate the scope of the monitoring and the frequency and nature of the reporting.[210]

84. The Appeals Chamber is also satisfied that the Referral Chamber acted within its discretion in ordering the specific scope and guidelines imposed for the ACHPR's monitoring in this case. Although the Appeals Chamber notes that the Tribunal lacks the authority to compel an independent organization which is neither a party nor an organ of the Tribunal to conduct monitoring,[211] Rule 11*bis*(D)(iv) of the Rules authorizes a designated trial chamber to order the Registrar to send monitors. In this case, the Referral Chamber specifically requested the Registrar to enter into a suitable agreement with the ACHPR and to seek further directions from the President of the Tribunal, should the arrangements prove ineffective.[212] Therefore, any difference between the monitoring ordered by the Referral Chamber and the initial expression of willingness by the ACHPR to provide monitoring can be resolved during this process or, if not, can be brought to the attention of the Tribunal for appropriate action.

85. As regards Mr. Uwinkindi's access to reports submitted through the monitoring mechanism, the Appeals Chamber observes that the Impugned Decision does not impose any limitation on Mr. Uwinkindi's access to such reports. The Appeals Chamber considers that, as a general matter, Mr. Uwinkindi shall have access to the monitoring reports unless the President of the Tribunal or

[206] Response Brief, paras. 143, 144. Moreover, the Prosecution contends that the Referral Chamber adequately dealt with the funding of the monitoring mechanism since the financial arrangements were stipulated in the ACHPR's letter indicating that it would conduct the monitoring at the Tribunal's expense as well as in the Referral Chamber's order to the Registrar to construct a formal agreement regarding the financial arrangements. Response Brief, para. 143.
[207] Response Brief, paras. 146-150.
[208] Impugned Decision, paras. 35, 60, 132, 139, 146, 159, 169, 196, 219. *See also* Impugned Decision, pp. 57, 58 (disposition).
[209] *See Stankovi}* Appeal Decision, para. 52.
[210] *See Stankovi}* Appeal Decision, paras. 50-52, 55.
[211] The Tribunal's coercive authority cannot exceed Chapter VII of the United Nations Charter, which imposes obligations on member states of the United Nations only. Although paragraph 4 of Security Council Resolution 955 (1994) requests voluntary financial, material, and expert assistance from organizations, it does not mandate this type of cooperation. *See The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Motion to Obtain Cooperation from the Vatican Pursuant to Article 28, 13 May 2004, para. 3.

Residual Mechanism determines that there is good cause to limit such access. Finally, the Appeals Chamber considers that Mr. Uwinkindi's assertion that there are insufficient means by which he can seek revocation fails to appreciate that the Referral Chamber granted him standing to personally request this remedy, and this contention is therefore dismissed.

86. Consequently, the Appeals Chamber dismisses Mr. Uwinkindi's Fifteenth and Sixteenth Grounds of Appeal.

K. Conclusion

87. The Appeals Chamber has dismissed Mr. Uwinkindi's appeal, and, therefore, his case may be referred to Rwanda in accordance with the Impugned Decision. In addition, the Appeals Chamber has found that monitoring reports should be submitted on a monthly basis until the President of the Tribunal or Residual Mechanism decides otherwise.

88. Finally, the Appeals Chamber recalls that, in a separate decision, it ordered Trial Chamber III of the Tribunal ("Trial Chamber") to direct the Prosecution to file a corrected indictment in Mr. Uwinkindi's case in order to remedy several defects which had been identified.[213] The Appeals Chamber considers it important that these defects be remedied prior to Mr. Uwinkindi's transfer to Rwanda so that the Rwandan Prosecutor General's Office may file its own adapted indictment[214] based on an instrument that gives proper notice and so that this case remains trial ready at the Tribunal in the event of any possible revocation of the order referring this case to Rwanda.

IV. DISPOSITION

89. For the foregoing reasons, the Appeals Chamber

DENIES Mr. Uwinkindi's Motion to Expunge;

DENIES Mr. Uwinkindi's Motion for Hearing;

DENIES the Prosecution's Motion to Strike;

DENIES the Motion to File an *Amicus Curiae* Brief;

DISMISSES Mr. Uwinkindi's appeal in all respects and **AFFIRMS** the Impugned Decision; and

STAYS the transfer of Mr. Uwinkindi to Rwanda pending the Trial Chamber's acceptance of the corrected indictment.

[212] Impugned Decision, para. 221. *See also* Impugned Decision, pp. 57, 58 (disposition).

[213] *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR72(C), Decision on Defence Appeal against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011, para. 60.

Done in English and French, the English version being authoritative.

Done this 16th day of December 2011,
At The Hague,
The Netherlands.

_____
Judge Theodor Meron
Presiding

[Seal of the Tribunal]

[214] The Appeals Chamber observes that, pursuant to Article 4 of the Transfer Law, "[t]he Prosecutor General's Office of the Republic [of Rwanda] shall adapt the ICTR indictment in order to make [it] compliant with the provisions of the Code of Criminal Procedure of Rwanda".

ANNEX K

The authority exceeds 30 pages

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991

Case No.: IT-97-25/1-AR11*bis*.1 & IT-97-25/1-AR11*bis*.2

Date: 4 September 2006

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision of: **4 September 2006**

PROSECUTOR

v.

MITAR RAŠEVIĆ
SAVO TODOVIĆ

DECISION ON SAVO TODOVIĆ'S APPEALS AGAINST DECISIONS ON REFERRAL UNDER RULE 11*bis*

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per: The Embassy of the Republic of Serbia to the Netherlands, The Hague

Referral Bench did the same here and therefore, it was reasonable for the Referral Bench to conclude that, it was "satisfied that [BiH] has a legal structure in place to ensure that operation of the detention facility is in accordance with international standards" and that the Appellant failed to concretely establish that he would be subject to retaliation if detained in BiH.[207] Pursuant to its previous findings, the Appeals Chamber considers that the Appellant has failed to show that the Referral Bench's conclusion on conditions of detention in BiH do not also encompass concerns about post-conviction detention.[208] Accordingly, the Appeals Chamber finds that the Appellant has not demonstrated that the Referral Bench erred in law or in fact by failing to properly examine the general conditions of detention — including post-conviction detention — in BiH, as well as the risks involved in light of the personal circumstances of the Appellant.

99. The Appeals Chamber stresses that it is satisfied that the pre-trial conditions in the detention unit attached to the State Court of BiH meet internationally recognized standards. However, as to the vagueness of the timing for the construction of the new prison to accommodate persons convicted by the State Court of BiH, the Appeals Chamber recalls the Prosecution's obligation to alert the Referral Bench in case there are any serious concerns that the minimum standards of pre-trial—or, in case of a conviction, post-conviction— detention will not be met.

100. For the foregoing reasons, the Appellant's fifth ground of appeal is dismissed.

F. Sixth Ground of Appeal

101. The Appellant submits that the Referral Bench erred in law and in fact by: (a) assuming that monitoring of the case, if referred, would be undertaken by the OSCE or a similar organization by arrangement with the Prosecutor; (b) determining that it had the authority to order the Prosecution to continue its efforts to ensure the monitoring of and reporting on the proceedings before the State Court of BiH after the case had been referred to BiH, and to report to the Referral Bench on the progress made by the BiH Prosecutor, as well as on the progress of the proceedings.[209]

(a) Submissions

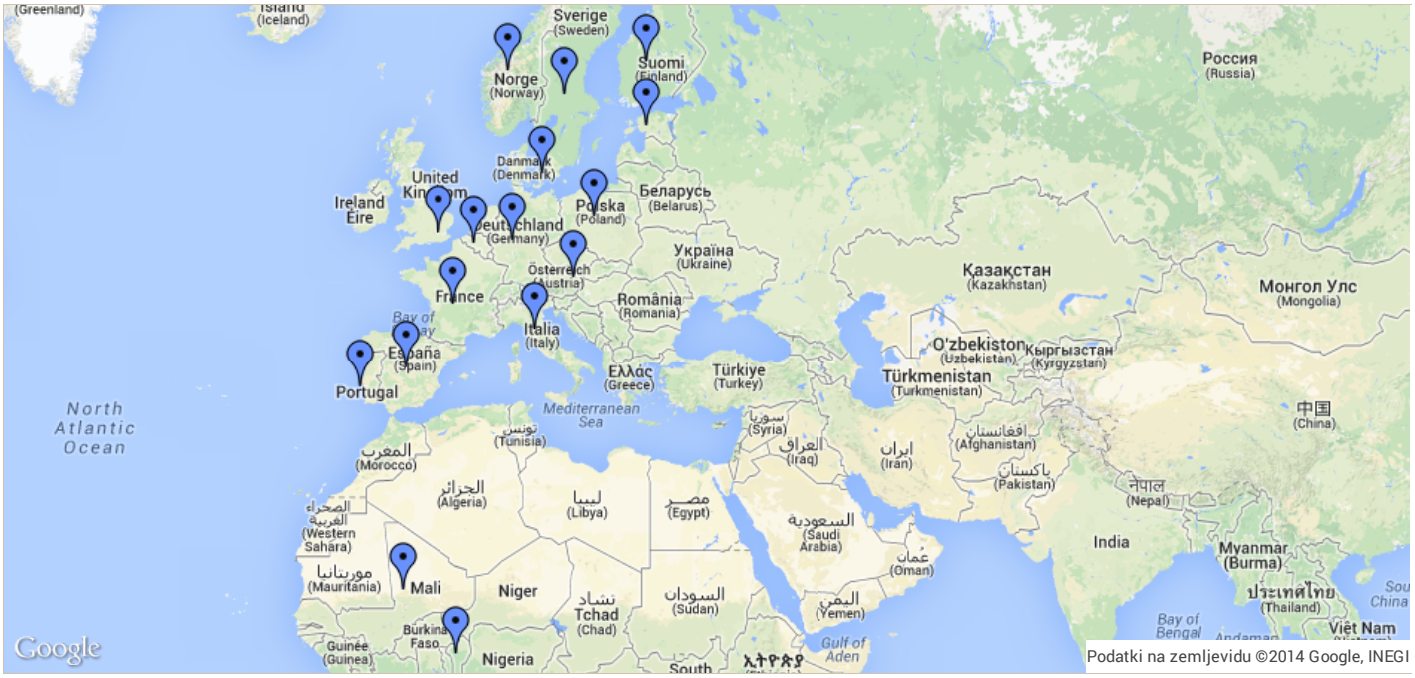
102. The Appellant submits that: (a) the Prosecution has no obligation to monitor the proceedings; (b) the Referral Bench has no authority to issue orders to the Prosecution in this respect, and (c) the Prosecution's observers "would not be an appropriate and sufficient tool to

[207] First Impugned Decision, para. 87.
[208] *Cf. Stanković* Rule 11*bis* Appeal Decision, para. 37; *Janković* Rule 11*bis* Appeal Decision, para. 74: "the Appellant has offered nothing to suggest that the Referral Bench erred in considering the fairness of the conditions of confinement in Bosnia and Herzegovina, be it pre- or post-conviction"; *see also Mejakić* Rule 11*bis* Appeal Decision, para. 58.
[209] First Notice of Appeal, para. 12.

ANNEX L

Enforcement of sentences

Accused convicted by the ICTR ▼ Show on map Accused convicted by the ICTY ▼ Show on map



On 1 July 2012 and 1 July 2013, the Mechanism took over responsibility for the supervision of all sentences pronounced by the ICTR and the ICTY, respectively.

Individuals convicted of crimes by the ICTR or ICTY do not serve their sentences in the United Nations detention facilities in Arusha or The Hague, because these facilities are not penitentiaries. Sentences are served in UN Member States that have concluded enforcement agreements with the Tribunals or the Mechanism. The same regime applies to any individuals convicted by the MICT and the agreements concluded by the ICTR and ICTY remain in force for the MICT.

This map displays the States that have signed an enforcement of sentences agreement and where convicted persons have been transferred.

How an enforcement State is chosen

The decision on where a convicted person will serve his or her sentence is governed by Article 25 of the Mechanism Statute and the Mechanism's Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to Serve His or Her Sentence. The designation process consists of 4 steps:

1. The Registrar communicates with one or more State(s) to determine their willingness to enforce the sentence.
2. The Registrar submits a report to the Mechanism President, which lists potential enforcing State(s) and contains other pertinent information.
3. The President designates an enforcement State, based on the information submitted by the Registrar and any other inquiries he or she chooses to make.
4. The Registrar executes the decision.

Standards of detention

Sentences handed down by the ICTR, ICTY, and Mechanism are enforced in accordance with international standards of detention and the applicable law of the enforcing State, subject to the supervision of the Mechanism.

Related links

- Agreements on Enforcement of ICTR Sentences
- Agreements on Enforcement of ICTY Sentences

Conditions of imprisonment must be compatible with relevant human rights standards including:

- The Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.
- The Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, approved by the UN General Assembly resolution 43/173 of 9 Dec. 1988.
- The Basic Principles for the Treatment of Prisoners, affirmed by the UN General Assembly resolution 45/111 of 14 Dec. 1990.

Recognised organisations such as the International Committee of the Red Cross and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment regularly monitor the conditions of imprisonment to ensure international standards are being met.

Pardon, Commutation of Sentence or Early Release

Article 26 of the Mechanism Statute enables those convicted by the ICTR, the ICTY or the Mechanism to apply for pardon, commutation of sentence or early release.

The decision on whether to grant a request is taken by the Mechanism President and, in addition to Article 26, is governed by:

- Rule 151 of the MICT Rules of Procedure and Evidence, and
- 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.

As set out in the Practice Direction, an application may be initiated in two ways: by the enforcement State or by direct petition from the convicted person. See for example the First Decision of the MICT President on early release, in the case against Paul Bisengimana, 11 Dec. 2012.

Countries that have signed an agreement with the ICTR but where no detainees have been transferred to date: France, Rwanda, Senegal, Swaziland.

Countries that have signed an agreement with the ICTY but where no detainees have been transferred to date: Albania, Poland, Slovakia, Ukraine.

ANNEX M

Member States Cooperation **11284**

Headquarters Agreement between the United Nations and the Kingdom of the Netherlands

Main document (1994) | Amendment (2001): Article XV bis |

Annex to Headquarters Agreement

Legislations implementing the Statute of the Tribunal:

Greece, 15 Dec. 1998	Belgium, 22 Mar.1996	France, 2 Jan. 1995	Finland, 15 Jan. 1994
Romania, 28 July 1998	Switzerland, 21 Dec. 1995	Denmark, 21 Dec. 1994	United States, 1994
Hungary, 1996	Australia, 28 Aug. 1995	Sweden, 1 July 1994	(amended 5 July 2011)
Croatia, 1996	New Zealand, 9 June 1995	Norway, 1 July 1994	Italy, 28 Dec. 1993
United Kingdom, 1996	Germany, 10 Apr.1995	Spain, 1 June 1994	
Austria, 1 June 1996	Bosnia-Herzegovina, 6 Apr. 1995	The Netherlands, 21 Apr. 1994	

Agreements on the Enforcement of Sentences:

Albania, 19 Sept. 2008	Belgium, 2 May 2007	Austria, 23 July 1999
Poland, 18 Sept. 2008	United Kingdom, 11 Mar. 2004	Norway, 24 Apr. 1998
Slovakia, 7 Apr. 2008	Denmark, 4 June 2002	Finland, 7 May 1997
Estonia, 11 Feb. 2008	Spain, 28 Mar. 2000	Italy, 6 Feb. 1997
Portugal, 19 Dec. 2007	France, 25 Feb. 2000	
Ukraine, 7 Aug. 2007	Sweden, 23 Feb. 1999	

Germany, ad hoc agreements:

Tarčulovski, 16 June 2011 | Galić, 16 Dec. 2008 | Kunarac, 14 Nov. 2002 | Tadić, 17 Oct. 2000

View the Map on Enforcement of Sentences

ANNEX N

International Criminal Tribunal for Rwanda

Challenging Impunity

Bilateral Agrements

Legal

Security Council Resolutions
Statute of the Tribunal
Rules of Procedure and Evidence
Practice Directions
Directive on Assignment and Defence Counsel
Proscecutor's Regulations
Bilateral Agrements
Code of Professional Conduct for Defence Counsel
Directive for the Registry-Judicial & Legal ...
Rules Covering the Detention of Persons ...
Prosecution of Sexual Violence

2008	
Mar 4, 2008	Agreement between the Government of the Republic of Rwanda and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda
2004	
Apr 21, 2004	Agreement between the United Nations and the Government of Sweden on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda
Mar 17, 2004	Agreement between the Italian Republic and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda
2003	
Mar 14, 2003	Accord entre le Gouvernment de la Republique Française et l'organisation des Nations Unies concernant l'exécution des peines prononcées par le Tribunal Pénal International pour le Rwanda
2000	
Aug 30, 2000	Agreement between the Kingdom of Swaziland and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda
Aug 30, 2000	Accord entre le Royaume de Swaziland et l'organisation des Nations Unies concernant l'exécution des peines prononcées par le Tribunal Pénal International pour le Rwanda
1999	
Aug 26, 1999	Agreement between the Government of the Republic of Benin and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda
Feb 12, 1999	Agreement between the Government of the Republic of Mali and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda, concluded in Bamako on 12 February 1999, registered on 4 October 2000 (Reg. No. 36963). (Treaty Section, New York, 17 January 2002)
1996	
Sep 24, 1996	Agreement between the United Nations and the United Republic of Tanzania concerning the headquarters of the International Tribunal for Rwanda

11287

ANNEX O

CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)

Adopted at the Forty-fourth Session of the Human Rights Committee, on 10 April 1992

[Replaces general comment 9 concerning humane treatment of persons deprived of liberty]

1. This general comment replaces general comment No. 9 (the sixteenth session, 1982) reflecting and further developing it.

2. Article 10, paragraph 1, of the International Covenant on Civil and Political Rights applies to any one deprived of liberty under the laws and authority of the State who is held in prisons, hospitals - particularly psychiatric hospitals - detention camps or correctional institutions or elsewhere. States parties should ensure that the principle stipulated therein is observed in all institutions and establishments within their jurisdiction where persons are being held.

3. Article 10, paragraph 1, imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7, including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.

4. Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

5. States parties are invited to indicate in their reports to what extent they are applying the relevant United Nations standards applicable to the treatment of prisoners: the Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for

Law Enforcement Officials (1978) and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982).

6. The Committee recalls that reports should provide detailed information on national legislative and administrative provisions that have a bearing on the right provided for in article 10, paragraph 1. The Committee also considers that it is necessary for reports to specify what concrete measures have been taken by the competent authorities to monitor the effective application of the rules regarding the treatment of persons deprived of their liberty. States parties should include in their reports information concerning the system for supervising penitentiary establishments, the specific measures to prevent torture and cruel, inhuman or degrading treatment, and how impartial supervision is ensured.

7. Furthermore, the Committee recalls that reports should indicate whether the various applicable provisions form an integral part of the instruction and training of the personnel who have authority over persons deprived of their liberty and whether they are strictly adhered to by such personnel in the discharge of their duties. It would also be appropriate to specify whether arrested or detained persons have access to such information and have effective legal means enabling them to ensure that those rules are respected, to complain if the rules are ignored and to obtain adequate compensation in the event of a violation.

8. The Committee recalls that the principle set forth in article 10, paragraph 1, constitutes the basis for the more specific obligations of States parties in respect of criminal justice, which are set forth in article 10, paragraphs 2 and 3.

9. Article 10, paragraph 2 (a), provides for the segregation, save in exceptional circumstances, of accused persons from convicted ones. Such segregation is required in order to emphasize their status as unconvicted persons who at the same time enjoy the right to be presumed innocent as stated in article 14, paragraph 2. The reports of States parties should indicate how the separation of accused persons from convicted persons is effected and explain how the treatment of accused persons differs from that of convicted persons.

10. As to article 10, paragraph 3, which concerns convicted persons, the Committee wishes to have detailed information on the operation of the penitentiary system of the State party. No penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner. States parties are invited to specify whether they have a system to provide assistance after release and to give information as to its success.

11. In a number of cases, the information furnished by the State party contains no specific reference either to legislative or administrative provisions or to practical measures to ensure the re-education of convicted persons. The Committee requests specific information concerning the measures taken to provide teaching, education and re-education, vocational guidance and training and also concerning work programmes for prisoners inside the penitentiary establishment as well as outside.

12. In order to determine whether the principle set forth in article 10, paragraph 3, is being fully respected, the Committee also requests information on the specific measures applied during detention, e.g., how convicted persons are dealt with individually and how they are categorized, the disciplinary system, solitary confinement and high-security detention and the conditions under which contacts are ensured with the outside world (family, lawyer, social and medical services, non-governmental organizations).

13. Moreover, the Committee notes that in the reports of some States parties no information has been provided concerning the treatment accorded to accused juvenile persons and juvenile offenders. Article 10, paragraph 2 (b), provides that accused juvenile persons shall be separated from adults. The information given in reports shows that some States parties are not paying the necessary attention to the fact that this is a mandatory provision of the Covenant. The text also provides that cases involving juveniles must be considered as speedily as possible. Reports should specify the measures taken by States parties to give effect to that provision. Lastly, under article 10, paragraph 3, juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status insofar as conditions of detention are concerned, such as shorter working hours and contact with relatives, with the aim of furthering their reformation and rehabilitation. Article 10 does not indicate any limits of juvenile age. While this is to be determined by each State party in the light of relevant social, cultural and other conditions, the Committee is of the opinion that article 6, paragraph 5, suggests that all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice. States should give relevant information about the age groups of persons treated as juveniles. In that regard, States parties are invited to indicate whether they are applying the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as the Beijing Rules (1987).

ANNEX P

United Nations A/RES/45/111

General Assembly

Distr. GENERAL

14 December 1990

ORIGINAL: ENGLISH

A/RES/45/111

68th plenary meeting
14 December 1990

45/111. Basic Principles for the Treatment of Prisoners

The General Assembly,

Bearing in mind the long-standing concern of the United Nations for the humanization of criminal justice and the protection of human rights,
Bearing in mind also that sound policies of crime prevention and control are essential to viable planning for economic and social development,

Recognizing that the Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, are of great value and influence in the development of penal policy and practice,

Considering the concern of previous United Nations congresses on the prevention of crime and the treatment of offenders, regarding the obstacles of various kinds that prevent the full implementation of the Standard Minimum Rules,

Believing that the full implementation of the Standard Minimum Rules would be facilitated by the articulation of the basic principles underlying them,

Recalling resolution 10 on the status of prisoners and resolution 17 on the human rights of prisoners, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Recalling also the statement submitted at the tenth session of the Committee on Crime Prevention and Control by Caritas Internationalis, the Commission of the Churches on International Affairs of the World Council of Churches, the International Association of Educators for World Peace, the International Council for Adult Education, the International Federation of Human Rights, the International Prisoners' Aid Association, the International Union of Students, the World Alliance of Young Men's Christian Associations and the World Council of Indigenous Peoples, which are non-governmental organizations in consultative status with the Economic and Social Council, category II,

Recalling further the relevant recommendations contained in the report of the Interregional Preparatory Meeting for the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders on topic II, "Criminal justice policies in relation to problems of imprisonment, other penal sanctions and alternative measures",

Aware that the Eighth Congress coincided with International Literacy Year, proclaimed by the General Assembly in its resolution 42/104 of 7 December 1987,

Desiring to reflect the perspective noted by the Seventh Congress, namely, that the function of the criminal justice system is to contribute to safeguarding the basic values and norms of society,

Recognizing the usefulness of drafting a declaration on the human rights of prisoners,

Affirms the Basic Principles for the Treatment of Prisoners, contained in the annex to the present resolution, and requests the Secretary-General to bring it to the attention of Member States.

ANNEX

Basic Principles for the Treatment of Prisoners

1. All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.

2. There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. It is, however, desirable to respect the religious beliefs and cultural precepts of the group to which prisoners belong, whenever local conditions so require.

4. The responsibility of prisons for the custody of prisoners and for the protection of society against crime shall be discharged in keeping with a State's other social objectives and its fundamental responsibilities for promoting the well-being and development of all members of society.

5. Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.

6. All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality.

7. Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.

8. Conditions shall be created enabling prisoners to undertake meaningful remunerated employment which will facilitate their reintegration into the country's labour market and permit them to contribute to their own financial support and to that of their families.

9. Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.

10. With the participation and help of the community and social institution, and with due regard to the interests of victims, favourable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions.

11. The above Principles shall be applied impartially.

ANNEX Q

Standard Minimum Rules for the Treatment of Prisoners

Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977

PRELIMINARY OBSERVATIONS

1. The following rules are not intended to describe in detail a model system of penal institutions. They seek only, on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.

2. In view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.

3. On the other hand, the rules cover a field in which thought is constantly developing. They are not intended to preclude experiment and practices, provided these are in harmony with the principles and seek to further the purposes which derive from the text of the rules as a whole. It will always be justifiable for the central prison administration to authorize departures from the rules in this spirit.

4. (1) Part I of the rules covers the general management of institutions, and is applicable to all categories of prisoners, criminal or civil, untried or convicted, including prisoners subject to "security measures" or corrective measures ordered by the judge.

(2) Part II contains rules applicable only to the special categories dealt with in each section. Nevertheless, the rules under section A, applicable to prisoners under sentence, shall be equally applicable to categories of prisoners dealt with in sections B, C and D, provided they do not conflict with the rules governing those categories and are for their benefit.

5. (1) The rules do not seek to regulate the management of institutions set aside for young persons such as Borstal institutions or correctional schools, but in general part I would be equally applicable in such institutions.

(2) The category of young prisoners should include at least all young persons who come within the jurisdiction of juvenile courts. As a rule, such young persons should not be sentenced to imprisonment.

Part I

RULES OF GENERAL APPLICATION

Basic principle

6. (1) The following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(2) On the other hand, it is necessary to respect the religious beliefs and moral precepts of the group to which a prisoner belongs.

Register

7. (1) In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received:

(a) Information concerning his identity;

(b) The reasons for his commitment and the authority therefor;

(c) The day and hour of his admission and release.

(2) No person shall be received in an institution without a valid commitment order of which the details shall have been previously entered in the register.

Separation of categories

8. The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,

(a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate;

(b) Untried prisoners shall be kept separate from convicted prisoners;

(c) Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence;

(d) Young prisoners shall be kept separate from adults.

Accommodation

9. (1) Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room.

(2) Where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions. There shall be regular supervision by night, in keeping with the nature of the institution.

10. All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.

11. In all places where prisoners are required to live or work,

(a) The windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;

(b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.

12. The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.

13. Adequate bathing and shower installations shall be provided so that every prisoner may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as

necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate.

14. All parts of an institution regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times.

Personal hygiene

15. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.

16. In order that prisoners may maintain a good appearance compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be enabled to shave regularly.

Clothing and bedding

17. (1) Every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him in good health. Such clothing shall in no manner be degrading or humiliating.

(2) All clothing shall be clean and kept in proper condition. Underclothing shall be changed and washed as often as necessary for the maintenance of hygiene.

(3) In exceptional circumstances, whenever a prisoner is removed outside the institution for an authorized purpose, he shall be allowed to wear his own clothing or other inconspicuous clothing.

18. If prisoners are allowed to wear their own clothing, arrangements shall be made on their admission to the institution to ensure that it shall be clean and fit for use.

19. Every prisoner shall, in accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness.

Food

20. (1) Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.

(2) Drinking water shall be available to every prisoner whenever he needs it.

Exercise and sport

21. (1) Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.

(2) Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided.

Medical services

22. (1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.

(2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.

(3) The services of a qualified dental officer shall be available to every prisoner.

23. (1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.

(2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.

24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.

25. (1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.

(2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.

26. (1) The medical officer shall regularly inspect and advise the director upon:

(a) The quantity, quality, preparation and service of food;

(b) The hygiene and cleanliness of the institution and the prisoners;

(c) The sanitation, heating, lighting and ventilation of the institution;

(d) The suitability and cleanliness of the prisoners' clothing and bedding;

(e) The observance of the rules concerning physical education and sports, in cases where there is no technical personnel in charge of these activities.

(2) The director shall take into consideration the reports and advice that the medical officer submits according to rules 25 (2) and 26 and, in case he concurs with the recommendations made, shall take immediate steps to give effect to those recommendations; if they are not within his competence or if he does not concur with them, he shall immediately submit his own report and the advice of the medical officer to higher authority.

Discipline and punishment

27. Discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life.

28. (1) No prisoner shall be employed, in the service of the institution, in any disciplinary capacity.

(2) This rule shall not, however, impede the proper functioning of systems based on self-government, under which specified social, educational or sports activities or responsibilities are entrusted, under supervision, to prisoners who are formed into groups for the purposes of treatment.

29. The following shall always be determined by the law or by the regulation of the competent administrative authority:

(a) Conduct constituting a disciplinary offence;

(b) The types and duration of punishment which may be inflicted;

(c) The authority competent to impose such punishment.

30. (1) No prisoner shall be punished except in accordance with the terms of such law or regulation, and never twice for the same offence.

(2) No prisoner shall be punished unless he has been informed of the offence alleged against him and given a proper opportunity of presenting his defence. The competent authority shall conduct a thorough examination of the case.

(3) Where necessary and practicable the prisoner shall be allowed to make his defence through an interpreter.

31. 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.

32. (1) Punishment by close confinement or reduction of diet shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it.

(2) The same shall apply to any other punishment that may be prejudicial to the physical or mental health of a prisoner. In no case may such punishment be contrary to or depart from the principle stated in rule 31.

(3) The medical officer shall visit daily prisoners undergoing such punishments and shall advise the director if he considers the termination or alteration of the punishment necessary on grounds of physical or mental health.

Instruments of restraint

33. Instruments of restraint, such as handcuffs, chains, irons and strait-jackets, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:

(a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority;

(b) On medical grounds by direction of the medical officer;

(c) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.

34. The patterns and manner of use of instruments of restraint shall be decided by the central prison administration. Such instruments must not be applied for any longer time than is strictly necessary.

Information to and complaints by prisoners

35. (1) Every prisoner on admission shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution.

(2) If a prisoner is illiterate, the aforesaid information shall be conveyed to him orally.

36. (1) Every prisoner shall have the opportunity each week day of making requests or complaints to the director of the institution or the officer authorized to represent him.

(2) It shall be possible to make requests or complaints to the inspector of prisons during his inspection. The prisoner shall have the opportunity to talk to the inspector or to any other inspecting officer without the director or other members of the staff being present.

(3) Every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, the judicial authority or other proper authorities through approved channels.

(4) Unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay.

Contact with the outside world

37. Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.

38. (1) Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.

(2) Prisoners who are nationals of States without diplomatic or consular representation in the country and refugees or stateless persons shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.

39. Prisoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications, by hearing wireless transmissions, by lectures or by any similar means as authorized or controlled by the administration.

Books

40. Every institution shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make full use of it.

Religion

41. (1) If the institution contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. If the number of prisoners justifies it and conditions permit, the arrangement should be on a full-time basis.

(2) A qualified representative appointed or approved under paragraph (1) shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his religion at proper times.

(3) Access to a qualified representative of any religion shall not be refused to any prisoner. On the other hand, if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected.

42. So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination.

Retention of prisoners' property

43. (1) All money, valuables, clothing and other effects belonging to a prisoner which under the regulations of the institution he is not allowed to retain shall on his admission to the institution be placed in safe custody. An inventory thereof shall be signed by the prisoner. Steps shall be taken to keep them in good condition.

(2) On the release of the prisoner all such articles and money shall be returned to him except in so far as he has been authorized to spend money or send any such property out of the institution, or it has been found necessary on hygienic grounds to destroy any article of clothing. The prisoner shall sign a receipt for the articles and money returned to him.

(3) Any money or effects received for a prisoner from outside shall be treated in the same way.

(4) If a prisoner brings in any drugs or medicine, the medical officer shall decide what use shall be made of them.

Notification of death, illness, transfer, etc.

44. (1) Upon the death or serious illness of, or serious injury to a prisoner, or his removal to an institution for the treatment of mental affections, the director shall at once inform the spouse, if the prisoner is married, or the nearest relative and shall in any event inform any other person previously designated by the prisoner.

(2) A prisoner shall be informed at once of the death or serious illness of any near relative. In case of the critical illness of a near relative, the prisoner should be authorized, whenever circumstances allow, to go to his bedside either under escort or alone.

(3) Every prisoner shall have the right to inform at once his family of his imprisonment or his transfer to another institution.

Removal of prisoners

45. (1) When the prisoners are being removed to or from an institution, they shall be exposed to public view as little as possible, and proper safeguards shall be adopted to protect them from insult, curiosity and publicity in any form.

(2) The transport of prisoners in conveyances with inadequate ventilation or light, or in any way which would subject them to unnecessary physical hardship, shall be prohibited.

(3) The transport of prisoners shall be carried out at the expense of the administration and equal conditions shall obtain for all of them.

Institutional personnel

46. (1) The prison administration shall provide for the careful selection of every grade of the personnel, since it is on their integrity, humanity, professional capacity and personal suitability for the work that the proper administration of the institutions depends.

(2) The prison administration shall constantly seek to awaken and maintain in the minds both of the personnel and of the public the conviction that this work is a social service of great importance, and to this end all appropriate means of informing the public should be used.

(3) To secure the foregoing ends, personnel shall be appointed on a full-time basis as professional prison officers and have civil service status with security of tenure subject only to good conduct, efficiency and physical fitness. Salaries shall be adequate to attract and retain suitable men and women; employment benefits and conditions of service shall be favourable in view of the exacting nature of the work.

47. (1) The personnel shall possess an adequate standard of education and intelligence.

(2) Before entering on duty, the personnel shall be given a course of training in their general and specific duties and be required to pass theoretical and practical tests.

(3) After entering on duty and during their career, the personnel shall maintain and improve their knowledge and professional capacity by attending courses of in-service training to be organized at suitable intervals.

48. All members of the personnel shall at all times so conduct themselves and perform their duties as to influence the prisoners for good by their example and to command their respect.

49. (1) So far as possible, the personnel shall include a sufficient number of specialists such as psychiatrists, psychologists, social workers, teachers and trade instructors.

(2) The services of social workers, teachers and trade instructors shall be secured on a permanent basis, without thereby excluding part-time or voluntary workers.

50. (1) The director of an institution should be adequately qualified for his task by character, administrative ability, suitable training and experience.

(2) He shall devote his entire time to his official duties and shall not be appointed on a part-time basis.

(3) He shall reside on the premises of the institution or in its immediate vicinity.

(4) When two or more institutions are under the authority of one director, he shall visit each of them at frequent intervals. A responsible resident official shall be in charge of each of these institutions.

51. (1) The director, his deputy, and the majority of the other personnel of the institution shall be able to speak the language of the greatest number of prisoners, or a language understood by the greatest number of them.

(2) Whenever necessary, the services of an interpreter shall be used.

52. (1) In institutions which are large enough to require the services of one or more full-time medical officers, at least one of them shall reside on the premises of the institution or in its immediate vicinity.

(2) In other institutions the medical officer shall visit daily and shall reside near enough to be able to attend without delay in cases of urgency.

53. (1) In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution.

(2) No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer.

(3) Women prisoners shall be attended and supervised only by women officers. This does not, however, preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women.

54. (1) Officers of the institutions shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Officers who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution.

(2) Prison officers shall be given special physical training to enable them to restrain aggressive prisoners.

(3) Except in special circumstances, staff performing duties which bring them into direct contact with prisoners should not be armed. Furthermore, staff should in no circumstances be provided with arms unless they have been trained in their use.

Inspection

55. There shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be in particular to ensure that these institutions are administered in accordance with existing laws and regulations and with a view to bringing about the objectives of penal and correctional services.

Part II

RULES APPLICABLE TO SPECIAL CATEGORIES

A. Prisoners under sentence

Guiding principles

56. The guiding principles hereafter are intended to show the spirit in which penal institutions should be administered and the purposes at which they should aim, in accordance with the declaration made under Preliminary Observation 1 of the present text.

57. Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.

58. The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.

59. To this end, the institution should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners.

60. (1) The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.

(2) Before the completion of the sentence, it is desirable that the necessary steps be taken to ensure for the prisoner a gradual return to life in society. This aim may be achieved, depending on the case, by a pre-release regime organized in the same institution or in another appropriate institution, or by release on trial under some kind of supervision which must not be entrusted to the police but should be combined with effective social aid.

61. The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners. There should be in connection with every institution social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his family and with valuable social agencies. Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners.

62. The medical services of the institution shall seek to detect and shall treat any physical or mental illnesses or defects which may hamper a prisoner's rehabilitation. All necessary medical, surgical and psychiatric services shall be provided to that end.

63. (1) The fulfilment of these principles requires individualization of treatment and for this purpose a flexible system of classifying prisoners in groups; it is therefore desirable that such groups should be distributed in separate institutions suitable for the treatment of each group.

(2) These institutions need not provide the same degree of security for every group. It is desirable to provide varying degrees of security according to the needs of different groups. Open institutions, by the very fact that they provide no physical security against escape but rely on the self-discipline of the inmates, provide the conditions most favourable to rehabilitation for carefully selected prisoners.

(3) It is desirable that the number of prisoners in closed institutions should not be so large that the individualization of treatment is hindered. In some countries it is considered that the population of such institutions should not exceed five hundred. In open institutions the population should be as small as possible.

(4) On the other hand, it is undesirable to maintain prisons which are so small that proper facilities cannot be provided.

64. The duty of society does not end with a prisoner's release. There should, therefore, be governmental or private agencies capable of lending the released prisoner efficient after-care directed towards the lessening of prejudice against him and towards his social rehabilitation.

Treatment

65. The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility.

66. (1) To these ends, all appropriate means shall be used, including religious care in the countries where this is possible, education, vocational guidance and training, social casework, employment counselling, physical development and strengthening of moral character, in accordance with the individual needs of each prisoner, taking account of his social and criminal history, his physical and mental capacities and aptitudes, his personal temperament, the length of his sentence and his prospects after release.

(2) For every prisoner with a sentence of suitable length, the director shall receive, as soon as possible after his admission, full reports on all the matters referred to in the foregoing paragraph. Such reports shall always include a report by a medical officer, wherever possible qualified in psychiatry, on the physical and mental condition of the prisoner.

(3) The reports and other relevant documents shall be placed in an individual file. This file shall be kept up to date and classified in such a way that it can be consulted by the responsible personnel whenever the need arises.

Classification and individualization

67. The purposes of classification shall be:

(a) To separate from others those prisoners who, by reason of their criminal records or bad characters, are likely to exercise a bad influence;

(b) To divide the prisoners into classes in order to facilitate their treatment with a view to their social rehabilitation.

68. So far as possible separate institutions or separate sections of an institution shall be used for the treatment of the different classes of prisoners.

69. As soon as possible after admission and after a study of the personality of each prisoner with a sentence of suitable length, a programme of treatment shall be prepared for him in the light of the knowledge obtained about his individual needs, his capacities and dispositions.

Privileges

70. Systems of privileges appropriate for the different classes of prisoners and the different methods of treatment shall be established at every institution, in order to encourage good conduct, develop a sense of responsibility and secure the interest and co-operation of the prisoners in their treatment.

Work

71. (1) Prison labour must not be of an afflictive nature.

(2) All prisoners under sentence shall be required to work, subject to their physical and mental fitness as determined by the medical officer.

(3) Sufficient work of a useful nature shall be provided to keep prisoners actively employed for a normal working day.

(4) So far as possible the work provided shall be such as will maintain or increase the prisoners, ability to earn an honest living after release.

(5) Vocational training in useful trades shall be provided for prisoners able to profit thereby and especially for young prisoners.

(6) Within the limits compatible with proper vocational selection and with the requirements of institutional administration and discipline, the prisoners shall be able to choose the type of work they wish to perform.

72. (1) The organization and methods of work in the institutions shall resemble as closely as possible those of similar work outside institutions, so as to prepare prisoners for the conditions of normal occupational life.

(2) The interests of the prisoners and of their vocational training, however, must not be subordinated to the purpose of making a financial profit from an industry in the institution.

73. (1) Preferably institutional industries and farms should be operated directly by the administration and not by private contractors.

(2) Where prisoners are employed in work not controlled by the administration, they shall always be under the supervision of the institution's personnel. Unless the work is for other departments of the government the full normal wages for such work shall be paid to the administration by the persons to whom the labour is supplied, account being taken of the output of the prisoners.

74. (1) The precautions laid down to protect the safety and health of free workmen shall be equally observed in institutions.

(2) Provision shall be made to indemnify prisoners against industrial injury, including occupational disease, on terms not less favourable than those extended by law to free workmen.

75. (1) The maximum daily and weekly working hours of the prisoners shall be fixed by law or by administrative regulation, taking into account local rules or custom in regard to the employment of free workmen.

(2) The hours so fixed shall leave one rest day a week and sufficient time for education and other activities required as part of the treatment and rehabilitation of the prisoners.

76. (1) There shall be a system of equitable remuneration of the work of prisoners.

(2) Under the system prisoners shall be allowed to spend at least a part of their earnings on approved articles for their own use and to send a part of their earnings to their family.

(3) The system should also provide that a part of the earnings should be set aside by the administration so as to constitute a savings fund to be handed over to the prisoner on his release.

Education and recreation

77. (1) Provision shall be made for the further education of all prisoners capable of profiting thereby, including religious instruction in the countries where this is possible. The education of illiterates and young prisoners shall be compulsory and special attention shall be paid to it by the administration.

(2) So far as practicable, the education of prisoners shall be integrated with the educational system of the country so that after their release they may continue their education without difficulty.

78. Recreational and cultural activities shall be provided in all institutions for the benefit of the mental and physical health of prisoners.

Social relations and after-care

79. Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his family as are desirable in the best interests of both.

80. From the beginning of a prisoner's sentence consideration shall be given to his future after release and he shall be encouraged and assisted to maintain or establish such relations with persons or agencies outside the institution as may promote the best interests of his family and his own social rehabilitation.

81. (1) Services and agencies, governmental or otherwise, which assist released prisoners to re-establish themselves in society shall ensure, so far as is possible and necessary, that released prisoners be provided with appropriate documents and identification papers, have suitable homes and work to go to, are suitably and adequately clothed having regard to the climate and season, and have sufficient means to reach their destination and maintain themselves in the period immediately following their release.

(2) The approved representatives of such agencies shall have all necessary access to the institution and to prisoners and shall be taken into consultation as to the future of a prisoner from the beginning of his sentence.

(3) It is desirable that the activities of such agencies shall be centralized or co-ordinated as far as possible in order to secure the best use of their efforts.

B. Insane and mentally abnormal prisoners

82. (1) Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible.

(2) Prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialized institutions under medical management.

(3) During their stay in a prison, such prisoners shall be placed under the special supervision of a medical officer.

(4) The medical or psychiatric service of the penal institutions shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment.

83. It is desirable that steps should be taken, by arrangement with the appropriate agencies, to ensure if necessary the continuation of psychiatric treatment after release and the provision of social-psychiatric after-care.

C. Prisoners under arrest or awaiting trial

84. (1) Persons arrested or imprisoned by reason of a criminal charge against them, who are detained either in police custody or in prison custody (jail) but have not yet been tried and sentenced, will be referred to as "untried prisoners" hereinafter in these rules.

(2) Unconvicted prisoners are presumed to be innocent and shall be treated as such.

(3) Without prejudice to legal rules for the protection of individual liberty or prescribing the procedure to be observed in respect of untried prisoners, these prisoners shall benefit by a special regime which is described in the following rules in its essential requirements only.

85. (1) Untried prisoners shall be kept separate from convicted prisoners.

(2) Young untried prisoners shall be kept separate from adults and shall in principle be detained in separate institutions.

86. Untried prisoners shall sleep singly in separate rooms, with the reservation of different local custom in respect of the climate.

87. Within the limits compatible with the good order of the institution, untried prisoners may, if they so desire, have their food procured at their own expense from the outside, either through the administration or through their family or friends. Otherwise, the administration shall provide their food.

88. (1) An untried prisoner shall be allowed to wear his own clothing if it is clean and suitable.

(2) If he wears prison dress, it shall be different from that supplied to convicted prisoners.

89. An untried prisoner shall always be offered opportunity to work, but shall not be required to work. If he chooses to work, he shall be paid for it.

90. An untried prisoner shall be allowed to procure at his own expense or at the expense of a third party such books, newspapers, writing materials and other means of occupation as are compatible with the interests of the administration of justice and the security and good order of the institution.

91. An untried prisoner shall be allowed to be visited and treated by his own doctor or dentist if there is reasonable ground for his application and he is able to pay any expenses incurred.

92. An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.

93. For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.

D. Civil prisoners

94. In countries where the law permits imprisonment for debt, or by order of a court under any other non-criminal process, persons so imprisoned shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order. Their treatment shall be not less favourable than that of untried prisoners, with the reservation, however, that they may possibly be required to work.

E. Persons arrested or detained without charge

95. Without prejudice to the provisions of article 9 of the International Covenant on Civil and Political Rights, persons arrested or imprisoned without charge shall be accorded the same protection as that accorded under part I and part II, section C. Relevant provisions of part II, section A, shall likewise be applicable where their application may be conducive to the benefit of this special group of persons in custody, provided that no measures shall be taken implying that re-education or rehabilitation is in any way appropriate to persons not convicted of any criminal offence.

ANNEX R

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43/173. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

The General Assembly,

Recalling its resolution 35/177 of 15 December 1980, in which it referred the task of elaborating the draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment to the Sixth Committee and decided to establish an open-ended working group for that purpose,

Taking note of the report of the Working Group on the Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which met during the forty-third session of the General Assembly and completed the elaboration of the draft Body of Principles,

Considering that the Working Group decided to submit the text of the draft Body of Principles to the Sixth Committee for its consideration and adoption,

Convinced that the adoption of the draft Body of Principles would make an important contribution to the protection of human rights,

Considering the need to ensure the wide dissemination of the text of the Body of Principles,

1. Approves the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the text of which is annexed to the present resolution;

2. Expresses its appreciation to the Working Group on the Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment for its important contribution to the elaboration of the Body of Principles;

3. Requests the Secretary-General to inform the States Members of the United Nations or members of specialized agencies of the adoption of the Body of Principles;

4. Urges that every effort be made so that the Body of Principles becomes generally known and respected.

ANNEX

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

Scope of the Body of Principles

These principles apply for the protection of all persons under any form of detention or imprisonment.

Use of terms

For the purposes of the Body of Principles:

(a) "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;

(b) "Detained person" means any person deprived of personal liberty except as a result of conviction for an offence;

(c) "Imprisoned person" means any person deprived of personal liberty as a result of conviction for an offence;

(d) "Detention" means the condition of detained persons as defined above;

(e) "Imprisonment" means the condition of imprisoned persons as defined above;

(f) The words "a judicial or other authority" mean a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 2

Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

Principle 3

There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

Principle 4

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

Principle 5

1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

2. Measures applied under the law and designed solely to protect the rights

and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.* No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

* The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

Principle 7

1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.

2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.

3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

Principle 8

Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.

Principle 9

The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

Principle 10

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

Principle 11

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Principle 12

1. There shall be duly recorded:

(a) The reasons for the arrest;

(b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;

(c) The identity of the law enforcement officials concerned;

(d) Precise information concerning the place of custody.

2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

Principle 13

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights.

Principle 14

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

Principle 15

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 16

1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

3. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.

4. Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.

Principle 17

1. A detained person shall be entitled to have the assistance of a legal

counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it. 11316

2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

Principle 18

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

Principle 19

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

Principle 20

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

Principle 21

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.

Principle 22

No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health.

Principle 23

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.

2. A detained or imprisoned person, or his counsel when provided by law,

shall have access to the information described in paragraph 1 of the present principle.

Principle 24

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

Principle 25

A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

Principle 26

The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefor shall be in accordance with relevant rules of domestic law.

Principle 27

Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.

Principle 28

A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.

Principle 29

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.

2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph l of the present principle, subject to reasonable conditions to ensure security and good order in such places.

Principle 30

1. The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.

2. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.

Principle 31

The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left without supervision.

Principle 32

1. A detained person or his counsel shall be entitled at any time to take

proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful. 11318

2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

Principle 33

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.

4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

Principle 34

Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

Principle 35

1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules on liability provided by domestic law.

2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

Principle 36

1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on

grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden. 11319

Principle 37

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.

Principle 38

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

Principle 39

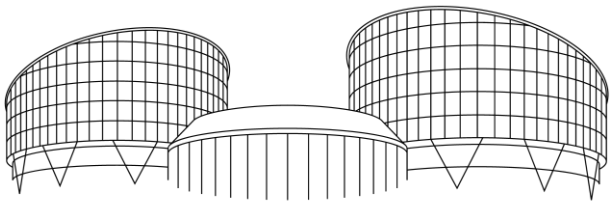
Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

General clause

Nothing in this Body of Principles shall be construed as restricting or derogating from any right defined in the International Covenant on Civil and Political Rights.

ANNEX S

The authority exceeds 30 pages



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

FIRST SECTION

CASE OF KHODORKOVSKIY AND LEBEDEV v. RUSSIA

(Applications nos. 11082/06 and 13772/05)

JUDGMENT

STRASBOURG

25 July 2013

FINAL

25/10/2013

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

(c) money transfers to Mr Gusinskiy's companies (the Most Bank episode imputed to the first applicant, see Section 2 (i) above, §§ 115).

319. As to the pecuniary claims forwarded against the applicants, the City Court held that the amounts of non-paid taxes cannot be recovered from the sham companies; therefore, they should be recovered from the applicants personally, since they were the *de facto* organisers and beneficiaries of the tax evasion scheme. The judgment of the City Court in this part did not refer to any provisions of the law.

320. Finally, the City Court changed the legal classification of certain episodes with which the applicants had been charged. As a result, the overall sentence was reduced to eight years' imprisonment for each applicant. A reasoned decision was delivered by the court of appeal some time later.

E. Serving of the sentences by the applicants

1. Placement of the first applicant in FGU IK-10

321. On 9 October 2005 the first applicant was transferred from the remand prison.

322. On 15 October 2005 the first applicant arrived at penal colony *FGU IK-10*, located in the town of Krasnokamensk, Chita Region. On 20 October 2005 the first applicant's wife was notified of that by post.

323. The distance between Moscow and Chita is about 6,320 km by motorway. According to the Government, *FGU IK-10* is located about 580 km from the city of Chita. There is a railway line between Chita and Krasnokamensk; the trains have "sleeping wagons" (first-class compartments for two persons) with Internet connection and a dining car. The "transport infrastructure" within Krasnokamensk allowed the visitors to reach the territory of the penal colony.

324. According to the first applicant, penal colony *FGU IK-10* in Krasnokamensk was not quite the furthest penal colony from Moscow but it was the least accessible, because direct flights were available to the colonies further from Moscow. To reach Krasnokamensk from Moscow involved a minimum of two days. It was a long and strenuous journey, made even more difficult by the infrequency of flights from Moscow to Chita. A flight from Moscow to Chita took approximately six and a half hours (occasionally more, when the aircraft had to refuel in Yekaterinburg). On arrival in Chita, there was a seven-hour wait before boarding a train for Krasnokamensk, which took another fifteen hours to arrive. Alternatively, the visitors had the choice of a train ride from Moscow, 106 hours on an uninterrupted run. This made it very arduous for the first applicant's lawyers and family to gain access to him, and inevitably some of them were not seeing the first applicant as much as they otherwise would. The first applicant's lawyers described the journey as "very exhausting and debilitating". Mr Mkrtychev, a lawyer who undertook the journey from Moscow to Krasnokamensk on eight occasions, testified that he had never seen any "sleeping wagons" or a dining car on the trains on which he had travelled. Internet and mobile

phone reception were also impossible, contrary to what the Government had maintained. The first applicant further maintained that Krasnokamensk itself was subject to huge extremes in climate. According to Mr Mkrtychev, during his first journey there in October 2005 the temperature was approximately minus ten degrees Celsius, with a freezing and almost unbearable wind. On one of his later visits the temperature dropped to 41 degrees below freezing point. The short summer was equally oppressive, with blistering heat and swarms of mosquitoes.

325. On 25 October 2005 the first applicant's wife visited him in the colony. She was entitled to a "long family visit" and stayed with the first applicant until 28 October 2005.

326. The decision to send the first applicant to the Krasnokamensk colony was taken by the Federal Service of Execution of Sentences – FSIN. On 9 January 2006 the defence lodged a complaint challenging that decision. They claimed that the decision was unlawful and arbitrary. In addition, the first applicant's lawyers pointed out that the second applicant had also been sent to a very remote region of the Russian Federation, in apparent disregard of the provisions of Russian law.

327. At the hearing the representatives of the FSIN argued that there had not been enough places in the penitentiary facilities in Central Russia, and that a decision had been taken that five convicts should be sent from Moscow to various regions of Russia. There was no requirement in the law to consider the individual circumstances of each convict; as a result, the first applicant was among the five detainees who had been sent to the Chita Region.

328. The first applicant in the proceedings referred in particular to the figure mentioned in an interview by the then Minister of Justice Mr Chayka, who said that in September 2005 the admission capacity of Russian colonies was 786,753 places, whereas only 637,079 convicts were detained there. In another interview by Mr Kalinin, the then director of the FSIN, acknowledged that there had been free places in some of the colonies.

329. On 6 April 2006 the Zamoskvoretskiy District Court of Moscow dismissed the first applicant's claim and, referring to Article 73 § 2 of the Code on the Execution of Sentences, upheld the FSIN's decision as lawful and justified. The District Court found that under Article 73 of the Code of Execution of Criminal Sentences a convicted person had the right to serve his sentence in the region where he was convicted or where he had lived before. However, if in that prison there were no places vacant, the detainee could be sent to serve his sentence in the nearest region where it was possible to accommodate him. The District Court referred to a decision of FSIN which defined which colonies must accept convicts from Moscow and in what proportions. According to the District Court, that decision was taken within the competence of FSIN, and did not violate the law. The District Court also held that if the first applicant was placed in a nearer colony the rights of other prisoners might have been violated. The court ruled that information contained in the interviews of Mr Chayka and Mr Kalinin on the number of places vacant in the Russian colonies was

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties' submissions

1. The Government's submissions

823. The Government maintained that there had been no interference with the applicants' rights under Article 8 of the Convention. The Government emphasised that any limitation of the applicants' rights under Article 8 was related to their criminal conviction and was inherent in the very concept of criminal punishment. The Government described the geographical position of the Krasnokamensk colony (where the first applicant had been sent) and the Kharp colony (where the second applicant had been sent) and transport routes linking them to Moscow, where the applicants' families lived. They concluded that there had been no interference with the applicants' private lives on account of their placement in those particular penal colonies.

824. Further, the colonies where the applicants were serving their sentences had special facilities for long-term family visits. Those facilities were furnished and equipped with household appliances. The applicants could have had six short-term and four long-term family visits per year. Furthermore, they were entitled to obtain additional family visits as a reward for exemplary behaviour. The relatives were informed about the time of the visits in advance. The administration of the penal colonies had never refused the applicants or their relatives the right to a visit.

825. In any event, even if there had been an interference with the applicants' rights under Article 8, it was in accordance with paragraph 2 of this Convention provision. Thus, the Government insisted that the measure complained of was lawful. Under Article 73 of the CES a convict was entitled to serve his prison sentence in the same federal constituency where he was convicted (in the applicants' case, Moscow). However, where this is impossible, the convict was sent to serve his sentence in a penal colony situated in the next closest federal constituency. Several regions of Russia (Moscow, St Petersburg and some republics of the Northern Caucasus) have no general-regime penal colonies. In order to avoid prison overcrowding and comply with the requirements of Article 3 of the Convention, as interpreted in the Court's case-law in respect to prison conditions in Russia, convicts from those regions were sent to colonies situated in other regions. For example, convicts from Moscow often served their sentences even further from Moscow than the town of Krasnokamensk, where the first applicant had been sent. According to the Government, Article 73 of the CES "was complied with in the majority of the federal constituencies of the Russian Federation". In many regions new penal colonies were being built. The applicants were treated in this respect

in the same manner as any other convict in a similar situation. There were no grounds for giving the applicants preferential treatment because of their family or financial situation. They were sent to serve their sentences in such distant locations because there was no place for them in other regions of Russia.

826. The Government further maintained that it had been necessary to guarantee the security of the applicants themselves. The Government considered that since the applicants' case had been widely publicised, it had been important to protect them from "unauthorised contacts with journalists, ill-disposed private individuals, in particular those who had suffered as a result of [the applicant's crimes]..., from unauthorised rallies and picketing". Furthermore, the Government noted that the applicants' cellmates could have learned that they had money in foreign banks. That could have put the applicants in danger. In the Government's words, the detainees in the Yamalo-Nenetskiy Autonomous region and in the Chita region were less informed about the details of the applicants' case than those in Central Russia. Therefore, the applicants were more secure where they were.

827. Finally, the Government indicated that if, by derogation from the general rule, the applicants had obtained places in a prison closer to Moscow that would also have disposed their cellmates against them and could have put them in danger.

2. The applicants' submissions

828. In the applicants' words, the location of the penal colony in which they had to serve their sentences was of direct relevance to their rights under Article 8. It was inevitable that serving their sentences in such remote places had interfered with their family life to a greater degree than if they had been sent to a penal colony nearer to Moscow.

829. The applicants described the hardships related to travelling from Moscow to Krasnokamensk and Kharp. In support, the first applicant cited an article written by a group of journalists who had accompanied his relatives on their trip to the penal colony and testimony by his lawyers. As a direct consequence of his transfer to Krasnokamensk, his family had only been able to make use of the "short" visits on one occasion since 2005. Of course, had the applicant been serving his sentence closer to his family, he would have been able to make far greater use of the facility for short visits. On account of the exhausting and demanding nature of the journey, his young twin sons were unable to visit him in Krasnokamensk at all. The children were able to visit the first applicant whilst he was detained in Moscow. The first applicant's elderly father had been able to visit him only once. The fact that the first applicant's family did not use up his full allowance of visits – he had five long visits and only one short visit over 14 months at *IK-10* penal colony – clearly suggested that the enormous distance prevented visits taking place.

830. The second applicant also described the hardships associated with travelling from Moscow to the Kharp colony. In his words, they totally precluded his family – his wife and two daughters, who at the relevant time were two and four years old – from visiting him in the colony because of

Federation in apparent disregard of the provisions of the law. The fact that both men had been sent thousands of miles from Moscow was strongly suggestive of improper motives on the part of the State authorities.

B. The Court's assessment

1. Whether there was an interference with the applicants' Article 8 rights

835. The parties disagreed as to whether the fact of serving a sentence in a particular penal colony amounts to an "interference" with one's private life. The Court reiterates in this respect that any detention which is lawful for the purposes of Article 5 of the Convention (and there is no doubt that the applicants' detention following their conviction complied with Article 5 § 1 (a) of the Convention) entails by its nature various limitations on private and family life (see *Silver and Others v. the United Kingdom,* 25 March 1983, § 98, Series A, no. 161). It would be fundamentally wrong to analyse each and every case of detention following conviction from the standpoint of Article 8, and to consider the "lawfulness" and "proportionality" of the prison sentence as such.

836. Thus, as a starting point, the Court accepts that the authorities had a wide discretion in matters related to execution of sentences. However, the Convention cannot stop at the prison gate (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 70, ECHR 2005-IX), and there is no question that a prisoner forfeits all of his Article 8 rights merely because of his status as a person detained following conviction (see *Ploski v. Poland,* no. 26761/95, 12 November 2002). The Court will not turn a blind eye to such limitations which go beyond what would normally be accepted in the case of an ordinary detainee. Thus, for example, it is an essential part of a prisoner's right to respect for family life that the prison authorities assist him in maintaining contact with his close family (see *Messina v. Italy (no. 2)*, no. 25498/94, § 61, ECHR 2000-X). Limitations on contacts with other prisoners and with family members, imposed by prison rules, have been regarded by the Court as an "interference" with the rights protected by Article 8 of the Convention (see *Van der Ven v. the Netherlands*, no. 50901/99, § 69, ECHR 2003-II).

837. Thus, placing a convict in a particular prison may potentially raise an issue under Article 8 if its effects for the applicant's private and family life go beyond "normal" hardships and restrictions inherent to the very concept of imprisonment. As the Commission already observed in *Wakefield v. the United Kingdom* (no. 15817/89, decision of 1 October 1990, DR 66, p. 251): "Article 8 requires the State to assist prisoners as far as possible to create and sustain ties with people outside prison in order to promote prisoners' social rehabilitation. In this context the location of the place where a prisoner is detained is relevant". Furthermore, the right to respect for family life imposes upon states a positive obligation to assist prisoners in maintaining effective contact with their close family members (see *X. v. the United Kingdom,* no. 9054/80, Commission decision of 8 October 1982, DR 30, p. 115). In the context of imprisonment the Commission recognised that the possibility for close family members to

visit a detainee constitutes an essential factor in the maintenance of family life (see *Hacisuleymanoglou v. Italy* no. 23241/94, decision of 20 October 1994, DR no. 79-B, p. 121).

838. The Court reiterates that in the *Wakefield* case the Commission considered that the refusal to allow the applicant a permanent transfer from Yorkshire to Scotland to be near his fiancée had constituted an interference with the applicant's right to respect for private life. In the present case the distances involved were much longer than those in *Wakefield*. Given the geographical situation of the colonies concerned, and the realities of the Russian transport system the Court has no difficulty in accepting that a trip from Moscow to the Krasnokamensk colony or the Kharp colony was a long and exhaustive endeavour, especially for the applicants' young children. Indeed, it was not the applicants themselves but the members of their respective families who suffered from the remoteness of the colonies. Still, the applicants were affected by this measure, albeit indirectly, because they probably received fewer visits than they would have received had they been located closer to Moscow. In sum, the Court finds that this measure constituted an interference with the applicants' Article 8 rights to privacy and family life.

2. Whether the interference was justified under Article 8 § 2

839. The Court now will turn to the justification for the interference. The Court reiterates that under Article 8 § 2 an interference with family and private life is justified if it is "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

(a) Whether the interference was "lawful"

840. Russian law stipulates that, as a matter of principle, a detainee should serve his sentence in the place where he was convicted. Exemption from this rule is possible if there is no physical place available in the local penitentiary institutions; in this case a detainee must be sent to serve his sentence to the nearest region, or, if there is no place there, to the next nearest region (Article 73 of the CES – see paragraph 454 above).

841. The applicants claimed that Article 73 of the CES had not been complied with in their cases. The Court recalls, however, that the principle of subsidiarity dictates that the Court will not overrule interpretations of the domestic law given by the domestic courts, except in specific circumstances (see *Malone v. the United Kingdom*, 2 August 1984, § 79, Series A no. 82; *Kruslin*, cited above, § 29; and *Huvig v. France,* 24 April 1990, § 28, Series A no. 176-B). The Court retains only residual control in this sphere.

842. The Court notes that the Russian courts did not find any breach of the domestic law in the applicants' cases. They considered that the decision taken by the FSIN (the penitentiary service) establishing quotas for distributing the convicts between different colonies constituted a sufficient lawful basis for the applicants' transferral to Krasnokamensk and Kharp

(see paragraphs 329 and 349 above). The Court is aware that the FSIN was the main regulatory body in the penitentiary system and, as such, was competent to decide matters related to transferrals of detainees. In such circumstances, the Court does not consider it necessary to review the findings of the Russian courts as to the lawfulness of the measure complained of. The Court is prepared to accept, for the purposes of the present case, that the interference with the applicants' family and private lives was compatible with the domestic legal provisions.

(b) Whether the interference pursued a "legitimate aim"

843. The next question is whether that interference pursued one or several "legitimate aims". Before the Court the Government argued that sending the applicants to the two remote colonies pursued three aims: (a) preventing "unauthorised contacts with journalists", and preventing "unauthorised rallies and picketing", (b) protecting the applicants from other convicts or persons who might wish to take vengeance on them, (c) avoiding overcrowding in the prisons located in Moscow.

844. As to the first aim, the Government did not explain how it was related to any of the "legitimate aims" expressly mentioned in Article 8 § 2 of the Convention. If there was a connection, it was very remote. In any event, that ground for the transferral of a detainee was not mentioned in the domestic law, and was not discussed in the domestic proceedings. It is an *ex post facto* justification which was absent from the domestic decision-making process at all levels, both legislative and judicial.

845. By contrast, the second and third aims mentioned by the Government appear to be genuine. Thus, the Russian law provided for transferral of a detainee from one colony to another when his own safety required it. Furthermore, it is evident that the exception to the "geographical rule" applied to the applicants was aimed at combating prison overcrowding in certain regions. Those aims (guaranteeing safety of the convict and avoiding general overcrowding) are, in the opinion of the Court, "legitimate" under Article 8 § 2 of the Convention since they contribute to preventing "disorder and crime" and securing the "rights and freedoms" of others. It remains to be established whether the measure complained of was proportionate to those aims.

(c) Whether the interference was proportionate to the legitimate aims

846. The Government claimed that the applicants' transferral to Krasnokamensk and Kharp had been necessary in order to guarantee their own safety. However, the authorities did not refer to that ground in the domestic proceedings, and the courts consequently did not consider whether the applicants were exposed to any security risks. Furthermore, the Court cannot accept the general assumption that inmates in the Kharp or Krasnokamensk colonies were less dangerous for the applicants since these other inmates did not know who the applicants were: the applicants' trial was the most mediatised trial of the recent decade and the first applicant's wealth was well-known from many sources open to the general public. Finally, the Government's assertion that unnamed "victims" of the applicants' crimes would try to take vengeance on them did not have any

factual basis - the principal victim of the crimes imputed to the applicants was the State itself. It follows that the measure complained of could not have been justified by the applicants' own safety.

847. The third aim invoked by the Government, namely reducing the number of inmates in the prisons located in Moscow or in the nearby regions, needs special attention. The Court is prepared to accept that given the size of the population in Moscow and the corresponding number of convicts from that city there were no free places for the applicants there. However, the rule set by Article 73 of the Code of Execution of Sentences was relatively clear and simple. It allowed sending a convict to the next closest region, not several thousand kilometres away.

848. The Court accepts that it was difficult to decide individually for every detainee from Moscow or another region affected by prison overcrowding where he or she must serve the sentence. It appears that in order to address that problem the FSIN came up with a general plan establishing quotas for the distribution of convicts amongst penitentiary colonies in different Russian regions ("federal constituencies"). The Government submitted to the Court a copy of that plan. However, the Government did not explain how that plan was prepared, and did not describe a method or algorithm of distribution of convicts used by the FSIN to draw that plan. The plan itself does not contain any information to that effect. It is consequently difficult to say to what extent the plan was compatible with the "geographical rule" set out in Article 73 of the CES.

849. On the facts of the present case it is hardly conceivable that there were no free places in any of the many colonies situated closer to Moscow, and that the only two colonies which had free space were located several thousand kilometres away from the applicants' home. Data referred to by the applicants and not contested by the Government suggested that at the time when the applicants were sent to Siberia and the Far North there were free places in the Russian penitentiary system, including in colonies situated in Central Russia (see paragraphs 328 and 347 above). Over thirty-five regions in Russia are closer to Moscow than the Yamalo-Nenetskiy region, and over fifty-five regions are closer than the Chita region. Therefore, it was likely that the FSIN plan did not adhere strictly to the "geographical rule" fixed in Article 73. This may not have led to a breach of the "geographical rule" in all cases, but it is very likely that that rule was not followed in the applicants' case.

850. The Court is aware of the difficulties involved in the management of the prison system. The Court is also mindful of the situation in Russia, where, historically, penal colonies were built in remote and deserted areas, far away from the densely populated regions of Central Russia. There are other arguments speaking in favour of giving the authorities a large margin of appreciation in this sphere. However, that margin of appreciation is not unlimited. The distribution of the prison population must not remain entirely at the discretion of the administrative bodies, such as FSIN. The interests of the convicts in maintaining at least some family and social ties must somehow be taken into account. The Russian law is based on a similar assumption, as the spirit and the goal of Article 73 of the CES was to preserve the applicants' social and family ties to the place where they

ANNEX T

The authority exceeds 30 pages

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

FIRST SECTION

CASE OF MOISEYEV v. RUSSIA

(Application no. 62936/00)

JUDGMENT

STRASBOURG

9 October 2008

FINAL

06/04/2009

This judgment may be subject to editorial revision.

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

A. Submissions by the parties

244. The applicant pointed out that no family visits had been authorised during the first nine months after his arrest. In subsequent periods visits had been limited in number and time: he had been permitted two visits a month for one hour each. Moreover, he had been separated from his wife or daughter by a glass partition and could talk to them only through an interphone and in the presence of a warden. In addition, owing to the established administrative practice of the Supreme Court, he had not been permitted any family visits from 3 March to 5 September 2000 and from 7 December 2001 to 10 January 2002, while the appeals against his conviction were being examined.

245. The Government submitted that during the pre-trial investigation the investigators had "reasonably restricted" visits by the applicant's relatives, pursuant to section 18 of the Custody Act. In subsequent periods the applicant's relatives had been allowed to visit him on a regular basis.

B. The Court's assessment

246. The Court reiterates that detention, like any other measure depriving a person of his liberty, entails inherent limitations on his private and family life. However, it is an essential part of a detainee's right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family. Such restrictions as limitations imposed on the number of family visits, supervision over those visits and, if so justified by the nature of the offence, subjection of a detainee to a special prison regime or special visit arrangements constitute an interference with his rights under Article 8 but are not, by themselves, in breach of that provision. Nevertheless, any restriction of that kind must be applied "in accordance with the law", must pursue one or more of the legitimate aims listed in paragraph 2 and, in addition, must be justified as being "necessary in a democratic society" (see, among other authorities, *Estrikh v. Latvia*, no. 73819/01, § 166, 18 January 2007; *Kučera v. Slovakia*, no. 48666/99, § 127, ECHR 2007-... (extracts); and *Klamecki v. Poland (no. 2)*, no. 31583/96, § 144, 3 April 2003).

247. It was submitted by the applicant, and not contested by the Government, that during certain periods of his detention he had not been allowed any family visits, that in the remaining period family visits had been limited to two one-hour meetings per month, and that he had always been separated from his family by bars and a glass partition. The Court

finds that these restrictions amounted to an interference with the applicant's right to respect for his family life (see *Messina v. Italy (no. 2)*, no. 25498/94, § 62, ECHR 2000-X). It will now proceed to examine whether each of the above-mentioned restrictions was justified in the present case.

1. Refusal of family visits

248. The applicant was not authorised to receive any family visits from July 1998 to April 1999 and from March to September 2000, and also in December 2001 and January 2002.

249. The Court must first examine whether the refusal of family visits was "in accordance with the law". The interference was based on section 18 of the Custody Act, which provided for the discretionary right of the investigator to authorise up to two family visits per month. The Court is therefore satisfied that the refusal had a basis in domestic law. It reiterates, however, that the expression "in accordance with the law" does not merely require that the impugned measure should have a basis in domestic law but also refers to the quality of the law in question. The law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to resort to the impugned measures. In addition, domestic law must afford a measure of legal protection against arbitrary interference by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law for legal discretion granted to the executive to be expressed in terms of unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, in order to give the individual adequate protection against arbitrary interference (see, for instance, *Lupsa v. Romania*, no. 10337/04, §§ 32 and 34, ECHR 2006-..., and *Al-Nashif v. Bulgaria*, no. 50963/99, § 119, 20 June 2002).

250. The Court notes that the Custody Act was officially published and therefore accessible to detainees. However, it fell short of the requirement of foreseeability because it conferred unfettered discretion on the investigator in the matter of family visits but did not define the circumstances in which a family visit could be refused. The impugned provision went no further than implying the possibility of refusing family visits, without saying anything about the length of the measure or the reasons that could warrant its application. No mention was made of the possibility of challenging a refusal to issue an authorisation or whether a court was competent to rule on such a challenge. It follows that the provisions of Russian law governing family visits did not indicate with reasonable clarity the scope and manner of exercise of the relevant

discretion conferred on the public authorities, so that the applicant did not enjoy the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society (compare *Ostrovar v. Moldova*, no. 35207/03, § 100, 13 September 2005, and *Calogero Diana v. Italy*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, §§ 32-33). In view of the above, the Court considers that the refusal of family visits cannot be regarded as having been "prescribed by law". In the light of this finding, it is not necessary to assess whether the other conditions set out in paragraph 2 of Article 8 have been complied with.

251. There has therefore been a violation of Article 8 on account of refusal of family visits to the applicant during the periods of his detention concerned.

2. Limitation on the frequency and duration of family visits

252. In the remaining period of the applicant's detention he was allowed to have no more than two short family visits per month.

253. The limitation on the frequency and duration of family visits afforded to detainees was introduced by section 18 of the Custody Act and had therefore a lawful basis. The Court accepts that the limitation pursued the legitimate aims of protecting public safety and preventing disorder and crime.

254. As to the necessity of the impugned measure in a democratic society, the Court reiterates that in a series of Italian cases it has already examined a prison regime substantially similar to that to which the applicant was subjected. The regime at issue restricted the number of family visits to not more than two per month and provided for prisoners' separation from visitors by a glass partition. Taking into account the specific nature of the phenomenon of Mafia-type organised crime, in which family relations often play a crucial role, the Court noted that the special regime was instrumental in curtailing the contacts of imprisoned Mafia members with the outside world and preventing them from organising and procuring the commission of crimes both inside and outside their prisons. This led the Court to accept that in the critical circumstances of the investigations of the Mafia being conducted by the Italian authorities, the measures complained of were necessary and proportionate to the legitimate aim (see, among others, *Messina (no. 2)*, cited above, §§ 65-67, and *Indelicato v. Italy* (dec.), no. 31143/96, 6 July 2000).

255. In the present case the Government did not put forward any argument for justification of the restriction beyond a reference to the applicable section of the Custody Act. The Court notes with concern that the Custody Act restricted the maximum frequency of family visits to two per month in a general manner, without affording any degree of flexibility for determining whether such limitations were appropriate or indeed necessary

in each individual case. As regards the applicant's personal situation, the Court is unable to discern the necessity for such stringent limitations on the frequency and duration of family visits. It notes that the applicant's wife was neither a witness nor a co-accused in the criminal proceedings against him, which removed the risk of collusive action or other obstruction to the process of collecting evidence (see, by contrast, *Kučera*, cited above, § 130; *Bagiński v. Poland*, no. 37444/97, § 92 et seq., 11 October 2005; and *Klamecki*, cited above, § 135). The same can be said of the applicant's daughter, who was still a minor at the material time. Furthermore, the security considerations relating to criminal family links which had been found to be justified in the above-mentioned Italian cases were conspicuously absent in the instant case. In these circumstances, and having regard to the duration of the limitations on the applicant's contact with his family, the Court concludes that they went beyond what was necessary in a democratic society "to prevent disorder and crime". Indeed, the measure in question reduced the applicant's family life to a degree that can be justified neither by the inherent limitations involved in detention nor by the pursuance of the legitimate aim relied on by the Government. The Court therefore holds that the authorities failed to maintain a fair balance of proportionality between the means employed and the aim they sought to achieve.

256. There has therefore been a violation of Article 8 on account of the restrictions on the frequency and duration of family visits.

3. Separation by glass partition

257. The Court notes that the Government did not refer to any legal or regulatory act as the basis for installing a glass partition in the cabin for meetings between detainees and their visitors. The wording which could be considered as authorising such a measure in remand centres could be found in the Internal Rules for Remand Centres of the Ministry of Justice (paragraph 147 of order no. 148 of 12 May 2000). However, these provisions were not applicable in the applicant's case because at that time the Lefortovo remand centre was outside the jurisdiction of the Ministry of Justice and under the management of the Federal Security Service. Although comparable provisions might be contained in the rules for the remand centres under the jurisdiction of the Federal Security Service, such rules – assuming they had been adopted as required by section 16 of the Custody Act – were never published or made otherwise publicly accessible. It follows that the impugned measure was not "prescribed by law".

258. In any event, the Court reiterates that, although physical separation of a detainee from his visitors may be justified by security considerations in certain cases (see the above-cited Italian cases and also the Dutch cases concerning a prison regime designed to prevent escapes: *Van der Ven v. the Netherlands*, no. 50901/99, § 71, ECHR 2003-II, and *Lorsé and Others v.*

ANNEX U

The authority exceeds 30 pages

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

FIRST SECTION

CASE OF KLAMECKI v. POLAND (NO. 2)

(Application no. 31583/96)

JUDGMENT
This version was rectified on 8 September 2003 under Rule 81
of the Rules of the Court

STRASBOURG

3 April 2003

C. Limitations imposed on the applicant's contact with his wife

72. On 10 August 1996 the Wrocław-Śródmieście District Court ordered that the applicant should not be allowed to have any personal contact with his wife in view of the fact that in the meantime she had been charged with fraud in which the applicant had also been involved. That restriction included a prohibition of supervised family visits and of communication by a prison internal phone. Before that date their personal contact had not been restricted.

73. On 30 January 1997 the applicant requested the Wrocław District Court to grant his wife a permit to visit him in prison as they had had no personal contact since 10 August 1996. The application was dismissed on 7 February 1997 without any reasons being given.

74. On 7 February 1997 the applicant complained to the President of the Wrocław Regional Court that not only had all his letters to his wife been censored but some of them also intercepted or delayed and that he had not even been allowed to make phone calls to his wife. He submitted that these facts taken together with the absolute prohibition on any personal contact with her had amounted to inhuman treatment.

75. On 10 February 1997 the applicant unsuccessfully requested the Wrocław-Śródmieście District Court to stop the censorship of his letters to his wife.

76. On 24 March 1997 the applicant, likewise unsuccessfully, asked the court to allow his wife to visit him in prison.

77. On 11 April 1997 he made a similar application, submitting that at the hearing of 10 April 1997 the court had heard evidence from him and he had explained all the circumstances relating to his the charges laid against his wife. The court dismissed the application on 18 April 1997. No reasons for that decision were given.

78. Subsequently, on 22 and 28 April and 8, 20 and 28 May 1997 the Wrocław-Śródmieście District Court, without giving any reasons for its decisions, dismissed five further applications in which the applicant asked to be allowed to see his wife. He argued that the prolonged and drastic restrictions on their contact were cruel and inhuman and had severely affected his family life. In his application of 22 May 1997, the applicant stressed that since the court had heard evidence from his wife on 21 May 1997 (see also paragraph 41 above), there was no further justification to continue the harsh measures imposed on their personal contact. He relied on Articles 3 and 8 of the Convention.

79. On 16 June 1997 the Wrocław-Śródmieście District Court dismissed two further, similar applications made by the applicant on 5 and 12 June 1997, holding that the prohibition on any personal contact between him and his wife was justified by the risk that they might induce one another to give

C. Proceedings relating to the lawfulness of detention on remand

97. At the material time there were three different legal avenues enabling a detainee to challenge the lawfulness of his detention: appeal to a court against a detention order made by a prosecutor; proceedings in which courts examined applications for prolongation of detention made by a prosecutor at the investigation stage and proceedings set in motion by a detainee's application for release.

As regards the last of these, Article 214 of the Code (in the version applicable at the material time) stated that an accused could at any time apply to have a preventive measure quashed or lifted. Such an application had to be decided by the prosecutor or, after the bill of indictment had been lodged, by the court competent to deal with the case, within a period not exceeding three days.

98. Under Article 88 of the Code of Criminal Procedure the presence of the parties at judicial sessions other than hearings was a matter for discretion of the court. Sessions concerning an application for release, a prosecutor's application for prolongation of detention or an appeal against a decision on detention on remand were held *in camera*. If the defendant asked for release at a hearing, the court made a decision either during the same hearing or at a subsequent session *in camera*.

99. At the material time the law did not give the detainee the right to participate in any court session concerning his detention on remand. In practice, only the prosecutor was informed of and could participate in such sessions. If he was present, he was entitled to adduce arguments before the court. The prosecutor's submissions were put on the record of the session (cf. *Włoch v. Poland*, no. 27785/95, judgment of 19 October 2000, §§ 69-73).

D. Censorship of a detainee's correspondence and rules concerning his contact with the outside world

100. Articles 82-90 of the Code of Execution of Criminal Sentences of 1969 (the Code is no longer in force; it was repealed and replaced by the "new" Code of Execution of Criminal Sentences of 5 August 1997, which entered into force on 1 September 1998) concerned the execution of detention on remand. Under Article 89 § 2 of the Code, a detainee might receive visitors in prison or might contact his family by prison internal phone provided that he had obtained permission in writing from the investigating prosecutor (at the investigation stage) or from the trial court (once the trial commenced). The authorities could order that a visit should take place in the presence of a prison guard.

101. Pursuant to the same provision, all correspondence of a detainee was, as a rule, censored, unless a prosecutor or a court decided otherwise.

(b) Whether the interference was "in accordance with the law"

146. The Court notes that the contested measure was applied under Article 89 § 2 of the 1969 Code of Execution of Criminal Sentences (see paragraph 100). It consequently holds that the interference was "in accordance with the law".

(c) Whether the interference pursued a "legitimate aim"

147. The Government maintained that the restrictions in issue had been necessary in order to secure the proper conduct of the criminal proceedings against the applicant, in particular, to eliminate the risk of the applicant and his wife acting in collusion.

The Court notes that the limitations on the applicant's contact with his wife were imposed after she had been charged with a related offence and on the grounds that there was a risk that they might induce each other to give false testimonies or obstruct the proper course of the trial (see paragraphs 72-79 above). The impugned measure can, accordingly, be considered as having been taken in pursuance of "the prevention of disorder and crime", which is a legitimate aim under Article 8.

(d) Whether the interference was "necessary in a democratic society"

148. It remains for the Court to ascertain whether the authorities struck a fair balance of proportionality between, on the one hand, the need to secure the process of obtaining evidence in the applicant's case and, on the other, his right to respect for his family life while in detention (see paragraph 144 above).

149. The Court observes at the outset that the applicant was forbidden to have any contact with his wife on 10 August 1996. That restriction involved the prohibition to communicate with her by a prison internal phone or to receive supervised family visits. It was maintained until 9 August 1997, i.e. for 1 year (see paragraphs 72-80 above). At the same time, their correspondence was censored, pursuant to the same provision which allowed for the limitations on their contact, i.e. Article 89 § 2 of the 1969 Code of Execution of Criminal Sentences (see paragraphs 74-75 and 100-101 above).

150. The Court accepts that, initially, the resort to that measure could be considered reasonably necessary from the point of view of the aims sought by the authorities, even though it inevitably resulted in harsh consequences for the applicant's family life.

However, with the passage of time and given the severity of those consequences, as well as the authorities' general obligation to assist the applicant in maintaining contact with his family during his detention, the situation called, in the Court's opinion, for a careful review of the necessity of keeping him in a complete isolation from his wife.

151. In that regard, the Court notes that the District Court did not give grounds for any but the first and the last of its numerous decisions refusing the applicant to see his wife (see paragraphs 72-79 above). Nor did that court consider any alternative means of ensuring that their contact would not lead to any collusive action or otherwise obstruct the process of taking evidence, such as, for instance, subjection of their contact to supervision by a prison officer (see paragraphs 72-79 and 100 above) or to other restrictions as to the nature, frequency and duration of contact (see, a contrario, Kalashnikov v. Russia (dec.), no. 47095/99, ECHR-2001 ...).

Furthermore, the Court finds that the court heard evidence from the applicant's wife on 21 May 1997 but it maintained the prohibition of their personal contact for nearly 3 further months, despite the fact that during that time it did not proceed to obtain any evidence and the trial was adjourned (see paragraphs 41-43 and 78-80 above).

152. In the circumstances, and having regard to the duration and the nature of the restrictions on the applicant's contact with his wife as well as to the fact that they were combined with the censorship of their correspondence, the Court concludes that they went beyond what was necessary in a democratic society "to prevent disorder and crime". Indeed, the measure in question reduced the applicant's family life to the degree that can be justified neither by the inherent limitations involved in detention nor by the pursuance of the legitimate aim relied on by the Government. The Court therefore holds that the authorities failed to maintain a fair balance of proportionality between the means employed and the aim they sought to achieve.

3. Conclusion

153. There has, accordingly, been a violation of Article 8 of the Convention in regard to the applicant's right to respect for his family life.

VI. THE ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

154. Lastly, the applicant alleged that the censorship of his correspondence constituted a breach of Poland's obligation under Article 34, which reads:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

ANNEX V

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

FOURTH SECTION

CASE OF KUČERA v. SLOVAKIA

(Application no. 48666/99)

JUDGMENT

STRASBOURG

17 July 2007

FINAL

17/10/2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kučera v. Slovakia,

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

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr G. BONELLO,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Ms L. MIJOVIĆ,
Mr J. ŠIKUTA, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 15 May 2007 and on 26 June 2007,

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

PROCEDURE

1. The case originated in an application (no. 48666/99) against the Slovak Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovakian national, Mr Pavel Kučera ("the applicant"), on 3 September 1998.

2. The applicant, who had been granted legal aid, was represented by Mrs A. Kubovičová, a lawyer practising in Považská Bystrica. On 22 February 2007 he appointed Mr L. Košťa, a lawyer practising in Bratislava, to represent him before the Court. The Government of the Slovak Republic ("the Government") were represented by Mrs M. Pirošíková, their Agent.

3. The applicant alleged, in particular, violations of Article 5 §§ 1, 3 and 4 of the Convention in the context of his detention on remand as well as a violation of Article 8 of the Convention on account of the police's entry into his apartment and his ability to meet with his wife during his detention on remand.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. By a decision of 4 November 2003, the Court declared the application partly admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

7. On 15 March 2005 the Court decided to adjourn the case pending the outcome of domestic proceedings in which the applicant had claimed compensation pursuant to the State Liability Act of 1969 and Articles 11 et seq. of the Civil Code.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1962 and lives in Považská Bystrica.

9. The applicant was the director of the Police Department in the Považská Bystrica District. His application relates to criminal proceedings instituted against him, the circumstances of which are described below.

A. Entry by the police into the applicant's apartment

10. According to the applicant, at 6 a.m. on 17 December 1997 several armed policemen in masks burst into his flat without his consent. The policemen presented a police investigator's decision to the applicant and his wife. It was dated 17 December 1997 and accused them, together with several others, of extortion. The investigator suspected the accused of having forced the owner of a limited liability company to transfer his shares in the company and his car to a third party.

11. According to the Government, the police had come to the applicant's door and entered the apartment with the applicant's permission. The purpose of their visit had been to deliver the investigator's decision to the applicant and his wife.

12. The applicant was brought to the Regional Office of Investigation in Žilina. The applicant's wife was allowed to take their daughter to the kindergarten and she too was subsequently escorted to the Regional Office of Investigation, where she and the applicant were questioned. The applicant was held in a cell until 5 a.m. on 18 December 1997 when a public prosecutor ordered his release.

13. On 19 December 1997 an officer of the Police Interventions Department in Žilina wrote a report on the visit to the applicant's apartment on 17 December 1997. It indicated that the purpose of the visit had been fulfilled and that the applicant had been escorted to the Regional Office of Investigation. It had not been necessary to use any coercive measures, no one had been injured and no damage had been caused.

14. On 4 February 1998 the applicant filed a complaint about the incident of 17 December 1997. It was transferred to the Inspection Department of the Police Corps within the Ministry of the Interior.

15. On 5 March 1998 the applicant stated to the investigator that the police had entered his apartment without a search warrant after he had opened the door. They had delivered an envelope to him and had looked around the apartment without his consent.

16. On 22 April 1998 the applicant's wife was questioned. She stated that she had been in bed when the police arrived. After her husband had opened the door she had heard him asking the policemen what had happened and what they wanted. She had gone to the door and seen four policemen in the corridor, two of whom were wearing masks. She was asked to sign a document. Subsequently, the masked policemen had left with her husband and two officers in plain clothes had remained in the apartment with her, before accompanying her to the kindergarten. The officers had then taken her to the Regional Office of Investigation. No force had been used. She said that she had not heard her husband give the policemen permission to enter the apartment.

17. The investigator took statements from three policemen who had gone to the applicant's apartment on 17 December 1997. On 15 April 1998 Officer B. of the police interventions unit stated that the applicant had asked to be allowed to read the charge and to get dressed. The officers of the criminal police had therefore asked him whether they could enter the apartment. According to Officer B., the applicant had replied in the affirmative. Two members of the criminal police and two members of the police interventions unit had entered the apartment. On 24 April 1998 Officer M. stated that the applicant had invited them into the corridor of his apartment as he had not wanted to deal with them at the front door. The police had served the charge on both the applicant and his wife. They had not used force and did not search the apartment. Finally, on 26 May 1998 Captain B. stated that the applicant had invited them into his apartment as he considered that the whole matter was a mistake. No search had been carried out.

18. On 28 May 1998 the Inspection Department of the Police Corps dismissed the applicant's complaint about the police's entry into his apartment on 17 December 1997. The decision was based on statements of the applicant and his wife and on the explanations given by the three policemen involved. The inspection department concluded that there was no evidence of an offence having been committed.

B. Criminal proceedings and the applicant's detention on remand

19. On 19 December 1997 the police again arrested the applicant. On 20 December 1997 a judge of the Trenčín District Court remanded him in custody with effect from 19 December 1997. Reference was made to Article 67 § 1(b) of the Code of Criminal Procedure. The judge found that Mr R., the alleged victim, had described in detail the acts the accused were alleged

to have committed, including threats of physical liquidation. There was nothing to indicate that those statements were wholly unsubstantiated. The judge therefore considered the detention of the accused necessary to prevent them from exerting further pressure on the alleged victim.

20. On 27 January 1998 the Trenčín Regional Court dismissed the applicant's complaint against the decision to remand him in custody. It found that the acts the applicant and his co-accused were alleged to have committed had been described in detail by the alleged victim and several witnesses. Both the serious nature of those accusations and the need to take further evidence justified the conclusion that the accused's release could jeopardise the investigation.

21. In a letter dated 25 February 1998, the applicant asked for his release. He argued that the available evidence showed that the accusations the alleged victim had made against the applicant were false.

22. The request for release was filed with the Trenčín Regional Prosecutor's Office on 5 March 1998. The public prosecutor refused to release the applicant and submitted his request to the Trenčín District Court the same day.

23. On 12 March 1998 the Trenčín District Court dismissed the request on the ground that the available evidence did not indicate that the alleged victim's statements were false and the applicant's detention was still necessary within the meaning of Article 67 § 1(b) of the Code of Criminal Procedure. The decision was served on the applicant and his lawyer on 18 and 19 March 1998 respectively.

24. On 23 and 26 March 1998 the applicant filed a complaint. He alleged that despite the fact that the investigation had been under way for a long time, no direct evidence had been obtained against him. The applicant had been cross-examined in the presence of the alleged victim, who had expressly stated that the applicant had exerted no pressure on him.

25. The file was submitted to the Trenčín Regional Court on 2 April 1998. On 12 May 1998 the Trenčín Regional Court dismissed the applicant's complaint for the reasons set out in the District Court's decision. It added that the applicant's detention was also necessary on the ground that he had attempted, on 19 January 1998, to send a letter to his wife from the prison in secret. The decision was served on the applicant on 28 May 1998.

26. On 8 June 1998 Judge T., one of the two judges at the District Court in Trenčín then dealing with criminal matters, informed the President of that court that she had a conflict of interest as she had earlier acted as a lawyer of the alleged victim and had had contact with the applicant and his wife. The judge stated that she agreed to her replacement by a different judge pursuant to Article 30 § 4 of the Code of Criminal Procedure. On 18 June 1998 Judge T. formally requested the Trenčín Regional Court to allow her to stand down. The Regional Court granted the request on 7 July 1998. The

decision stated that Judge T. had asked to be allowed to stand down after the applicant's request for release was submitted to her for a decision.

27. In the meantime, on 13 June 1998, Judge Š., the other District Court judge involved in criminal matters, extended the period of detention of the applicant and four other accused until 19 December 1998. As regards the applicant, the decision stated that he had attempted to send a letter to his wife from the prison in secret. His wife had consulted the file on the premises of the Trenčín Regional Court without the prior consent of the public prosecutor or investigator and in the absence of the judge dealing with the case. There was a risk that the accused might interfere with witnesses and their co-accused or hamper the investigation into the case.

28. The applicant complained that the judge who had extended his detention on 13 June 1998 had not been entitled to deal with the case as by the time no decision had been taken on the request by the other judge to withdraw from the case.

29. On 22 September 1998 the General Prosecutor's Office found that the decision of 13 June 1998 to extend the applicant's detention had been taken in accordance with Article 71 § 1 of the Code of Criminal Procedure. The letter stated, *inter alia*, that the President of the Trenčín District Court had found no reason for proceeding pursuant to Article 30 § 4 of the Code of Criminal Procedure, and that the judge had therefore asked on 18 June 1998 to be allowed to stand down. The decision on the extension of the applicant's detention on remand and the decisions on the judge's request to withdraw were independent of each other and did not affect the merits of the case.

30. The Government submitted a statement made by the President of the Trenčín District Court on 16 January 2004 explaining that, at the relevant time, Judges T. and Š. dealt with all criminal matters. The public prosecutor's proposal to extend the detention of the applicant and his co-accused had been registered as a new matter in Judge Š's division in accordance with the work schedule for 1998 that had been issued by the President of the District Court. It had been allocated file number 4Tp 41/98. Judge Š. had ruled on the proposal on 13 June 1998.

As regards Judge T., the applicant's request for release had fallen to be examined by her. The file was registered under number 3Tp 42/98. Following Judge T.'s complete withdrawal from the criminal case concerning the applicant, the applicant's request for release had been assigned to Judge Š.

The practice had been to register separately all new submissions on which the District Court was required to decide at the pre-trial stage of the criminal proceedings against the applicant and his co-accused. As a result, different judges had determined various issues concerning the same accused.

31. On 26 July 1998 the Trenčín District Court dismissed the applicant's request for release for the reasons set out in its decisions of 20 December 1997 and 13 June 1998. The decision was taken in response to the applicant's complaint of 26 April 1998 to the General Prosecutor's Office about his detention. The complaint was treated as an application for release and was submitted to the Trenčín District Court on 5 June 1998 for decision.

32. On 11 August 1998 the applicant filed another request for release. Referring to the particular circumstances of the case and the statements of various witnesses, he claimed that there was no evidence against him. There was nothing to suggest that he had threatened the alleged victim. The content of the letter he had attempted to send to his wife from the prison was purely personal and had no bearing on the criminal proceedings. His wife had consulted the case-file in accordance with the relevant provisions of the Code of Criminal Procedure in the presence of two employees of the Regional Court.

33. The public prosecutor submitted the request to the Trenčín District Court on 28 August 1998, which dismissed it on 10 September 1998. The decision was served on 21 September 1998. It stated that the case was complex and that the available evidence indicated that the alleged victim's fear that the applicant might interfere with the witnesses in the event of his release was justified.

34. On 25 and 29 September 1998 the applicant filed a complaint in which he alleged that the investigation into the accusation against him had ended, that the witnesses had been heard and that there was no evidence that he had attempted to interfere with the witnesses or anybody else.

35. On 5 November 1998 the Trenčín Regional Court dismissed the applicant's complaint. The Regional Court held that the evidence taken did not weaken the suspicion that the applicant had committed the offence of which he was accused. The serious nature of the offence in question and the fact that it was likely that it had been committed by an organised group justified the conclusion that the applicant's continued detention was necessary within the meaning of Article 67 § 1(b) of the Code of Criminal Procedure. The file was returned to the District Court on 22 December 1998. The Regional Court's decision of 5 November 1998 was served on the applicant on 15 February 1999.

36. On 16 November 1998 the applicant requested the Regional Prosecutor's Office in Trenčín to deal with the charges against him and his wife in a separate set of proceedings pursuant to Article 23 § 1 of the Code of Criminal Procedure. He explained that several other charges against the other accused were being examined in the proceedings. As a result, there had been no progress in the investigation in respect of the accusation against the applicant for several months. There was no reason for his continued

detention as the investigation into the accusation against him had ended in October 1998.

37. On 4 December 1998 the Trenčín District Court dismissed the applicant's request of 23 November 1998 for release. The judge found that the reasons for the applicant's detention on remand, as set out in the above decisions, were still relevant. The offences in question were serious and there was a suspicion that they had been committed in the context of organised crime. The decision was served on 15 December 1998.

38. On 9 February 1999 the Trenčín Regional Court dismissed a complaint filed by the applicant on 18 December 1998 against the District Court's decision. The Regional Court's decision was served on the applicant on 25 February 1999.

39. In the meantime, on 7 December 1998, the Trenčín District Court extended the detention of the applicant and four other accused until 9 June 1999. The decision stated that the case was complex and that several of those involved had been accused of further offences. Co-operation with the German authorities was necessary with a view to establishing the relevant facts. There was a risk that the accused would interfere with the witnesses or otherwise hamper the investigation into the case. The decision referred to the previous decisions on the detention of the accused. It contained no specific reasons on the need for the further detention of the applicant.

40. On 16 February 1999 the applicant filed another request for release. The public prosecutor submitted it to the Trenčín District Court on 3 March 1999. The District Court dismissed the request on 16 March 1999. The decision stated that one of the accused had been arrested in the Czech Republic and would be extradited to Slovakia. Further investigations needed to be carried out including investigations into the criminal activity of which the applicant had been accused. The decision became final on 26 March 1999.

41. In the meantime, on 25 March 1999, the applicant again applied for release. On 6 April 1999 the Regional Prosecutor's Office informed him that under Article 72 § 2 of the Code of Criminal Procedure he was not allowed to re-apply for release until fourteen days after the date the decision on his previous request had become final.

42. On 15 April 1999 the applicant filed a further application for release. He argued that there was no indication that he had been involved in the offences that were under examination.

43. The public prosecutor submitted the file with the application for release to the Trenčín District Court on 16 April 1999. On 20 April 1999 the District Court dismissed the request, holding that the applicant's continued detention was necessary within the meaning of Article 67 § 1(b) of the Code of Criminal Procedure.

44. On 26 April 1999 the applicant filed a complaint. He argued that the investigation into the case had ended. The file was submitted to the Trenčín

Regional Court on 20 May 1999. The Regional Court dismissed the complaint on 10 June 1999.

45. In the meantime, on 11 May 1999, the applicant and his counsel examined the file. On 9 June 1999 the public prosecutor indicted the applicant, his wife and seven others before the Banská Bystrica Regional Court. The applicant and his wife were indicted on one count of extortion committed as members of an organised group. The indictment comprised nine other counts which did not concern the applicant or his wife.

46. On 23 June 1999 the Regional Court in Banská Bystrica dismissed a request by the applicant for release. On 30 June 1999 the applicant filed a complaint. He alleged that he had not threatened Mr R., the injured party, who in any event was abroad. There existed no relevant reason for his continued detention.

47. On 16 September 1999 the Regional Court in Banská Bystrica dismissed the applicant's further request for release. The decision referred to a statement by R. according to which the applicant had threatened him on 4 March 1997.

48. The applicant was released from custody on 19 December 1999. During his time in detention he had not been allowed any visits from his wife until 29 January 1999. Prior to that, on 6 May 1998, counsel for the applicant and his wife had requested that her clients be allowed to meet, if need be in the presence of the investigator. Reference was made to the suffering caused by the lengthy separation of the applicant from his wife and also to the fact that the investigation into the offences in issue had practically ended.

49. On 11 February 1999 the applicant's wife complained that her request for leave to visit the applicant on 24 February 1999 had not been accepted. She referred to a statement by the investigator of 15 January 1999 that he did not intend to carry out further questioning of the applicant or his wife.

50. On 28 January 2000 the Banská Bystrica Regional Court acquitted the applicant and his wife pursuant to Article 226(c) of the Code of Criminal Procedure, as it had not been shown that they had committed extortion. The court convicted seven other defendants.

51. On 7 February 2001 the Supreme Court quashed the relevant part of the Banská Bystrica Regional Court's judgment of 28 January 2000. The Supreme Court acquitted the applicant and his wife pursuant to Article 226(b) of the Code of Criminal Procedure, holding that their actions did not constitute an offence.

C. The applicant's attempts to obtain compensation

52. On 26 June 2002 the applicant and his wife sought damages from the State, as represented by the Ministry of Justice. They claimed compensation for the expenses they had incurred in the criminal proceedings. The applicant also claimed a specific sum in compensation for loss of income. He argued that a sum which the Ministry had paid to him earlier on that account had not been determined correctly. Finally, the applicant and his wife claimed 7,000,000 and 5,000,000 Slovakian korunas (SKK) respectively as compensation for non-pecuniary damage.

53. An initial decision by the District Court in Banská Bystrica was quashed by the Regional Court in Banská Bystrica on 30 April 2004. The Regional Court instructed the District Court to establish whether the plaintiffs were claiming compensation for damage under the State Liability Act of 1969 exclusively or whether they were also claiming compensation for non-pecuniary damage pursuant to Articles 11 et seq. of the Civil Code.

54. On 31 May 2005 the District Court in Banská Bystrica ordered the defendant to pay SKK 7,000,000 and 5,000,000 to the applicant and SKK 5,000,000 to his wife in compensation for damage of a non-pecuniary nature. That decision was based on Articles 11 et seq. of the Civil Code. With reference to the State Liability Act 1969, the District Court also ordered the defendant to pay SKK 67,464 plus default interest to the applicant in compensation for lost income as well as SKK 170,535 plus default interest in reimbursement of the costs and expenses the applicant had incurred in the criminal proceedings.

55. The Ministry appealed, arguing that the first-instance court had erroneously applied Articles 11 et seq. of the Civil Code, that the applicant had been prosecuted and tried in accordance with the relevant provisions of the criminal law, and that the impact of the criminal proceedings on him could not be qualified as an unjustified interference with his personal rights.

56. On 7 July 2006 the Regional Court in Banská Bystrica reversed the relevant part of the first-instance judgment. It took note of the applicant's arguments that the criminal proceedings had been unjustified and the decisions taken in those proceedings unlawful, that the applicant had been prohibited from meeting his wife and that his rights under the Convention had been violated. It summed up the Court's decision on the admissibility of the present application given on 4 November 2003. It also had regard to the documents included in the file concerning the criminal case against the applicant.

57. The Regional Court concluded that the applicant had not shown that the authorities involved in his criminal case had acted in an unlawful manner. In particular, as regards the entry of the police into the applicant's apartment on 17 December 1997, it noted that neither the applicant nor his wife had complained during their first interrogations on 17 and 19 December 1997. They had not submitted any evidence in support of that allegation. As regards the applicant's detention on remand, the Regional

Court found that its length had not been excessive given the complexity of the case and the applicant's requests for release had been decided within a reasonable time.

58. Relying on the Supreme Court's judgment of 20 October 2005 in a different case (no. 5 Cdo 150/03), the Regional Court held that criminal proceedings conducted in compliance with the applicable law could not constitute unjustified interference with the accused's integrity even if they ended with his acquittal. The same applied to any other action taken by the competent authorities in respect of an accused in criminal proceedings. There had therefore been no unjustified interference with the applicant's rights under Articles 11 et seq. of the Civil Code.

59. The Regional Court went on to find, however, that the right of the applicant and his wife under Article 6 § 2 of the Convention to be presumed innocent had been violated in that public officials had made inappropriate statements about the case in the media. It ordered the Ministry to pay SKK 2,000,000 to the applicant and SKK 1,000,000 to the applicant's wife as compensation for non-pecuniary damage they had suffered as a result.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Code of Criminal Procedure

60. Article 23 § 1 provides that, with a view to expediting the proceedings or for other important reasons, proceedings concerning a particular offence or one of the accused may be conducted separately.

61. Under Article 30 § 4, where a judge whose impartiality is in question agrees to be replaced, the president of the court concerned may replace him or her by a different judge.

62. Pursuant to Article 67 § 1(b), an accused can only be remanded in custody when there are concrete grounds to believe that he or she will interfere with witnesses or the co-accused or otherwise hamper the investigation into the relevant facts of the case.

63. Article 72 § 2 entitles the accused to apply for release at any time. When the public prosecutor dismisses such an application in the course of pre-trial proceedings, he or she must submit it immediately to the court. The decision on an application for release must be taken without delay. If an application is dismissed, the accused may only renew it fourteen days after the decision has become final unless he or she invokes other reasons justifying his or her release.

B. The Civil Code

64. The right to protection of a person's dignity, honour, reputation and good name is guaranteed by Articles 11 et seq. of the Civil Code.

65. According to Article 11, any natural person has the right to protection of his or her personality, in particular, his or her life and health, civil and human dignity, privacy, name and personal characteristics.

66. By virtue of Article 13 § 1, any natural person has the right to request an order restraining any unjustified infringement of his or her personal rights and remedying the consequences of such infringement, and to obtain appropriate satisfaction.

67. Article 13 § 2 provides that in cases where the satisfaction obtained under Article 13 § 1 is insufficient, in particular because the loss of dignity and social status has been considerable, the injured party is entitled to compensation for non-pecuniary damage.

C. The Police Corps Act 1993

68. Under section 8(1), police officers are under a duty to respect people's honour and dignity while carrying out their duties. They must avoid inflicting unjustified harm or interfering with a person's rights beyond what is necessary to achieve the aim of their action. Pursuant to paragraph 2 of section 8, when police action interferes with a person's rights or freedoms, the police must inform that person of his or her rights as soon as possible.

69. Section 29(1) permits the police to open and enter apartments and to take measures with a view to preventing a danger where, *inter alia*, a person's life is at risk or where the perpetrator of a serious offence is on the premises and fails to comply with an order to come out. Paragraph 3 of section 29 requires the presence of an impartial person during such action unless the life or health of the witness is in danger or the circumstances permit no delay.

D. The Detention on Remand Act 1993

70. Section 10 of the Detention on Remand Act 1993 (*Zákon o výkone väzby*), the legislation in force at the material time, provided, *inter alia*, that a person remanded in custody for reasons set out in Article 67 § 1(b) of the Code of Criminal Procedure could receive visits only with the prior written consent of the authority dealing with the case.

E. The State Liability Act 1969

71. Section 1(1) of Act no. 58/1969 on the liability of the State for damage caused by a State organ's decision or by an erroneous official act ("the State Liability Act") provided that the State was liable for damage caused by the unlawful decisions of a public authority.

72. Section 18(1) rendered the State liable for damage caused in the context of carrying out functions vested in public authorities resulting from erroneous official acts of persons entrusted with the exercise of those functions. An award of compensation could be made when the plaintiff showed that he or she had suffered damage as a result of an erroneous act of a public authority, quantified its amount, and showed that there was a causal link between the damage and the erroneous act in question.

73. Under the domestic courts' practice, the State Liability Act 1969 did not allow for compensation for non-pecuniary damage unless it was related to a deterioration in a person's health (for further details see *Havala v. Slovakia* (dec.), no. 47804/99, 13 September 2001).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

74. As at the admissibility stage, the Government raised an objection relating to an alleged failure by the applicant to exhaust domestic remedies as required by Article 35 § 1 of the Convention. In their view, it was open to the applicant to obtain appropriate redress as regards his complaints under Article 5 §§ 1, 3 and 4 of the Convention by means of an action for damages under the State Liability Act 1969 and an action for protection of his personal rights under Articles 11 et seq. of the Civil Code. The Government relied on the Court's judgment in *N.C. v. Italy* [GC], (no. 24952/94, §§ 49-58, ECHR 2002-X) in this respect.

They added that the remedy under Articles 11 et seq. of the Civil Code was effective also in respect of the applicant's complaints under Article 8 of the Convention.

75. The applicant contested those arguments.

76. In its decision on the admissibility of the present application the Court held that the applicant had not been required to use the above remedies for the purposes of Article 35 § 1 of the Convention. Subsequently the Court was informed that the applicant had tried to obtain redress by means of an action in which he had relied on both the State Liability Act 1969 and Articles 11 et seq. of the Civil Code. It therefore decided to adjourn its examination of the case pending the outcome of the proceedings brought by the applicant. Those proceedings ended with the Banská Bystrica Regional Court's judgment given on 7 July 2006.

77. The Regional Court had regard to the alleged shortcomings in the criminal proceedings including those of which the applicant complains before the Court. It concluded that there had been no unjustified interference with the applicant's rights under Articles 11 et seq. of the Civil Code as the authorities involved had acted in compliance with the applicable law.

78. The applicant has thus used the remedy invoked by the Government, but he has been unable to obtain redress in respect of the complaints which the Court is called upon to examine.

79. The fact that the applicant was awarded, under the State Liability Act 1969, compensation for loss of salary and for expenses incurred in the criminal proceedings cannot affect the position. That redress resulted from the fact that the applicant was acquitted and not from any finding of a violation of the rights on which the applicant relies before the Court. The compensation awarded to the applicant cannot be considered to constitute recognition of or redress for the violation of the Convention rights alleged by him in the present application. It therefore cannot suffice to deprive the applicant of his status as a "victim" within the meaning of Article 34 of the Convention (see *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; and, *mutatis mutandis*, *Yağcı and Sargın v. Turkey*, judgment of 8 June 1995, Series A no. 319-A, § 44). Similarly, the substantial amount of compensation for damage of a non-pecuniary nature awarded by the Regional Court was based on the finding of a violation of Article 6 § 2, that is, a provision which is not the subject-matter of the present application.

80. As regards the *N.C. v. Italy* [GC] judgment invoked by the Government, in that case the Court found the compensation which the applicant was entitled to obtain under the Italian Code of Criminal Procedure as a result of his acquittal to be indissociable from any compensation which he might have been entitled to under Article 5 § 5 of the Convention as a consequence of his deprivation of liberty being contrary to paragraphs 1 or 3 of that Article. It concluded that there had been no violation of Article 5 § 5 of the Convention in that case.

81. Unlike the position in the case of *N.C. v. Italy*, Article 5 § 5 of the Convention is not at stake in the present application in which the Court is required to determine whether or not there has been a violation of, *inter alia*, Article 5 §§ 1, 3 and 4 of the Convention. The reasons given by the Court for concluding that there had been no violation of Article 5 § 5 of the Convention in *N.C. v. Italy* and now relied on by the Government cannot be transposed to the determination of the complaints made by the applicant in the present application.

82. In these circumstances, the Government's preliminary objection must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

83. The applicant complained that his detention on remand was unlawful as the judge who had decided on its extension on 13 June 1998 had not been entitled to deal with the case at that time. He relied on Article 5 § 1 of the Convention, which in its relevant part reads as follows:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ..."

84. The Government relied on the statement made by the President of the Trenčín District Court on 16 September 2004. At the relevant time, no indictment had yet been filed against the applicant and the other accused. For that reason, their criminal case had not been registered under just one file number. Various procedural issues on which the District Court had been required to decide had been registered separately and been distributed among the judges who dealt with criminal matters. The proposal to extend the applicant's detention on remand had been directly assigned to Judge Š. who had decided on it on 13 June 1998. Judge T., the other criminal judge available at the District Court, had stated, on 8 June 1998, that she had a conflict of interest. The court of appeal had later accepted this. In those circumstances, it would have been contrary to democratic principles to assign to Judge T. the request for an extension of the applicant's detention on remand.

85. The applicant argued that the way in which the District Court had registered the various submissions made in the criminal proceedings against him was either mistaken or deliberately confusing. He also pointed out that the Government had modified their arguments on this issue in the course of the proceedings before the Court.

86. In the instant case, the question arises whether the way in which the decision of 13 June 1998 to extend the applicant's detention was taken was "in accordance with a procedure prescribed by law". In this respect, Article 5 § 1 of the Convention essentially refers back to national law and states the obligation to conform to the substantive and procedural rules thereof, but it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5 of the Convention, namely to protect individuals from arbitrariness. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 § 1 of the Convention failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with (see *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports* 1996-III, pp. 752-53, §§ 40-41).

87. The Court accepts the explanation given by the President of the Trenčín District Court on 16 January 2004 (see paragraph 30 above). The documents available confirm that different judges dealt with separate submissions on which the District Court was required to decide at the pre-trial stage of the proceedings. The Trenčín Regional Court's decision of 7 July 1998 indicates that Judge T. asked to withdraw after the applicant's request for release had been submitted to her for a decision. There is no indication that that judge was or should have been involved in the examination of the proposal to extend the detention of the applicant and his co-accused which the prosecuting authority had submitted to the District Court and on which Judge Š. ruled on 13 June 1998.

88. In these circumstances, the Court finds no appearance of unlawfulness or arbitrariness in the manner in which the above request for an extension of the applicant's detention was handled and decided by the District Court in Trenčín.

89. There has therefore been no violation of Article 5 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

90. The applicant complained that his detention on remand had lasted an excessively long time. He alleged a violation of Article 5 § 3 of the Convention which provides:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

91. The Government argued that the length of the applicant's detention on remand had not been excessive. The case was complex as it concerned particularly serious offences and involved nine accused; co-operation with foreign authorities had also been required. The applicant could not have been released at an earlier stage of the proceedings as the offence of which he had been accused was closely linked to different offences with which the other accused had been charged. The domestic courts had duly examined whether the applicant's detention had been necessary and the reasons for their decisions were sufficient and relevant.

92. The applicant maintained that the reasons for his protracted detention had been neither relevant nor sufficient, in particular as regards the second half of that period when the investigation into his alleged offence had ended.

93. The Court notes that the applicant was first remanded in custody on 19 December 1997. The indictment was filed on 4 June 1999 and the applicant was released on 19 December 1999. His detention thus lasted two years.

94. Whether a period of detention is reasonable must be assessed in each case individually according to its special features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (for a recapitulation of the relevant case-law see, for example, *McKay v. the United Kingdom* [GC], no. 543/03, §§ 41-45, ECHR 2006-..., with further references).

95. The Court has acknowledged that the existence of a general risk flowing from the organised nature of the alleged criminal activities of an applicant can be accepted as the basis for his or her detention for a certain period of time. In such cases, involving numerous accused, the need to obtain voluminous evidence from many sources and to determine the facts and degree of alleged responsibility of each of the co-accused may constitute relevant and sufficient grounds for an applicant's detention during the period necessary to terminate the investigation, to draw up the bill of indictment and to hear evidence from the accused. Moreover, in cases concerning organised criminal groups, the risk that a detainee if released might bring pressure to bear on witnesses or other co-accused, or might otherwise obstruct the proceedings, is often particularly high (see *Celejewski v. Poland*, no. 17584/04, §§ 37-38, 4 May 2006).

96. The accusation against the applicant concerned an offence allegedly committed in the context of organised criminal activity. The domestic courts held that there was a risk that the applicant would interfere with witnesses or his co-accused or otherwise hamper the investigation into the relevant facts of the case if released.

97. The Court notes that on 16 November 1998 the applicant requested that the charges against him and his wife should be dealt with in a separate set of proceedings pursuant to Article 23 § 1 of the Code of Criminal Procedure. He relied on the fact that there had been no further progress in the investigation into the accusation against him for several months. Such a request was not unjustified. The criminal proceedings in issue concerned a number of offences unrelated to the applicant and his wife. The documents available indicate that the proceedings were considerably protracted owing to the need to carry out additional investigations into those offences.

98. On 7 December 1998 the Trenčín District Court extended the detention of the applicant and four other accused until 9 June 1999. That

decision was explained by the complexity of the case. It indicated that several of the persons involved had been additionally accused of further offences. However, that decision contained no specific reasons as regards the need for the applicant's further detention.

99. The Court has noted that in the decision of 16 March 1999 the Trenčín District Court stated that one of the accused persons had been arrested in the Czech Republic and that a further investigation needed to be carried out into the case in that context. To the extent that the applicant was concerned, that investigation ended prior to 11 May 1999, when he was allowed to peruse the file prior to the filing of the indictment.

100. Having regard to the documents submitted by the parties the Court is not persuaded that, throughout the entire period of the applicant's detention, compelling reasons existed for fearing that he would interfere with witnesses or otherwise hamper the investigation into the case and certainly not such as to outweigh the applicant's right to trial within a reasonable time or release pending trial.

101. In view of the above considerations the Court, finds that the reasons on which the domestic courts relied were not relevant and sufficient to justify the overall length of the applicant's detention.

102. There has accordingly been a violation of Article 5 § 3 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

103. The applicant also complained that his requests for release from detention on remand of 25 February 1998, 11 August 1998 and 23 November 1998 had not been decided upon speedily. He relied on Article 5 § 4 of the Convention which provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

104. The Government maintained that the length of time it had taken to examine the applicant's requests for release had not contravened Article 5 § 4 of the Convention in the circumstances of the case. They submitted that the case was complex and that the courts dealing with the applicant's requests had had to examine the whole file on each occasion.

105. The applicant contended that there had been unjustified delays in deciding, in particular, his complaints against the District Court's decisions to dismiss his applications for release as well as in serving the relevant decisions on him or his counsel.

106. Article 5 § 4, in guaranteeing to detained persons a right to institute proceedings to challenge the lawfulness of their deprivation of liberty, also

proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful. The question whether a person's right under Article 5 § 4 has been respected has to be determined in the light of the circumstances of each case (see *Rehbock v. Slovenia*, no. 29462/95, § 84, ECHR 2000-XII, with further references).

107. Article 5 § 4 does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention and for hearing applications for release. Nevertheless, a State which institutes such a system must in principle accord to the detainees the same guarantees on appeal as at first instance. An overall assessment is required in such cases in order to determine whether a decision was given "speedily" (*Navarra v. France*, judgment of 23 November 1993, Series A no. 273-B, § 28, with further references).

108. The applicant's request for release dated 25 February 1998 was filed with the public prosecutor on 5 March 1998. The public prosecutor refused to release the applicant and submitted the request to the Trenčín District Court the same day. The District Court dismissed it on 12 March 1998. The decision was served on the applicant and his lawyer on 18 and 19 March 1998 respectively. On 23 and 26 March 1998 the applicant filed a complaint on which the Trenčín Regional Court ruled on 12 May 1998. The decision was served on the applicant on 28 May 1998. The examination of the applicant's request by courts at two levels of jurisdiction thus lasted 2 months and 7 days. The examination of the applicant's complaint against the District Court's decision took more than one and a half months. The Regional Court's decision of 12 May 1998 was served on 28 May 1998, that is 16 days after it was taken.

109. As to the applicant's request for release of 11 August 1998, it was dismissed by the Trenčín District Court on 10 September 1998. The decision was served on 21 September 1998, and the applicant filed a complaint on 25 and 29 September 1998. The second-instance court dismissed the complaint on 5 November 1998. The proceedings thus lasted 2 months and 25 days. The Regional Court's decision of 5 November 1998 was served on the applicant on 15 February 1999, that is more than 3 months after it was taken.

110. The applicant's request for release of 23 November 1998 was dismissed by the Trenčín District Court on 4 December 1998. The decision was served on 15 December 1998 and the applicant challenged it on 18 December 1998. The Trenčín Regional Court dismissed the applicant's complaint against the first-instance decision on 9 February 1999. The proceedings thus lasted 2 months and 17 days. The examination of the applicant's complaint against the District Court's decision alone lasted 1 month and 22 days. The Regional Court's decision was served on the applicant on 25 February 2002, that is 16 days after it was taken.

111. Having regard to its practice (see *Dobrev v. Bulgaria*, no. 55389/00, § 96, 10 August 2006; and *Vejmola v. the Czech Republic*, no. 57246/00, § 47, 25 October 2005, with further references), the Court considers the above periods to be in breach of the requirement of a speedy decision laid down in Article 5 § 4 of the Convention. In particular, it finds no justification for the length of time it took to examine the applicant's complaints against the District Court's respective decisions. The time taken to serve the Regional Court's decisions is also relevant as well as the fact that Article 72 § 2 of the Code of Criminal Procedure did not permit the applicant to renew his request for release until fourteen days after the decision on his previous request had become final, unless he invoked different reasons (see *Singh v. the Czech Republic*, no. 60538/00, §§ 74 and 76, 25 January 2005).

112. There has accordingly been a violation of Article 5 § 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

113. The applicant complained that the police had entered his apartment unlawfully and that he had not been allowed to meet his wife during his detention on remand. He relied on Article 8 of the Convention which provides:

> "1. Everyone has the right to respect for his private and family life, his home...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. As regards the entry of the applicant's apartment by the police

114. The Government argued that the applicant had voluntarily let the policemen enter his flat. There had therefore been no interference with his right under Article 8 of the Convention.

115. The applicant disagreed and maintained that the policemen, who had worn masks and aimed submachine guns at him, had entered his flat without his consent.

116. The Court notes that the Inspection Department of the Ministry of the Interior carried out an investigation into the alleged violation of the applicant's right to respect for his home. On the basis of the evidence obtained it concluded that the policemen had not acted contrary to the law.

117. It is uncontested that at least four policemen, two of whom belonged to a special unit and were armed and masked, entered the applicant's apartment at about 6 a.m. on 17 December 1997. Their purpose

was to serve charges on the applicant and his wife and to escort them to the police investigator for questioning. In view of the contradictory statements of those involved and in the absence of any independent witnesses, it is not possible to establish whether or not the police entered the apartment with the applicant's consent.

118. The applicant and his wife were heard separately at a time when the applicant was detained in custody. There is no contradiction in their statements and nothing to indicate that those statements are untrue. On the other hand, when questioned, Officer B. of the police interventions unit stated that the members of the criminal police had asked the applicant whether they could enter the apartment whereas the other policemen involved alleged that the applicant had invited them to come in (see paragraph 17 above).

119. For the Court, considering the number of policemen involved, the fact that four of them belonged to a special interventions unit and openly carried submachine guns and were masked, and noting that they had come to the applicant's apartment at daybreak, it can reasonably be concluded that the applicant was left with little choice but to allow them to enter his apartment. It is difficult to accept that, in the circumstances, any consent given by the applicant was free and informed. There was accordingly an interference with his right to respect for his home. That interference will only be justified if it complies with the requirements set out in Article 8 § 2 of the Convention.

120. The Inspection Department of the Police Corps and the Regional Court in Banská Bystrica found that the police officers involved had not acted in an unlawful manner (see paragraphs 18 and 57 above). Even assuming that to have been the case, the Court notes that the issue before it is whether the interference complained of was “necessary in a democratic society”. That matter, and in particular the issue of proportionality, was never addressed by the domestic authorities. For the Court, the interference must in the circumstances be considered disproportionate for the following reasons.

121. In particular, as indicated above, the police had come to the applicant's door in order to serve charges on him and his wife and to escort them to an investigator for questioning. There is no indication that the fulfilment of that task required the police to enter the apartment. The Government failed to provide a satisfactory and convincing explanation to justify that interference. The impugned measure must be considered disproportionate in the circumstances.

122. Furthermore, a risk of abuse of authority and violation of human dignity is inherent in a situation such as the one which arose in the present case where, as stated above, the applicant was confronted by a number of specially trained masked policemen at the front door of his apartment very early in the morning. In the Court's view, safeguards should be in place in

order to avoid any possible abuse in such circumstances and to ensure the effective protection of a person's rights under Article 8 of the Convention. Such safeguards might include the adoption of regulatory measures which both confine the use of special forces to situations where ordinary police intervention cannot be regarded as safe and sufficient and, in addition, prescribe procedural guarantees ensuring, for example, the presence of an impartial person during the operation or the obtaining of the owner's clear, written consent as a pre-condition to entering his or her premises. The Court notes that certain guarantees to that effect are incorporated in the Police Corps Act 1993 (see paragraphs 68 and 69 above). However, those guarantees failed to prevent the situation complained of in the instant case from occurring.

123. In view of the above considerations, the Court is not satisfied that the action in issue was compatible with the applicant's right to respect for his home.

124. There has accordingly been a violation of Article 8 of the Convention as a result of the entry by the police into the applicant's apartment.

B. As regards the applicant's inability to meet his wife

125. The Government argued, with reference to section 10 of the Detention on Remand Act 1993, that the interference had been lawful. It was aimed at preventing the applicant from hampering the investigation. The interference had been necessary in a democratic society as both the applicant and his wife had been accused of a particularly serious offence in the context of organised crime and the applicant had tried secretly to send a letter to his wife from prison.

126. The applicant contended that the refusal to allow him to meet with his wife over a period of thirteen months had no justification.

127. The Court reiterates that detention, likewise any other measure depriving a person of his liberty, entails inherent limitations on his private and family life. However, it is an essential part of a detainee's right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family. Any restriction in that respect must be applied “in accordance with the law”, must pursue one or more legitimate aims listed in paragraph 2 of Article 8 and, in addition, must be justified as being “necessary in a democratic society”. The notion of “necessity” for the purposes of Article 8 means that the interference must correspond to a pressing social need, and, in particular, must remain proportionate to the legitimate aim pursued. In assessing whether an interference was “necessary” the Court will take into account the margin of appreciation left to the State authorities, but it is the duty of the respondent State to demonstrate the existence of the pressing social need behind the

interference (see, among other authorities, *Klamecki v. Poland (no. 2)*, no. 31583/96, § 144, 3 April 2003, with further references).

128. The interference complained of was based on the relevant provisions of the Detention on Remand Act 1993. It can be considered as having pursued the aims of the prevention of crime and the protection of the rights of others, within the meaning of the second paragraph of Article 8, as that restriction was imposed in the context of the applicant's detention in criminal proceedings in which he was accused of extortion.

129. As to the question whether the interference was "necessary in a democratic society", the Court notes that the applicant was allowed to meet with his wife for the first time on 29 January 1999. The refusal to allow the applicant to meet her during the period of 13 months during which he had been held in custody undoubtedly constituted a serious interference with his right to respect for his private and family life.

130. It is evident that there was a legitimate need to prevent the applicant from hampering the investigation, for example by exchanging information with his co-accused including his wife, in particular during the investigation into the relevant facts. The Court is not persuaded, however, that the interference complained of was indispensable for achieving that aim. In particular, there is no indication that allowing the applicant to meet with his wife under special visiting arrangements including, for example, supervision by an official would have jeopardised the ongoing investigation into the criminal case.

131. It is also questionable whether relevant and sufficient grounds existed for preventing the applicant from meeting his wife for such a long period. In particular, on 6 May 1998 counsel for the applicant and his wife requested that her clients be allowed to meet each other, even if this meant that the investigator had to be present. Reference was made to the suffering caused by the lengthy separation of the applicant from his wife and also to the fact that the investigation into the offences in issue had practically ended. Similarly, in the second half of 1998 the applicant indicated in his requests for release that at that time the investigation into the case exclusively concerned offences which were unrelated to him and his wife.

132. The Court has considered the fact that the applicant attempted, on 19 January 1998, secretly to send a letter to his wife from the prison (see paragraphs 25 and 27 above). It does not attach particular importance to this incident as it occurred at an early stage of the proceedings and it has not been alleged that the purpose of that letter was to interfere with the investigation.

133. In view of the above, the Court considers that the interference in issue cannot be regarded as having been "necessary in a democratic society".

134. There has therefore been a violation of Article 8 of the Convention on account of prohibition on the applicant meeting with his wife.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

135. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

136. As regards pecuniary damage, the applicant claimed 954,489 Slovakian korunas (SKK) as compensation for lost salary.

137. The Government objected that the applicant had already obtained redress in that respect before the domestic courts.

138. The Court notes that the domestic authorities compensated the applicant for the loss of salary resulting from his detention in the context of the criminal proceedings (see paragraphs 52 and 54 above). To the extent that the loss of income by the applicant may be considered as linked to the violation of his rights found above, the Court considers that the applicant obtained appropriate reparation at domestic level. It therefore makes no award under this head.

139. The applicant further claimed SKK 8,000,000 in respect of non-pecuniary damage. That sum comprised SKK 1,000,000 in respect of the rights he alleged before the Court had been violated and SKK 7,000,000 as compensation for the impact which the above events had had on the applicant's personality as well as on his family and professional life. The applicant also requested that the respondent Government should be ordered to apologise to him in the media and to undertake to reinstate him in his former job.

140. The Government pointed out that the domestic courts had awarded SKK 2,000,000 to the applicant as compensation for non-pecuniary damage.

141. The domestic award invoked by the Government is unrelated to the violation of the applicant's rights under the Convention which the Court has found (see paragraph 59 above). The Court considers that the applicant suffered damage of a non-pecuniary nature which is not sufficiently redressed by the finding of a violation of his rights under the Convention. Deciding on an equitable basis, it awards the applicant EUR 6,000 under this head.

B. Costs and expenses

142. The applicant claimed SKK 438,960. That sum comprised postal expenses (SKK 13,230), various expenses incurred in the course of the applicant's detention (SKK 77,060), the costs of the defence in the criminal

proceedings (SKK 341,070), the costs of an expert opinion on the impact of the detention on the applicant's health (SKK 4,400) and translation costs (SKK 3,200).

143. The Government objected that the applicant had not shown that the sums claimed had been necessarily incurred with a view to preventing the violation of the Convention rights which the applicant alleged. In any event, the applicant had obtained redress at the domestic level.

144. Having regard to the redress which the applicant obtained at the domestic level (see paragraph 54 above) and to the documents submitted, the Court considers it appropriate to award EUR 300 in respect of the costs of translation and postal expenses.

The applicant submitted no specific claim in respect of the costs of his legal representation in the proceedings under the Convention. The Court therefore makes no award in this respect.

C. Default interest

145. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been no violation of Article 5 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

4. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

5. *Holds* that there has been a violation of Article 8 of the Convention as regards the entry of the applicant's apartment by the police;

6. *Holds* that there has been a violation of Article 8 of the Convention as regards the refusal to allow the applicant to meet with his wife during his detention on remand;

7. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 6,000 (six thousand euros) in

respect of non-pecuniary damage and EUR 300 (three hundred euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 July 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President

ANNEX W

CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 70258/01
by Syzane and Aulona SELMANI
against Switzerland

The European Court of Human Rights (Second Section), sitting on 28 June 2001 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mr A.B. BAKA,
Mr L. WILDHABER,
Mr G. BONELLO,
Mr P. LORENZEN,
Mr M. FISCHBACH,
Mrs M. TSATSA-NIKOLOVSKA, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having regard to the above application introduced on 31 May 2001 and registered on 12 June 2001,

Having deliberated, decides as follows:

THE FACTS

The applicants, Yugoslav citizens of Kosovo origin, are mother and daughter born in 1974 and 1997, respectively. The first applicant, who works as a cleaning lady, is married to A.S., a Yugoslav citizen of Kosovo origin born in 1971 and currently detained in Lenzburg prison. A.S. is the father of the second applicant.

A. The circumstances of the case

A.S. entered Switzerland in 1989 where he obtained a residence permit (*Aufenthaltsbewilligung*) and worked as a manual worker and taxi driver. On 17 January 1997 he married the first applicant in Switzerland who henceforth also obtained a residence permit. On 10 October 1997, their daughter, the second applicant, was born in Switzerland.

On 14 September 1998, A.S. was remanded in custody.

On 16 September 1999 the Criminal Court (*Strafgericht*) of the Canton of Basel-Landschaft sentenced A.S. to 8 years' imprisonment and 15 years' prohibition to enter Switzerland on account of offences against the Narcotics Act (*Betäubungsmittelgesetz*). Upon, appeal, the Basel-Landschaft Court of Appeal (*Obergericht*) reduced the sentence to six years' imprisonment.

On 3 January 2000 the Basel-Landschaft Aliens' Police (*Fremdenpolizei*) decided not to prolong the residence permits of the applicants and A.S. and ordered the applicants to leave Switzerland by 31 May 2000, whereas A.S. was ordered to leave upon termination of his prison sentence.

The applicants' appeal against this decision was dismissed by the Basel-Landschaft Government (*Regierungsrat*) on 6 June 2000 on the grounds that the applicants depended on public welfare, and as the conduct of A.S. did not permit the conclusion that he was willing to integrate in Switzerland.

On 11 October 2000 the Basel-Landschaft Administrative Court (*Verwaltungsgericht*) dismissed the applicants' further appeal. The court noted that the applicants, if they returned to their home country, would in fact be separated from A.S. However, in the court's opinion, their family life was already considerably limited in view of the prison sentence of A.S. Given the public interest in an orderly implementation of the prison sentence, the applicants' additional separation from A.S. appeared insignificant (*geringfügig*), particularly as they had the possibility of communicating by mail and telephone with him. The court furthermore confirmed the decision of the Basel-Landschaft Government according to which the refusal to prolong the applicants' residence permit was based on

S. 10 § 1 (d) of the Federal Aliens' Act (*Bundesgesetz über Aufenthalt und Niederlassung der Ausländer*) which envisaged a foreigner's expulsion if he or she depended continuously and substantially on public welfare.

The applicants filed an administrative law appeal (*Verwaltungsgerichts-beschwerde*) with the Federal Court which the latter declared inadmissible on 27 March 2001. It noted that S. 100 § 1 (b)(3) of the Organisation of Justice Act (*Organisationsgesetz*) only permitted administrative law appeals if the complainant could invoke an "entitlement". In cases of family separation this required as a rule that one of the family members had a "consolidated right to stay" (*gefestigtes Anwesenheitsrecht*) in Switzerland, for instance on account of Swiss nationality or of a right to domicile (*Niederlassungsbewilligung*), which was not the case for the present applicants. The judgment continued:

> "The only basis for such a right could ... at most, be Article 8 § 1 of the Convention and Article 13 § 1 of the Federal Constitution (*Bundesverfassung*), in that the family of applicants would provisionally be separated even more insofar as wife and child would have to leave Switzerland already before their husband and father is released from prison. However, for the applicants to live together as a family is in any event excluded until release from prison. The possible direct contacts between the detainee and his family will be limited until then to short visits in prison. Nevertheless, a right of the (remaining) family to stay in Switzerland merely to exercise such a limited right to visit the detained applicant, cannot *a priori* be derived from Article 8 of the Convention, *a fortiori* as this person only disposes of a ... residence permit rather than a consolidated right to stay, for which reason he cannot convey any rights to residence upon his wife and child. The (enforced) stay due to detention on remand or a prison sentence, based on an order of criminal procedure or penal law, cannot in itself provide a 'consolidated right to stay' within the meaning of the case-law to Article 8 of the Convention."

Subsequently, the Federal Aliens' Office (*Bundesamt für Ausländerfragen*) ordered the applicants to leave Switzerland by 29 June 2001, whereas A.S. was ordered to leave Switzerland upon release from detention.

The applicant's appeal against this decision was dismissed by the Federal Department of Justice and Police (*Eidgenössisches Justiz- und Polizeidepartment*) on 11 May 2001.

B. Relevant domestic law and practice

According to S. 13 § 1 of the Swiss Federal Constitution, "everyone has the right to respect for his private and family life, his home and his communications by mail, post and telecommunications".

S. 10 § 1 (d) of the Federal Aliens' Act provides that a foreigner may be expelled from Switzerland, *inter alia*, "if he, or a person for whom he has to care, continuously and substantially becomes a burden for public welfare".

S. 100 § 1 (b) (3) of the Organisation of Justice Act states that an administrative law appeal shall be inadmissible in matters of the aliens' police if it concerns the granting or the refusal of authorisations in respect of which federal law offers no entitlement.

COMPLAINTS

1. The applicants allege a breach of their right to respect for private and family life as enshrined in Article 8 of the Convention. They point out that A.S., their husband and father, respectively, will probably leave prison only in November 2002. If the applicants are obliged to leave Switzerland now, they will not be able to see their husband and father during a period of at least one and a half years. The applicants claim that it is financially impossible for them regularly to travel from Yugoslavia to Switzerland to visit A.S. in prison. There are no grounds justifying the expulsion of the first applicant who has never presented any danger to Swiss public order. The applicants admit that they currently live a limited family life with A.S. The first applicant visits her husband in prison whenever possible; later he will be able to spend his weekend leave from prison at home. These regular visits also counteract any estrangement between the second applicant and her father.

The first applicant submits that she has a regular work contract and does not depend on public welfare.

2. Under Article 14 of the Convention the applicants complain that they have been discriminated against on account of their family relations with A.S.

THE LAW

1. The applicants complain of a breach of Article 8 of the Convention in that they are obliged to leave Switzerland and will not, therefore, have the possibility to visit A.S., their husband and father, respectively, while he is serving his prison sentence.

Article 8 of the Convention states, insofar as relevant:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Court recalls that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8 § 1 of the Convention (see the Moustaquim v. Belgium judgment of 18 February 1991, Series A no. 193, p. 18, § 16).

In the present case, A.S. is serving a prison sentence, though the applicants have the possibility of regularly visiting him in prison. The Court notes that in this respect the applicants have not complained of an interference with their right to respect for private and family life within the meaning of Article 8 of the Convention.

The applicants furthermore do not as such contest the decision of the Swiss authorities that they, together with A.S., have to return to Yugoslavia together as a family. However, they complain that, if they are forced to leave Switzerland separately, in Yugoslavia they will not have the means to travel regularly to Switzerland to visit A.S. in prison until his release in November 2002.

The issue arises, therefore, whether there exists an obligation under Article 8 of the Convention for a Member State actively to ensure that a family may regularly visit, either from within the territory of that State or from another country, a family member detained in prison.

The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see the Gül v. Switzerland judgment of 19 February 1996*, Reports of Judgments and Decisions* 1996-I, p. 175-176, § 38).

The Court further recalls that the Convention does not grant detained persons the right of choosing their place of detention, and that the separation and distance from his family are inevitably consequences of his detention. Nevertheless, the detention of a person in a prison at a distance from his family which renders any visit very difficult, if not impossible, may in exceptional circumstances constitute an interference with his family life, the possibility for members of the family to visit a prisoner being an essential factor for the maintenance of family life (see *Ospina Vargas v. Italy*, no. 40750/98, ECHR 2000-).

In the present case, the Court has had regard, on the one hand, to the considerable organisational difficulties which such a right for a family to visit a family member in prison would imply for Convention States. On the

other hand, it notes that the Swiss authorities enable the applicants regularly to visit A.S. and to communicate with him in writing and by telephone, and that A.S. will apparently be released from prison in November 2002. The difficulties which the applicants may encounter are not, therefore, excessive and will not render family life impossible (see application no. 23241/94, decision of 20 October 1994, DR 79-B, p. 121, with further references).

In balancing the various interests, the Court does not consider that Article 8 encompasses, in the circumstances of the present case, an obligation for the Swiss authorities actively to ensure that the applicants can visit A.S. in prison.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected under Article 35 § 4 of the Convention.

2. Insofar as the applicants complain under Article 14 of the Convention that they have been discriminated against on account of their family relations with A.S., the Court finds no issue under this provision. The remainder of the application is, therefore, also manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected under Article 35 § 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President

ANNEX X

House of Lords

Beoku-Betts *v* Secretary of State for the Home Department

[2008] UKHL 39

2008 April 9;
June 25

Lord Bingham of Cornhill, Lord Hope of Craighead, Lord Scott of Foscote, Baroness Hale of Richmond, Lord Brown of Eaton-under-Heywood

Immigration — Appeal — Leave to enter and remain — Secretary of State refusing claimant indefinite leave to remain — Appeal to adjudicator on human rights grounds — Whether adjudicator's assessment limited to effect on claimant alone — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 8 — Immigration and Asylum Act 1999 (c 33), s 65

Following a military coup, the claimant, aged 19, fled from Sierra Leone to the United Kingdom where he was granted leave to enter as a student. His elder sister, a British citizen, already lived in the United Kingdom and thereafter his parents and younger sister also arrived in the United Kingdom from Sierra Leone. His father registered as a British citizen, but died later the same year, and his mother and his younger sister were granted indefinite leave to remain. On expiry of his leave the claimant claimed asylum and the right to remain under articles 3 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[1], contending, inter alia, that his right to respect for his family life would be violated if he were to be returned to Sierra Leone. The Secretary of State refused both claims. The claimant appealed to an adjudicator who dismissed his asylum claim but, on his human rights appeal pursuant to section 65 of the Immigration and Asylum Act 1999[2], found that, since his family constituted a close-knit unit and his mother relied on him for emotional support, the claimant's proposed removal from the United Kingdom would involve disproportionate interference with the family as a whole, in breach of article 8. The Immigration Appeal Tribunal allowed the Secretary of State's appeal, concluding that the adjudicator's approach was erroneous since he should not have considered the effect of proposed removal on other family members but should have concentrated on the claimant's own position, only considering the impact on them as it affected him. The Court of Appeal upheld that decision.

On the claimant's appeal—

Held, allowing the appeal, that, having regard to the jurisprudence of the European Court of Human Rights, a wider construction should be given to section 65 of the 1999 Act than that adopted by the tribunal and the Court of Appeal; that where a breach of a claimant's right to respect for his family life was alleged the appellate authorities were to consider the complaint with reference to the family unit as a whole and if his proposed removal would be disproportionate in that context each affected family member was to be regarded as a victim; and that, accordingly, the adjudicator had adopted the proper approach and his decision would be reinstated (post, paras 1, 2, 3, 4, 20, 43–44).

Decision of the Court of Appeal [2005] EWCA Civ 828 reversed.

[1] Human Rights Act 1998, Sch 1, Pt I, art 8: "1. Everyone has the right to respect for his . . . family life . . . 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[2] Immigration and Asylum Act 1999, s 65: see post, para 18.

The following cases are referred to in the opinion of Lord Brown of Eaton-under-Heywood:

AB (Jamaica) v Secretary of State for the Home Department [2007] EWCA Civ 1302; [2008] HRLR 465, CA
AC (Deportation—Article 8—Appellant) Turkey [2004] UKIAT 00122; [2004] Imm AR 573
Huang v Secretary of State for the Home Department [2005] EWCA Civ 105; [2006] QB 1; [2005] 3 WLR 488; [2005] 3 All ER 435, CA; [2007] UKHL 11; [2007] 2 AC 167; [2007] 2 WLR 581; [2007] 4 All ER 15, HL(E)
Kehinde v Secretary of State for the Home Department [2001] UKIAT 00010
Miao v Secretary of State for the Home Department [2006] EWCA Civ 75; [2006] INLR 473, CA
Mokrani v France (2003) 40 EHRR 123
NG (Pakistan) v Secretary of State for the Home Department [2007] EWCA Civ 1543, CA
R (AC) v Immigration Appeal Tribunal [2003] EWHC 389 (Admin); [2003] INLR 507
R (Ahmadi) v Secretary of State for the Home Department [2005] EWCA Civ 1721; [2006] INLR 318, CA
R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840, CA
SS (ECO—Article 8) Malaysia v Secretary of State for the Home Department [2004] UKIAT 00091; [2004] Imm AR 153
Sezen v The Netherlands (2006) 43 EHRR 621
VN (Uganda) v Entry Clearance Officer [2008] EWCA Civ 232; [2008] Imm AR 565, CA

The following additional cases were cited in argument:

AG (Eritrea) v Secretary of State for the Home Department [2007] EWCA Civ 801; [2008] 2 All ER 28, CA
Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471
Amrollahi v Denmark (Application No 56811/00) (unreported) given 11 July 2002, ECtHR
Beldjoudi v France (1992) 14 EHRR 801
Berrehab v The Netherlands (1988) 11 EHRR 322
Boultif v Switzerland (2001) 33 EHRR 1179
Gül v Switzerland (1996) 22 EHRR 93
M (Zambia) v Secretary of State for the Home Department [2007] EWCA Civ 1387, CA
MT (Zimbabwe) v Secretary of State for the Home Department [2007] EWCA Civ 455, CA
Met Sula v Secretary of State for the Home Department [2002] UKIAT 00295
Moustaquim v Belgium (1991) 13 EHRR 802
Mukarkar v Secretary of State for the Home Department [2006] EWCA Civ 1045; [2006] INLR 486, CA
Poku v United Kingdom (1996) 22 EHRR CD 94

APPEAL from the Court of Appeal

The claimant, Ernest Beoku-Betts, appealed, with leave of the Appeal Committee of the House of Lords (Lord Hope of Craighead, Lord Walker of Gestingthorpe and Baroness Hale of Richmond), granted on 5 December 2005, from the dismissal by the Court of Appeal (Brooke, Latham and Lloyd LJJ) on 6 July 2005 of his appeal from the Immigration Appeal Tribunal which, on 5 September 2003, had allowed the Secretary of State's appeal from an adjudicator. By his determination promulgated on

A 4 February 2003 the adjudicator had allowed the claimant's appeal on human rights grounds from the Secretary of State's decision refusing the claimant indefinite leave to remain in the United Kingdom.

The facts are stated in the opinion of Lord Brown of Eaton-under-Heywood.

Richard Drabble QC and *Sonali Naik* (instructed by *Irving & Co*) for the
B claimant.

Where an appellant, in an appeal under section 65 of the Immigration and Asylum Act 1999 asserts that his removal from the United Kingdom would be a disproportionate interference with family life contrary to article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the appellate authorities should take into account the impact of
C his removal not only on him but also on other family members. If, overall, removal would be disproportionate all affected family members are to be regarded as victims: see *R (AC) v Immigration Appeal Tribunal* [2003] INLR 507; *Huang v Secretary of State for the Home Department* [2007] 2 AC 167; *AB (Jamaica) v Secretary of State for the Home Department* [2008] HRLR 465; *Miao v Secretary of State for the Home Department* [2006] INLR 473 and *R (Ahmadi) v Secretary of State for the Home*
D *Department* [2006] INLR 318. The contrary approach, that the impact of removal on other family members will only be considered in so far as it affects the person to be removed, is incorrect. Its consequence is that other family members who claim, as potential victims, that the removal breaches their own human rights are required to bring proceedings by way of judicial review or under the Human Rights Act 1998. In such cases part of the
E whole picture is considered in the section 65 appeal and part in separate proceedings, whereas what is required is assessment of the overall position without that artificial divide. The case law giving effect to that approach is wrong: see *Kehinde v Secretary of State for the Home Department* [2001] UKIAT 00010; *AC (Deportation—Article 8—Appellant) Turkey* [2004] Imm AR 573; *SS (ECO—Article 8) Malaysia v Secretary of State for the Home Department* [2004] Imm AR 153 and *Huang v Secretary of State for*
F *the Home Department* [2006] QB 1.

There is no direct Strasbourg authority in point but, given the expansive notion of family life under article 8, the European Court of Human Rights would be unlikely to refuse to consider all the implications of removing a person with a shared family life such as that enjoyed by the appellant and his family: see *Moustaquim v Belgium* (1991) 13 EHRR 802; *Boultif v*
G *Switzerland* (2001) 33 EHRR 1179; *Berrehab v The Netherlands* (1988) 11 EHRR 322; *Beldjoudi v France* (1992) 14 EHRR 801 and *Amrollahi v Denmark* (Application No 56811/00) (unreported) given 11 July 2002. The assessment of the proportionality of interference in the context of the separation of an adult relative from the family is fact sensitive and requires careful evaluation so as to give effect to the wide ambit of article 8.

Monica Carss-Frisk QC and *Adam Robb* (instructed by *Treasury*
H *Solicitor*) for the Secretary of State.

The statutory framework clearly establishes that it is only the human rights of the appellant that fall to be considered on an appeal under section 65 of the 1999 Act. The section only refers to the rights of the appellant and provide no basis for taking into account the rights of anyone

else, independently of those rights. That is in accordance with the general principle that a court or tribunal only determines the rights of those who are parties before it. The impact of removal on his relatives with whom he enjoys family life might be relevant, however, in considering the extent of any interference with his article 8 right and/or in considering the proportionality of the proposed removal. Domestic case law has consistently applied that construction of the legislation: see *Kehinde v Secretary of State for the Home Department* [2001] UKIAT 00010; *AC (Deportation—Article 8—Appellant) Turkey* [2004] Imm AR 573; *SS (ECO—Article 8) Malaysia v Secretary of State for the Home Department* [2004] Imm AR 153; *AB (Jamaica) v Secretary of State for the Home Department* [2008] HRLR 465; *NG (Pakistan) v Secretary of State for the Home Department* [2007] EWCA Civ 1543 and *VN (Uganda) v Entry Clearance Officer* [2008] Imm AR 565; and contrast *R (AC) v Immigration Appeal Tribunal* [2003] INLR 507 and *Met Sula v Secretary of State for the Home Department* [2002] UKIAT 00295.

Since that is the position in domestic law, it is only if article 8 were itself to provide the basis for consideration of the rights of other family members that the appellate authorities could take their position into account. However there is no Strasbourg decision in point. That is unsurprising since relevant family members are often included as applicants and, even where the only applicant is the person to be removed, the impact of the removal on others with whom he shares family life will frequently impact on him: see *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471. But the Strasbourg court will only entertain an application by a person who claims to be a victim of a violation of the Convention: see article 34. The concept of an indirect victim has been recognised but that approach does not imply that the system of statutory immigration appeals is defective in requiring the authorities to focus on the rights of the appellant. Anyone other than the appellant who claims to be a victim will have a remedy under section 7 of the Human Rights Act 1998.

Respect for a person's family life involves the notion of respect for that person's relationship with members of his family, seen through his eyes, and consideration of the emotional and other impact on him of the removal. Although each family member participates in family life, each does so as an individual and will experience family life as an individual and different considerations apply to different members: see *Poku v United Kingdom* (1996) 22 EHRR CD 94. *M (Zambia) v Secretary of State for the Home Department* [2007] EWCA Civ 1387 is distinguishable on its own facts.

The appellate authorities are required to assess a different and narrower question than that addressed both by the Secretary of State, when making the removal decision from which the section 65 appeal lies, and the Strasbourg court on any subsequent complaint by other family members under the Convention. The proper approach to determining the issue of proportionality is that provided in the *Huang* decision [2007] 2 AC 167, para 20, that the question for the appellate authorities is whether refusal of leave to enter or remain, where family life cannot reasonably be enjoyed elsewhere, taking account of all the circumstances, prejudices his family life sufficiently seriously to amount to a breach of the right protected by article 8. It is unnecessary also to consider where the case is exceptional: see *AG (Eritrea) v Secretary of State for the Home Department* [2008]

2 All ER 28; *MT (Zimbabwe) v Secretary of State for the Home Department* [2007] EWCA Civ 455 and *Mukarkar v Secretary of State for the Home Department* [2006] INLR 486. The tribunal and the Court of Appeal, following *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 and the *Huang* decision [2006] QB 1, applied the wrong test. However the decision reached by the Court of Appeal is consistent with Strasbourg jurisprudence and was correct: see *Moustaquim v Belgium* 13 EHRR 802 and *Gül v Switzerland* (1996) 22 EHRR 93.

Drabble QC replied.

The Committee took time for consideration.

25 June 2008. **LORD BINGHAM OF CORNHILL**

1 My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Brown of Eaton-under-Heywood. I am in full agreement with it and would, for the reasons he gives, make the order he proposes.

LORD HOPE OF CRAIGHEAD

2 My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Brown of Eaton-under-Heywood. I agree with it, and for the reason he gives I would allow the appeal and make the order he proposes.

LORD SCOTT OF FOSCOTE

3 My Lords, I, too, have had the advantage of reading in draft the opinion prepared by my noble and learned friend, Lord Brown of Eaton-under-Heywood. The reasons given by my noble and learned friend for allowing the appeal are, in my opinion, wholly persuasive and I am in full agreement with them. I would make the order that he proposes.

BARONESS HALE OF RICHMOND

4 My Lords, I am in full agreement with the opinion of my noble and learned friend, Lord Brown of Eaton-under-Heywood, and for the reasons he gives I too would allow this appeal and reinstate the adjudicator's decision in the appellant's favour. To insist that an appeal to the Asylum and Immigration Tribunal consider only the effect upon other family members as it affects the appellant, and that a judicial review brought by other family members considers only the effect upon the appellant as it affects them, is not only artificial and impracticable. It also risks missing the central point about family life, which is that the whole is greater than the sum of its individual parts. The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed.

LORD BROWN OF EATON-UNDER-HEYWOOD

The issue

5 My Lords, in determining an appeal under section 65 of the Immigration and Asylum Act 1999 (now sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002) against the Secretary of State's refusal of leave to remain on the ground that to remove the appellant

would interfere disproportionately with his article 8 right to respect for his family life, should the immigration appellate authorities take account of the impact of his proposed removal upon all those sharing family life with him or only its impact upon him personally (taking account of the impact on other family members only indirectly i e only in so far as this would in turn have an effect upon him)?

6 That is the central question for your Lordships' determination on this appeal.

The background

7 The appellant is a citizen of Sierra Leone, now aged 29, who on 9 November 1997, just short of his 19th birthday, arrived in the United Kingdom from Senegal following a military coup in Sierra Leone. Initially he was granted 12 months' leave to enter as a student. Having completed his A-levels he began to study law at university, obtaining the necessary extensions of leave until 31 December 2000 when his final leave expired; he had mistakenly thought it continued until the end of his course.

8 The appellant is a member of a prominent and comparatively wealthy Creole family from Freetown which for generations had been involved in political life in Sierra Leone. His father was a friend of President Kabbah whose government was overthrown by the coup and, although in the coup no member of the family suffered physical harm, he and his elder brother Seth were subject to a terrifying mock execution and understandably the family sought refuge.

9 The appellant's elder sister, Josepha, is a British citizen (born here in 1973) and has lived here continuously since 1993. The rest of the family left Sierra Leone in stages, Seth going to the United States of America and the appellant being followed to the United Kingdom by his mother, father and a younger sister, Candace. His father registered as a British citizen in May 1998 (having originally applied as long ago as 1972) but died of cancer in December that year. Under the immigration policy then in force, the appellant's mother and Candace, as dependants, were both granted indefinite leave to remain in October 1998; the appellant was unable to benefit from the policy.

10 On 1 June 2001 (shortly after discovering that his leave had expired) the appellant claimed asylum and also the right to remain under articles 3 and 8 of European Convention for the Protection of Human Rights and Fundamental Freedoms. On 27 February 2002 the Secretary of State refused both claims. The appellant appealed.

The three successive appeal hearings below

11 On 30 January 2003 the adjudicator dismissed the appellant's asylum appeal but allowed his human rights appeal on the article 8 ground. As for the asylum appeal he accepted that "the appellant's situation in Sierra Leone at the time of his departure was life-threatening due to his family's political connections" but found that the situation in Sierra Leone had improved significantly not least because of President Kabbah's return to power, although conditions there remained "comparatively harsh".

12 On the article 8 appeal the evidence included a number of statements from members of the appellant's family. The adjudicator expressed himself

satisfied that "the appellant's family is close-knit and interacts on a very regular basis", that "the appellant has a strong relationship with his sisters" and "currently resides with his mother and younger sister", travelling home most weekends during university term time. The appellant also has "a range of cousins and uncles in the United Kingdom". As for the suggestion that the "appellant's mother relied upon him for emotional support", this he found "entirely natural in the circumstances of the family's departure from Sierra Leone and the death of [her husband] in 1998". He noted that Josepha was employed in a local law firm, that Candace (then 13) was clearly doing very well at school, and that her mother worked full-time as a study supervisor at that school. He expressed himself satisfied that the family

> "would not return to Sierra Leone even if the appellant was returned. Consequently, if the appellant's article 8 claim were to fail . . . he would be separated from his family."

Having directed himself to "consider whether the interference with the appellant's family rights, which would obviously interfere with the family as a whole, is justified in the interest of controlling immigration", he concluded that the appellant's return to Sierra Leone would indeed be disproportionate so as to breach article 8.

13 On 5 September 2003 the Immigration Appeal Tribunal allowed the Secretary of State's appeal. For present purposes the critical paragraph in the tribunal's determination is para 14:

> "So far as the article 8 claim is concerned, we take the view that the adjudicator has placed too much emphasis on the position of the respondent's mother and siblings. It is not disputed that this is a close family with a not inconsiderable amount of inter-dependence, but it has to be borne in mind that it is the position of the respondent with regard to article 8 that is being considered and not that of his mother and siblings. In our view, the approach of the adjudicator . . . is flawed to the extent that it places considerable importance on the position of other members of the respondent's family."

14 On 4 November 2003 the Immigration Appeal Tribunal gave leave to appeal to the Court of Appeal on one ground only, namely

> "as to the extent to which the position of the claimant's family members was to be taken into account. There are apparently conflicting decisions by the tribunal in *Kehinde*. . . and at first instance on judicial review by Jack J in *AC* [2003] INLR 507 which it is desirable the Court of Appeal should resolve."

15 On 6 July 2005, the Court of Appeal (Brooke, Latham and Lloyd LJJ) dismissed the appellant's appeal. Latham LJ gave the single reasoned judgment. Para 12 is central:

> "Under section 65 of [the 1999 Act], the right of appeal on human rights grounds requires consideration of the alleged breach of the appellant's human rights. In the present case this required the adjudicator to concentrate on the effects of removal on the appellant. True it is, as Jack J said in *R (AC) v Immigration Appeal Tribunal* [2003] INLR 507, the effect on others might have an effect on an appellant, none the less it is

the consequence to the appellant which is the relevant consequence. In the context of a merits appeal, which this was, the tribunal was entitled to conclude that the adjudicator had allowed his judgment to be affected unduly by the effect of removal on the remainder of the family in particular his mother. Further, the adjudicator does not suggest that the effect on the family, let alone the appellant, amounted to an exceptional circumstance."

16 Although by no means central to this appeal I should at this point briefly note two matters. First, that both the adjudicator and the IAT had directed themselves in accordance with *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 to ask whether the Secretary of State as the decision-maker could reasonably have concluded that the interference with the appellant's article 8 rights were proportionate in the interests of immigration control—an approach subsequently corrected by the Court of Appeal's later decision in *Huang v Secretary of State for the Home Department* [2006] QB 1 holding that the question is one for the appellate authority itself rather than by way of review of the Secretary of State's decision. Secondly, that the Court of Appeal below directed itself in accordance with *Huang's* case (decided just four months previously) that only in a "truly exceptional case" could the Secretary of State's decision be interfered with on appeal (a direction reflected in the final sentence of the passage cited above from Latham LJ's judgment)—itself held to be erroneous by this House on the appeal in *Huang's* case [2007] 2 AC 167 which decided that no additional test of exceptionality has to be met.

17 Whether these errors (each in turn obviously unhelpful to the appellant) may have affected the outcome of these appeals I for my part think it unnecessary to explore. I have already indicated the single issue of law raised for your Lordships' determination and it seems to me that if this is resolved in the appellant's favour then the adjudicator's determination ought simply to be reinstated.

The legislation

18 The 1999 Act:

"65(1) A person who alleges that an authority has, in taking any decision under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom, acted in breach of his human rights may appeal to an adjudicator against that decision . . .

"(2) For the purposes of this Part, an authority acts in breach of a person's human rights if he acts, or fails to act, in relation to that other person in a way which is made unlawful by section 6(1) of the Human Rights Act 1998.

"(3) Subsections (4) and (5) apply if, in proceedings before an adjudicator or the Immigration Appeal Tribunal on an appeal, a question arises as to whether an authority has, in taking any decision under the Immigration Acts relating to the appellant's entitlement to enter or remain in the United Kingdom, acted in breach of the appellant's human rights.

"(4) The adjudicator, or the tribunal, has jurisdiction to consider the question.

A "(5) If the adjudicator, or the tribunal, decides that the authority concerned acted in breach of the appellant's human rights, the appeal may be allowed on that ground."

19 The 2002 Act (which superseded the 1999 Act):

"82(1) Where an immigration decision is made in respect of a person he may appeal to an adjudicator."

B "84(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds . . . (c) that the decision is unlawful under section 6 of the Human Rights Act 1998 . . . as being incompatible with the appellant's Convention rights . . . (g) that removal of the appellant from the United Kingdom in consequence of the immigration decision . . . would be unlawful under section 6 of the C Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

The rival arguments

(a) The appellant's case

20 The appellant submits that the legislation allows, indeed requires, D the appellate authorities, in determining whether the appellant's article 8 rights have been breached, to take into account the effect of his proposed removal upon all the members of his family unit. Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of removal upon each member. If overall the E removal would be disproportionate, all affected family members are to be regarded as victims.

21 In making her initial decision on removal the Secretary of State must necessarily have regard to the article 8 rights of each and all of the family members. So too the European Court of Human Rights on a complaint by the family of an article 8 violation by the United Kingdom's removal of a family member would look at the overall impact on family life. So too, F therefore, should the immigration appeal authorities consider the matter on appeal. Otherwise, other family members would have no alternative but to bring separate proceedings under section 7 of the Human Rights Act 1998, parallel or sequential to the section 65 appeal.

(b) The Secretary of State's case

G **22** The Secretary of State submits that the wording of the legislation is clear and restrictive. Both section 65 of the 1999 Act and section 84 of the 2002 Act refer repeatedly to *the appellant's* human rights and to no one else's. The appellate authorities must decide whether *his* human rights would be breached, whether removal would be compatible with *his* Convention rights. (It is not contended that there is any material difference between the two Acts.)

H **23** Ms Carss-Frisk acknowledges that, on this approach, the appellate authorities are indeed required to answer a different and narrower question than that initially to be decided by the Secretary of State (from which the section 65 appeal lies) and that which would be addressed by Strasbourg on any subsequent complaint by the family under the Convention. She accepts,

therefore, that on occasion, if the section 65 appeal fails, other family members (whether or not in combination with the unsuccessful section 65 appellant) will have to bring proceedings under the 1998 Act so that effect can be given to the rights of the family as a whole. She submits, however, that Parliament has left no alternative and suggests that in practice, in the great majority of cases, the difference between the two approaches will be unlikely to produce any different result.

The domestic case law

24 The issue before the House was first addressed in the Immigration Appeal Tribunal's starred decision in *Kehinde v Secretary of State for the Home Department* [2001] UKIAT 00010 which laid stress on the narrow wording of section 65 and continued, at paras 9–10:

> "9. . . . In an appeal under section 65, therefore, there is no obligation to take into account claims made about the human rights of individuals other than the appellant or individuals who have not themselves been the subject of a decision which is under appeal. Such matters (save in so far as they relate to the human rights of the appellant himself) are irrelevant to the matter under consideration.
>
> "10. . . . Anybody else who claims that, in making or proposing to carry out the decision a public authority will breach his or her human rights, may bring proceedings under section 7(1)(a) of the 1998 Act."

25 As noted in para 14 above it was the apparent difference between that approach and Jack J's approach in *R (AC) v Immigration Appeal Tribunal* [2003] INLR 507 (hereinafter "*AC*") which prompted the Immigration Appeal Tribunal to grant leave to appeal to the Court of Appeal in the present case.

26 *AC* both on its facts and by reference to the course of proceedings there seems to me a most instructive case. AC was a Turkish woman who came here clandestinely in 1995 and claimed asylum. The next month she married her Turkish fiancée and the following year had a daughter, S. The marriage broke down and two years later AC committed a violent assault for which she was sentenced to ten years' imprisonment (reduced on appeal to eight) and recommended for deportation. If deported it was recognised that direct face to face contact between AC and S (then aged about seven) would in all likelihood be lost for some ten years.

27 The adjudicator allowed AC's appeal against the Secretary of State's deportation order. In 2002 the Immigration Appeal Tribunal on the Secretary of State's appeal gave a preliminary ruling that the section 65 appeal

> "was to be determined by looking at the rights of AC to her family life under article 8 and not by looking at S's human right to a family life. S's human rights did not require to be taken into account. This did not exclude evidence as to the mother/daughter relationship but that evidence would be examined in the light of AC's rights."

28 That ruling was the subject of a judicial review challenge before Jack J who gave judgment in March 2003. Regrettably his decision was not altogether clear: in parts it appeared to support the narrower approach, in parts the wider approach. (The Immigration Appeal Tribunal in the present

A case plainly thought it in conflict with *Kehinde* whereas the Court of Appeal appears to have regarded it as supporting the narrower approach—and never even mentioned *Kehinde*.)

29 In June 2004, following Jack J's judgment, AC's case returned to the Immigration Appeal Tribunal (before Ouseley J as President and two Vice-Presidents) who allowed the Secretary of State's appeal: *AC (Deportation—Article 8—Appellant) Turkey* [2004] Imm AR 573. The judgment includes the following passages, at paras 16–18 and 76:

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> "16. . . . There was some debate before us as to what [Jack J's] judgment decided and, in any event, as to what the true position in law is."
>
> "17. . . . We regard it as clear that the effect of section 65 is to require the adjudicator and tribunal to decide whether or not the decision breaches the appellant's human rights and not whether it breaches the rights of others who are not appellants . . . That other person has the ability, if a victim, to bring proceedings in the Administrative Court under section 7 of the 1998 Act. It may be cumbersome, but it avoids an appellant making claims relating to someone else who may be unaware of what is being said, or who may disagree with it. A child of divorced or separated parents may be in a particularly difficult position in this respect.
>
> "18. . . . We also accept . . . that although the right to family life and the effect of interference [in] it is examined, under section 65, from the viewpoint of the appellant, the impact of separation on another may cause distress or anxiety to the appellant and that indirect impact on the appellant should be taken into account. It is right to recognise that although some family relationships may involve complete reciprocity, others, and parent-child relationships are the obvious example, may be very different depending upon the person from whose viewpoint the matter is examined."
>
> "76. We make it clear that we have not considered the position from the viewpoint of S. We recognise that the decision in this case affects her rights and interests, but for the reasons which we have given we do not bring those into the balance in this decision."

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That judgment had in fact been foreshadowed just two months previously by the Immigration Appeal Tribunal's decision (again presided over by Ouseley J) in *SS (ECO—Article 8) Malaysia v Secretary of State for the Home Department* [2004] Imm AR 153. In that case too, having expressed doubts as to the effect of Jack J's judgment in *AC* [2003] INLR 507 and said that the tribunal was bound by the starred decision in *Kehinde*, Ouseley J said that section 65 required the narrow approach to be adopted even though that might result in other family members having to challenge removal decisions under section 7 of the 1998 Act.

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30 The next decision was that of the Court of Appeal in the present case [2005] EWCA Civ 828. As has been seen, only Jack J's judgment in *AC* was referred to and that as if it constrained the narrower approach.

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31 It is perhaps worth noting that in September 2005 (after the Court of Appeal's decision in the present case) a consent order was made in the Court of Appeal in *AC's* case allowing her further appeal and recording:

"The parties are in agreement that the appellant's article 8 appeal requires re-examination by a freshly constituted tribunal. There was only one appellant before the Immigration Appeal Tribunal and there is only one family life. A proper assessment of the proportionality of the interference with the family life requires an assessment of the impact on the child of loss of contact with her parent. Although a 'third party', the child's right to respect for family life is thereby a relevant factor in the assessment of proportionality."

Your Lordships were not told the final outcome of *AC's* case.

32 The present issue has arisen in the Court of Appeal in a number of cases since the decision in the present case. *R (Ahmadi) v Secretary of State for the Home Department* [2006] INLR 318 concerned two brothers, one seeking to remain here to protect the other (a refugee settled here) from the consequences of his florid schizophrenia. The appeal succeeded without the court finding it necessary to resolve the issue. It was noted that the brother settled here had brought contingent separate proceedings in case they proved necessary. (The only other instances drawn to our attention of separate proceedings being brought by other family members were two Scottish cases involving petitions by other family members for judicial review following the failure of appeals against deportation orders.)

33 *Miao v Secretary of State for the Home Department* [2006] INLR 473 concerned a husband and wife seeking to remain here to care for the husband's father (settled as a refugee) who suffered chronic depression and presented a high suicide risk. The appeal succeeded. Although in argument the Crown relied on the Court of Appeal's decision in the present case, the issue was not mentioned in the judgment.

34 *NG (Pakistan) v Secretary of State for the Home Department* [2007] EWCA Civ 1543 concerned a Pakistani mother, with two young children, who was to be deported after separating from her husband, a British citizen of Pakistani origin. Contact between father and children would thereby be broken. Although it may well not have been decisive the Court of Appeal stated at para 9:

"There was no prospect of the father actually caring for the children. The children would travel with their mother if she were removed. It was the mother's article 8 rights that were under scrutiny, not the father's or even the children's (see the decision of the Immigration Appeal Tribunal in *Kehinde*)."

35 *AB (Jamaica) v Secretary of State for the Home Department* [2008] HRLR 465 concerned a Jamaican woman who overstayed here, was thereafter joined by her two daughters, then met and married a British citizen who had lived here all his life. Allowing the appeal against the mother's deportation the Court of Appeal (per Sedley LJ) said, at para 20:

"In substance, albeit not in form, [the husband] was a party to the proceedings. It was as much his marriage as the appellant's which was in jeopardy, and it was the impact of removal on him rather than on her which, given the lapse of years since the marriage, was now critical. From Strasbourg's point of view, his Convention rights were as fully engaged as hers. He was entitled to something better than the cavalier treatment he received . . . It cannot be permissible to give less than

A detailed and anxious consideration to the situation of a British citizen who has lived here all his life before it is held reasonable and proportionate to expect him to emigrate to a foreign country in order to keep his marriage intact."

Again no mention was made of the present issue.

36 Most recently the issue was raised in *VN (Uganda) v Entry Clearance Officer* [2008] Imm AR 565 when again it was found unnecessary B to resolve it. The Court of Appeal dismissed the appeal on the basis that even if the immigration judge had taken full account of the appellant's brother's separate article 8 rights it could not have affected the outcome.

The Strasbourg case law

C **37** Plainly the present issue could not arise on a Strasbourg application: as Sedley LJ pointed out in *AB (Jamaica)*, from Strasbourg's point of view the husband's Convention rights were as fully engaged as the wife's. Time and again the Strasbourg case law emphasises the crucial importance of family life.

38 *Sezen v The Netherlands* (2006) 43 EHRR 621 is a case in point. Noting that the case concerned "a functioning family unit where the parents D and children are living together", para 49 of the judgment continued:

> "The court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by article 8 of the Convention and that to split up a family is an interference of a very serious order. Having regard to its finding . . . that the second applicant and the children cannot be expected to follow E the first applicant to Turkey, the effect of the family being split up therefore remains the same [as when a ten-year exclusion order remained in force] as long as the first applicant continues to be denied the right to reside in the Netherlands."

39 True, unlike *Sezen*, the present case is not concerned with young children. But the dependency between the appellant and his mother here F clearly engages article 8. As the court stated in *Mokrani v France* (2003) 40 EHRR 123, para 33:

> "relationships between adults do not necessarily benefit from protection under article 8 of the Convention unless the existence of additional elements of dependence, other than normal emotional ties, can be proven."

G On the adjudicator's findings of fact, such additional elements of dependence can properly be said to exist in the present case.

40 All of this, moreover, is entirely consistent with the approach taken by the House in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 18:

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> "the main importance of the [Strasbourg] case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from

this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant."

Conclusions

41 Whilst it is no doubt true that only infrequently will the present issue affect the outcome of an appeal, clearly on occasion it will and in any event that could provide no reason for maintaining the present narrow approach if it is wrong—indeed, quite the contrary.

42 Ouseley J in *AC's* case, at para 29 above, envisaged as a disadvantage of the wider construction that the appellant might make claims relating to other family members which they might not agree with. To my mind the risk of this is small: generally the appellant would be advised to adduce signed statements from other affected family members if not indeed to call them. The greater risk surely arises upon the narrower construction: if the impact of removal on other family members is relevant only in so far as it causes the appellant distress and anxiety, that puts a premium on the appellant exaggerating his feelings.

43 The disadvantages of the narrow approach are manifest. What could be less convenient than to have the appellant's article 8 rights taken into account in one proceeding (the section 65 appeal), other family members' rights in another (a separate claim under section 7 of the Human Rights Act 1998)? Is it not somewhat unlikely that the very legislation which introduced "one-stop" appeals—the shoulder note to section 77 of the 1999 Act—should have intended the narrow approach to section 65? Surely Parliament was attempting to streamline and simplify proceedings. And would it not be strange too that the Secretary of State (and the Strasbourg court) should have to approach the appellant's article 8 claim to remain on one basis, the appellate authorities on another? Unless driven by the clearest statutory language to that conclusion, I would not adopt it. And here the language seems to be far from decisive. Once it is recognised that, as recorded in the eventual consent order in *AC's* case, at para 31 above, "there is only one family life", and that, assuming the appellant's proposed removal would be disproportionate looking at the family unit as a whole, then each affected family member is to be regarded as a victim, section 65 seems comfortably to accommodate the wider construction.

44 I would accordingly adopt the wider construction to section 65 contended for by the appellant, and, in the result allow the appeal, set aside the decisions of the Court of Appeal and the Immigration Appeal Tribunal, and reinstate the adjudicator's determination in the appellant's favour. Written submissions on costs are invited within 14 days.

Appeal allowed.
Order of Court of Appeal set aside.
Adjudicator's determination reinstated.

DECP

ANNEX Y

The authority exceeds 30 pages

Supreme Court

H (H) *v* Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening)

H (P) *v* Same (Same intervening)

F-K *v* Polish Judicial Authority

[2012] UKSC 25

2012 March 5, 6, 7, 8; June 20

Lord Hope of Craighead DPSC, Lord Judge CJ, Baroness Hale of Richmond, Lord Mance, Lord Kerr of Tonaghmore, Lord Wilson JJSC, Lord Brown of Eaton-under-Heywood

Extradition — Compatibility with Convention rights — Respect for family life — Proposed extraditees claiming serious adverse consequences of extradition for selves and children — Whether consequences outweighed by strong public interest in prevention of crime — Whether gravity of offences material consideration — Whether consequences for children primary consideration — Whether extradition compatible with Convention right to respect for family life — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 8 — Extradition Act 2003 (c 41), s 21

In the first case, the husband and the wife were British citizens who had married in 1996. Their three children were born in 2000, 2003 and 2009 respectively. In 2003 the husband and the wife were charged in Italy with criminal association for the purpose of drug-trafficking and with a number of offences of importing large quantities of cannabis from Morocco. Prior to their trial they both fled to England in breach of their bail conditions. They were subsequently convicted in their absence and sentenced to long custodial sentences. Pursuant to Council Framework Decision 2002/584/JHA on the European arrest warrant and surrender procedures between member states of the European Union the Italian prosecutor issued European arrest warrants requesting their surrender to serve the remainder of their sentences. Italy was a category 1 territory to which Part 1 of the Extradition Act 2003[1] applied. In the proceedings before the district judge the husband and the wife resisted extradition on the ground that it would be incompatible with their and their children's rights to respect for their private and family life under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[2]. Shortly after the hearing the wife suffered a physical and mental collapse which rendered her incapable of caring for herself or the children and the husband became the children's primary caregiver. In April 2010 the district judge, having considered expert reports both as to the wife's condition and on behalf of the children, concluded that it would not be unjust or oppressive to order her extradition and he made an order for her surrender. In June 2010 the district judge concluded that, for the purposes of section 21 of the 2003 Act, the husband's extradition would be compatible with his Convention rights within the meaning of the Human Rights Act 1998 and accordingly directed his surrender. On their appeal the judge considered fresh reports on the wife's condition and took account of submissions and evidence filed by the Official Solicitor on behalf of the children as to the effect, in particular, of the proposed separation from their parents. He concluded that it would not be

[1] Extradition Act 2003, s 21(1): see post, para 151.
[2] Human Rights Act 1998, Sch 1, Pt I, art 8: see post, para 110.

32 The second main criticism of the approach in later cases is that the courts have *not* been examining carefully the nature and extent of the interference in family life. In focussing on "some quite exceptionally compelling feature" (para 56 in *Norris*), they have fallen into the trap identified by Lord Mance JSC, tending

> "to divert attention from consideration of the potential impact of extradition on the particular persons involved . . . towards a search for factors (particularly *external* factors) which can be regarded as out of the run of the mill": para 109.

Some particularly grave consequences are not out of the run of the mill at all. Once again, the test is always whether the gravity of the interference with family life is justified by the gravity of the public interest pursued: see also Lord Wilson JSC, at para 153. Exceptionality is a prediction, just as it was in *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368, and not a test. We are all agreed upon that.

33 These two points clarified, what more needs to be said about the interests of children? There appears to be some disagreement between us about the order in which the judge should approach the task. I agree entirely that different judges may approach it in different ways. However, it is important always to ask oneself the right questions and in an orderly manner. That is why it is advisable to approach article 8 in the same order in which the Strasbourg court would do so. There is an additional reason to do so in a case involving children. The family rights of children are of a different order from those of adults, for several reasons. In the first place, as *Neulinger* and *ZH (Tanzania)* have explained, article 8 has to be interpreted in such a way that their best interests are a primary consideration, although not always the only primary consideration and not necessarily the paramount consideration. This gives them an importance which the family rights of other people (and in particular the extraditee) may not have. Secondly, children need a family life in a way that adults do not. They have to be fed, clothed, washed, supervised, taught and above all loved if they are to grow up to be the properly functioning members of society which we all need them to be. Their physical and educational needs may be met outside the family, although usually not as well as they are met within it, but their emotional needs can only be fully met within a functioning family. Depriving a child of her family life is altogether more serious than depriving an adult of his. Careful attention will therefore have to be paid to what will happen to the child if her sole or primary carer is extradited. Extradition is different from other forms of expulsion in that it is unlikely that the child will be able to accompany the extraditee. Thirdly, as the Coram Children's Legal Centre point out, although the child has a right to her family life and to all that goes with it, there is also a strong public interest in ensuring that children are properly brought up. This can of course cut both ways: sometimes a parent may do a child more harm than good and it is in the child's best interests to find an alternative home for her. But sometimes the parents' past criminality may say nothing at all about their capacity to bring up their children properly. Fourthly, therefore, as the effect upon the child's interests is always likely to be more severe than the effect upon an adult's, the court may have to consider whether there is any way in which the public interest in extradition can be met without doing such harm to the child.

ANNEX Z

Supreme Court

ZH (Tanzania) *v* Secretary of State for the Home Department

[2011] UKSC 4

2010 Nov 9, 10;
2011 Feb 1

Lord Hope of Craighead DPSC, Baroness Hale of Richmond, Lord Brown of Eaton-under-Heywood, Lord Mance, Lord Kerr of Tonaghmore JJSC

Immigration — Asylum — Removal — Claimant giving birth to children of British father while asylum applications pending — Children having British citizenship through father — Father later diagnosed with HIV — Claimant's asylum applications unsuccessful — Claimant resisting removal on grounds of interference with Convention right to respect for private and family life — Weight to be given to children's best interests when considering claimant's removal from United Kingdom — Importance to be attached to children's British citizenship — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 8

The claimant, a citizen of Tanzania, arrived in the United Kingdom in 1995. Over the next ten years she made three claims for asylum, two using false identities, a human rights claim and two applications for leave to remain, all of which were unsuccessful. In 1997 she formed a relationship with a British citizen and they had two children, born in 1998 and 2001, who both had British citizenship through the father. In 2005 the claimant and the father separated. The children continued to live with the claimant, although the father continued to have regular contact with them. After the father was diagnosed as being HIV positive in 2007 the claimant made a fresh claim under the Human Rights Act 1998[1], claiming that her removal from the United Kingdom would constitute a disproportionate interference with her right to respect for her private and family life, guaranteed by article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Secretary of State rejected the claim and the claimant's appeal to the Asylum and Immigration Tribunal was dismissed after a reconsideration. The Court of Appeal dismissed the claimant's further appeal.

On the claimant's appeal—

Held, allowing the appeal, that international law placed a binding obligation upon public bodies, including the immigration authorities and the Secretary of State, to discharge their functions having regard to the need to safeguard and promote the welfare of children; that the obligation applied not only to how children were looked after in the United Kingdom but also to decisions made about asylum, deportation and removal from the United Kingdom; that any such decision which was taken without having regard to the need to safeguard and promote the welfare of any child involved would not be "in accordance with law" for the purposes of article 8.2 of the Convention; that, further, in all decisions directly or indirectly affecting a child's upbringing national authorities were required to treat the best interests of the child as a primary consideration, by identifying what those best interests required and then assessing whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the child's best interests; that although a child's British nationality was not a decisive factor it was nevertheless of particular importance in assessing the child's best interests and was relevant in deciding whether it would be reasonable to expect the child to live in another country; and that, having regard to the benefits of British citizenship, the facts that the claimant's children were British by descent from their British father with whom they had a good relationship, had an unqualified right to live in the United Kingdom where they had always lived,

[1] Human Rights Act 1998, Sch 1, Pt I, art 8: see post, para 14.

were being educated and had social links with the community, and the countervailing considerations of the need to maintain firm and fair immigration control, the claimant's appalling immigration history and the precariousness of her position when the children had been conceived, for none of which the children could be blamed, the claimant's removal would constitute a disproportionate interference with the children's rights under article 8 to respect for their family life (post, paras 23–26, 30–33, 38, 39, 45).

Wan v Minister for Immigration and Multicultural Affairs (2001) 107 FCR 133 considered.

Per curiam. The immigration authorities must be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so. While their interests may be the same as their parents' that should not be taken for granted in every case (post, paras 37, 39, 45).

Decision of the Court of Appeal [2009] EWCA Civ 691 reversed.

The following cases are referred to in the judgments:

Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471
Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39; [2009] AC 115; [2008] 3 WLR 166; [2008] 4 All ER 1146, HL(E)
Boultif v Switzerland (2001) 33 EHRR 1179
EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41; [2009] AC 1159; [2008] 3 WLR 178; [2008] 4 All ER 28, HL(E)
EM (Lebanon) v Secretary of State for the Home Department (AF (A Child) intervening) [2008] UKHL 64; [2009] AC 1198; [2008] 3 WLR 931; [2009] 1 All ER 559, HL(E)
Edore v Secretary of State for the Home Department [2003] EWCA Civ 716; [2003] 1 WLR 2979; [2003] 3 All ER 1265, CA
Fadele v United Kingdom (1991) 70 DR 159
Jaramillo v United Kingdom (Application No 24865/94) (unreported) 23 October 1995, EComHR
Maslov v Austria [2009] INLR 47, GC
Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273
Naidike v Attorney General of Trinidad and Tobago [2004] UKPC 49; [2005] 1 AC 538; [2004] 3 WLR 1430, PC
Neulinger v Switzerland (2010) 28 BHRC 706, GC
O and OL v United Kingdom (Application No 11970/86) (unreported) 13 July 1987, EComHR
Poku v United Kingdom (1996) 22 EHRR CD 94
R (WL (Congo)) v Secretary of State for the Home Department [2010] EWCA Civ 111; [2010] 1 WLR 2168; [2010] 4 All ER 489, CA
Rodrigues da Silva, Hoogkamer v The Netherlands (2006) 44 EHRR 729
Sorabjee v United Kingdom [1996] EHRLR 216
Üner v The Netherlands (2006) 45 EHRR 421, GC
Wan v Minister for Immigration and Multicultural Affairs [2001] FCA 568; 107 FCR 133

The following additional cases were cited in argument:

AB (Jamaica) v Secretary of State for the Home Department [2007] EWCA Civ 1302; [2008] 1 WLR 1893, CA
Beljoudi v France (1992) 14 EHRR 801
Chen v Secretary of State for the Home Department (Case C-200/02) [2005] QB 325; [2004] 3 WLR 1453; [2005] All ER (EC) 129, ECJ
Chikwamba v Secretary of State for the Home Department [2008] UKHL 40; [2008] 1 WLR 1420; [2009] 1 All ER 363, HL(E)

R v Secretary of State for the Home Department, Ex p Gangadeen [1998] 1 FLR 762, CA
R (M) v Islington London Borough Council [2004] EWCA Civ 235; [2005] 1 WLR 884; [2004] 4 All ER 709, CA
Sen v The Netherlands (2001) 36 EHRR 81
Tuquabo-Tekle v The Netherlands [2006] 1 FLR 798

APPEAL from the Court of Appeal

By permission of the Supreme Court (Lord Rodger of Earlsferry, Baroness Hale of Richmond and Lord Mance JJSC) granted on 28 March 2010, the claimant, ZH, appealed from the judgment of the Court of Appeal (Lawrence Collins, Moses LJJ and Holman J) on 26 March 2009 [2009] EWCA Civ 691, dismissing the claimant's appeal from a decision dated 5 August 2008 of the Asylum and Immigration Tribunal (Immigration Judges Blandy and Middleton Roy) which, having reconsidered the claimant's case, had upheld a decision on 4 March 2008 of the tribunal (Immigration Judge Rowlands) to refuse the claimant's application under the Human Rights Act 1998 claiming that the decision of the Secretary of State for the Home Department to give directions for her removal to Tanzania would result in a violation of her right to respect for her private and family life guaranteed by article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The facts are stated in the judgment of Baroness Hale of Richmond JSC.

Manjit Gill QC and *Benjamin Hawkin* (instructed by *Raffles Haig*) for the claimant.

The first issue is what is in the best interests of the children under article 8.2 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The children must be treated as persons to whom the law ascribes specific rights of their own. Because they are minors, international human rights law recognises that they are entitled to specific, special and enhanced protection in respect of those rights. Their best interests are not merely a factor to be taken into account like any other. Where consideration is being given to the removal of a parent, the best interests of an affected child is the first thing which has to be identified before a decision to remove can properly be taken.

These are British children and the possession of British nationality is in itself of particular importance and must be given consideration. The Court of Appeal failed to appreciate that in certain circumstances, including those that arise in the present appeal, the fact that the children are British citizens will be decisive. Some sort of primacy must be attached to British nationality. The conclusions of the courts below give rise to anomalous and discriminatory results. The children have a right to have a personal relationship and regular contact with their parents.

The Secretary of State's decision amounts to sending British citizens into exile or constructively removing them when both domestic and international law only permits that result in rare and extreme circumstances. The Secretary of State's decision has imposed on the parents and the children a heartbreaking choice as to whether the children should stay in the United Kingdom, the only country in which they have ever lived, and lose their primary carer who is their mother, or go with their mother to Tanzania and be separated from their father. Although the parents can be criticised for not

A thinking about that potential choice, the children are innocent victims and the Secretary of State and the courts have positive obligations to protect the children both as minors and as British citizens. The children cannot be treated merely as appendages of their parents and therefore irrelevant in the decision-making process relating to their mother. They cannot be deprived of the consequences and benefits of their British citizenship.

B Article 8 requires that in cases where the removal of a parent potentially gives rise to a separation of a child from a parent, the court should keep uppermost in its mind the rights of the child and should always treat the best interests of the child as the paramount, or alternatively, the primary consideration in the assessment of proportionality. Decision-makers should ensure that a mechanism is found to ensure that the children's voices are heard. These children's own best interests require that they should not be C removed from the United Kingdom and that they should remain here with both their parents.

[Reference was made to *Neulinger v Switzerland* (2010) 28 BHRC 706; *Sen v The Netherlands* (2003) 36 EHRR 81; *Tuquabo-Tekle v The Netherlands* [2006] 1 FLR 798; *Boultif v Switzerland* (2001) 33 EHRR 1179; *Üner v The Netherlands* (2006) 45 EHRR 421; *Maslov v* D *Austria* [2007] INLR 47; *Beoku-Betts v Secretary of State for the Home Department* [2009] AC 115; *Chikwamba v Secretary of State for the Home Department* [2008] 1 WLR 1420; *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159; *R (M) v Islington London Borough Council* [2005] 1 WLR 884; *AB (Jamaica) v Secretary of State for the Home Department* [2008] 1 WLR 1893 and *Chen v Secretary of State for the* E *Home Department* (Case C-200/02) [2005] QB 325. Reference was also made to the United Nations Convention on the Rights of the Child (1989) (Cm 1976), articles 3 and 9; the United Nation Committee on the Rights of the Child, General Comment No 6 (39th Session, 2005) (CRC/GC/2005/6) on "Treatment of Unaccompanied and Separated Children Outside their Country of Origin" and General Comment No 12 (51st Session, 2009) (CRC/C/GC/12) on "The right of the child to be heard" and the Borders, F Citizenship and Immigration Act 2009, section 55. Additional reference was made to various academic writings on the rights of the child, including: Philip Alston, "The Legal Framework of the Convention on the Rights of the Child", Bulletin of Human Rights 91/2, p 9 (United Nations); "The Child as Citizen" (Council of Europe, 1996); Michael Freeman, "Article 3: The Best Interests of the Child" (Martinus Nijhoff, 2007) and Jane McAdam, G "Seeking Asylum under the Convention on the Rights of the Child: A case for Complementary Protection" (2006) 14 International Journal of Children's Rights, pp 251–274.]

Joanna Dodson QC and *Edward Nicholson* (instructed by *Raffles Haig*) for the children, intervening.

The submissions made on behalf of the claimant are adopted. It would be H appropriate to canvas the children's views on whether they wanted to go to Tanzania with the claimant. It is also relevant to consider whether section 1 of the Children Act 1989 which states that the children's welfare shall be the paramount consideration applies to immigration decisions. The outcome of the proceedings will have a profound effect on the children's future lives.

Monica Carss-Frisk QC and *Susan Chan* (instructed by *Treasury Solicitor*) for the Secretary of State. A

In the particular circumstances of this case the decision to remove the claimant was incompatible with article 8, but the claimant's submissions should be rejected.

Article 8 calls for a fact sensitive approach in which all relevant factors are carefully evaluated and no one factor is decisive, or paramount in the sense of inevitably "trumping" all other considerations. The best interests of B the child are a primary consideration, but it is not decisive. The British citizenship of a relevant family member is a factor to be weighed in the balance but it is not decisive and its weight depends on all the circumstances. Article 8 does not grant the right to enjoy family life in any particular country.

The best interests of the child are "a" primary consideration and not "the" C primary consideration. Other considerations can be taken into account. There must be sufficient countervailing factors to outweigh the best interests of the child. Nothing in the case law, whether domestic or of the European Court of Human Rights, indicates that the best interests of the child are paramount or decisive.

British citizenship in itself does not put this case in a special category. The D children's citizenship has "a role" to play but that is all it is. The concern is with family life and not other benefits like welfare protection. The children have equal rights with adults, not more rights. The child can be heard through another person including the parent if there is no conflict between them. Otherwise the child should be separately represented.

[Reference was made to *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159; *Rodrigues da Silva, Hoogkamer v The Netherlands* (2006) 44 EHRR 729; *Naidike v Attorney General of Trinidad and Tobago* [2005] 1 AC 538; *Üner v The Netherlands* 45 EHRR 421; *Maslov v Austria* [2009] INLR 47; *Neulinger v Switzerland* 28 BHRC 706; *Beldjoudi v France* (1992) 14 EHRR 801; *O and OL v United Kingdom* (Application No 11970/86) (unreported) 13 July 1987; *Sorabjee v United Kingdom* [1996] EHRLR 216; *R v Secretary of State for the Home Department, Ex p Gangadeen* [1998] FLR 762; *EM (Lebanon) v Secretary of State for the Home Department) (AF (A Child) intervening)* [2009] AC 1198 and *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133.]

Gill QC in reply.

None of the cases in the European Court of Human Rights is consistent with the conclusion that, where a child's best interests requires the parent's G presence, immigration concerns will override that. [Reference was made to *Edore v Secretary of State for the Home Department* [2003] 1 WLR 2979.]

The court took time for consideration.

1 February 2011. **BARONESS HALE OF RICHMOND JSC** (with whom Lord Brown of Eaton-under-Heywood and Lord Mance JJSC agreed) H

1 The over-arching issue in this case is the weight to be given to the best interests of children who are affected by the decision to remove or deport one or both of their parents from this country. Within this, however, is a much more specific question: in what circumstances is it permissible to

A remove or deport a non-citizen parent where the effect will be that a child who is a citizen of the United Kingdom will also have to leave? There is, of course, no power to remove or deport a person who is a United Kingdom citizen: see Immigration Act 1971, section 3(5)(6). They have a right of abode in this country, which means that they are free to live in, and to come and go into and from the United Kingdom without let or hindrance: see 1971 Act, sections 1 and 2. The consistent stance of the Secretary of State is B that UK citizens are not compulsorily removed from this country (e g Phil Woolas, Hansard (HC Debates), 15 June 2009, written answers, col 33). However if a non-citizen parent is compulsorily removed and agrees to take her children with her, the effect is that the children have little or no choice in the matter. There is no machinery for consulting them or giving independent consideration to their views.

C

The facts

2 The facts of this case are a good illustration of how these issues can arise. The mother is a national of Tanzania who arrived here in December 1995 at the age of 20. She made three unsuccessful claims for asylum, one in her own identity and two in false identities. In 1997 she met and formed a D relationship with a British citizen. They have two children, a daughter, T, born in 1998 (who is now 12 years old) and a son, J, born in 2001 (who is now nine). The children are both British citizens, having been born here to parents, one of whom is a British citizen. They have lived here with their mother all their lives, nearly all of the time at the same address. They attend local schools.

3 Their parents separated in 2005 but their father continues to see them E regularly, visiting approximately twice a month for four to five days at a time. In 2007 he was diagnosed with HIV. He lives on disability living allowance with his parents and his wife and is reported to drink a great deal. The tribunal nevertheless thought that there would not "necessarily be any particular practical difficulties" if the children were to go to live with him. The Court of Appeal very sensibly considered this "susceptible to criticism as F having no rational basis". Nevertheless, they upheld the tribunal's finding that the children could reasonably be expected to follow their mother to Tanzania: [2009] EWCA Civ 691 at [27]. They also declined to hold that there was no evidence to support the tribunal's finding that the father would be able to visit them in Tanzania, despite his fragile health and limited means: para 32.

4 As it happens, this court has seen another illustration of how these G issues may arise, in *R (WL (Congo)) v Secretary of State for the Home Department* [2010] 1 WLR 2168 (Supreme Court judgment pending). Both father and mother are citizens of the Democratic Republic of Congo. Their child, however, is a British citizen. The Secretary of State intends to deport the father under section 3(5) of the 1971 Act and also served notice of intention to deport both mother and child. There is power to deport non-citizen family members of those deported under section 3(5) but there is no H power to deport citizens under that or any other provision of the 1971 Act. It is easy to see how a mother served with such a notice might think that there was such a power and that she had no choice. Fortunately, it appears that the notice was not followed up with an actual decision to deport in that case.

These proceedings

5 This mother's immigration history has rightly been described as "appalling". She made a claim for asylum on arrival in her own name which was refused in 1997 and her appeal was dismissed in 1998, shortly after the birth of her daughter. She then made two further asylum applications, pretending to be a Somali, both of which were refused. In 2001, shortly before the birth of her son, she made a human rights application, claiming that her removal would be in breach of article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. This was refused in 2004 and her appeal was dismissed later that year. Also in 2004 she and the children applied for leave to remain under the "one-off family concession" which was then in force. This was refused in 2006 because of her fraudulent asylum claims. Meanwhile in 2005 she applied under a different policy known as the "seven-year child concession". This too was refused, for similar reasons, later in 2006 and her attempts to have this judicially reviewed were unsuccessful.

6 After the father's diagnosis in 2007, fresh representations were made. The Secretary of State accepted these as a fresh claim but rejected it early in 2008. The mother's appeal was dismissed in March 2008. However an application for reconsideration was successful. In May 2008, Senior Immigration Judge McGeachy held that the immigration judge had not considered the relationship between the children and their father (it being admitted that there was no basis on which he could have found that they could live here with him), the fact that they had been born in Britain and were then aged nine and seven and were British. It was a material error of law for the immigration judge not to have taken into account the rights of the children and the effect of the mother's removal upon them.

7 Nevertheless at the second stage of the reconsideration, the tribunal, having heard the evidence, dismissed the appeal: Appeal Number IA/01284/2008. They found that there was family life between the mother and the children and between the father and the children, although not between the parents, and also that the mother had built up a substantial private life in this country: para 5.3. Removal to Tanzania, if the children accompanied the mother, would substantially interfere with the relationship with their father; staying behind would substantially interfere with the relationship with their mother: para 5.4. Removing the mother would be in accordance with the law for the purpose of protecting the rights and freedoms of others. The only question was whether it would be proportionate: para 5.5.

8 The tribunal found the mother to be seriously lacking in credibility. She had had the children knowing that her immigration status was precarious. Having her second child was "demonstrably irresponsible": para 5.8. However, the children were innocent of their parents's shortcomings: para 5.9. The parents now had to choose what would be best for their children:

> "We do not consider that it can be regarded as unreasonable for the [Secretary of State's] decision to have that effect, because the eventual need to take such a decision must have been apparent to them ever since they began their relationship and decided to have children together": para 5.10.

A 9 The tribunal found it a "distinct and very real possibility" that the children might remain here with their father: para 5.11. This might motivate him to overcome his difficulties. People with HIV can lead ordinary lives. The daughter was of an age when many African children were separated from their parents and sent to boarding schools. The son, had he been a Muslim, would have been regarded as old enough to live with his father
B rather than his mother. Hence the tribunal could not see "any particular practical difficulties" if the children were to go and live with their father: para 5.15.

10 Equally, it would be "a very valid decision" for the children to go and live with their mother in Tanzania: para 5.16. It is not an uncivilised or an inherently dangerous place. Their mother must have told them about it. There were no reasons why their father should not from time to time travel
C to see the children there. They did not accept that either his HIV status or his financial circumstances were an obstacle. Looking at the circumstances in the round, therefore:

> "neither of the potential outcomes of the [mother's] removal which we have outlined above would represent such an interference with the family life of the children, or either of them, with either their mother on the one
D hand or their father on the other as to be disproportionate, again having regard to the importance of the removal of the [mother] in pursuance of the system of immigration control in this country": para 5.20.

They had earlier said that this was "of very great importance and considerable weight must be placed upon it": para 5.19.

11 Permission to appeal was initially refused on the basis that, even if
E the tribunal had been wrong to think that the children could stay here with their father, they could live in Tanzania with their mother. Ward LJ eventually gave permission to appeal because he was troubled about the effect of their leaving upon their relationship with their father: "how are we to approach the family rights of a broken family like this?" Before the Court of Appeal, however, it was argued that the British citizenship of the children
F was a "trump card" preventing the removal of their mother. This was rejected as inconsistent with the authorities, and in particular with the principle that there is no "hard-edged or bright-line rule", which was enunciated by Lord Bingham of Cornhill in *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159, and is quoted in full at para 15 below.

G 12 Mr Manjit Gill QC, on behalf of the appellant mother, does not argue in this court that the citizenship of the children should be dispositive in every case. But he does argue that insufficient weight is given to the welfare of all children affected by decisions to remove their parents and in particular to the welfare of children who are British citizens. This is incompatible with their right to respect for their family and private lives, considered in the light of the obligations of the United Kingdom under the United Nations
H Convention on the Rights of the Child. Those obligations are now (at least partially) reflected in the duty of the Secretary of State under section 55 of the Borders, Citizenship and Immigration Act 2009.

13 The Secretary of State now concedes that it would be disproportionate to remove the mother in the particular facts of this case.

But she is understandably concerned about the general principles which the Border Agency and appellate authorities should apply.

The domestic law

14 This is the mother's appeal on the ground that her removal will constitute a disproportionate interference with her right to respect for her private and family life, guaranteed by article 8 of the Human Rights Convention:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> "2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

However, in *Beoku-Betts v Secretary of State for the Home Department* [2009] AC 115, the House of Lords held that both the Secretary of State and the immigration appellate authorities had to consider the rights to respect for their family life of all the family members who might be affected by the decision and not just those of the claimant or appellant in question. Lord Brown of Eaton-under-Heywood summarised the argument which the House accepted thus, at para 20:

> "Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims."

I added this footnote at para 4:

> "To insist that an appeal to the Asylum and Immigration Tribunal consider only the effect upon other family members as it affects the appellant, and that a judicial review brought by other family members considers only the effect upon the appellant as it affects them, is not only artificial and impracticable. It also risks missing the central point about family life, which is that the whole is greater than the sum of its individual parts. The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed."

15 When dealing with the relevant principles in *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159, Lord Bingham of Cornhill said, at para 12:

> "Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a

close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied in the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires."

Thus, of particular importance is whether a spouse or, I would add, a child can reasonably be expected to follow the removed parent to the country of removal.

16 Miss Monica Carss-Frisk QC, for the Secretary of State, was content with the way I put it in the Privy Council case of *Naidike v Attorney General of Trinidad and Tobago* [2005] 1 AC 538, para 75:

> "The decision-maker has to balance the reason for the expulsion against the impact upon other family members, including any alternative means of preserving family ties. The reason for deporting may be comparatively weak, while the impact on the rest of the family, either of being left behind or of being forced to leave their own country, may be severe. On the other hand, the reason for deporting may be very strong, or it may be entirely reasonable to expect the other family members to leave with the person deported."

The Strasbourg cases

17 These questions tend to arise in two rather different sorts of case. The first relates to long-settled residents who have committed criminal offences (as it happens, this was the context of *R (WL (Congo)) v Secretary of State for the Home Department* [2010] 1 WLR 2168). In such cases, the principal legitimate aims pursued are the prevention of disorder and crime and the protection of the rights and freedoms of others. The Strasbourg court has identified a number of factors which have to be taken into account in conducting the proportionality exercise in this context. The leading case is now *Üner v The Netherlands* (2006) 45 EHRR 421. The starting point is, of course, that states are entitled to control the entry of aliens into their territory and their residence there. Even if the alien has a very strong residence status and a high degree of integration he cannot be equated with a national. Article 8 does not give him an absolute right to remain. However, if expulsion will interfere with the right to respect for family life, it must be necessary in a democratic society and proportionate to the legitimate aim pursued. At para 57, the Grand Chamber repeated the relevant factors which had first been enunciated in *Boultif v Switzerland* (2001) 33 EHRR 1179 (numbers inserted):

> "(i) the nature and seriousness of the offence committed by the applicant; (ii) the length of the applicant's stay in the country from which he or she is to be expelled; (iii) the time elapsed since the offence was committed and the applicant's conduct during that period; (iv) the nationalities of the various persons concerned; (v) the applicant's family situation, such as the length of the marriage, and other factors expressing

the effectiveness of a couple's family life; (vi) whether the spouse knew about the offence at the time when he or she entered into a family relationship; (vii) whether there are children of the marriage, and if so, their age; and (viii) the seriousness of the difficulties which the spouse is likely to encounter in the country to which the appellant is to be expelled."

Significantly for us, however, the Grand Chamber in *Üner* went on, in para 58, "to make explicit two criteria which may already be implicit" in the above (again, numbers inserted):

"(ix) the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and (x) the solidity of social, cultural and family ties with the host country and with the country of destination."

The importance of these is reinforced in the recent case of *Maslov v Austria* [2009] INLR 47, para 75 where the Grand Chamber emphasised that

"for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile."

18 The second sort of case arises in the ordinary immigration context, where a person is to be removed because he or she has no right to be or remain in the country. Once again, the starting point is the right of all states to control the entry and residence of aliens. In these cases, the legitimate aim is likely to be the economic well-being of the country in controlling immigration, although the prevention of disorder and crime and the protection of the rights and freedoms of others may also be relevant. Factors (i), (iii), and (vi) identified in *Boultif* and *Üner* are not relevant when it comes to ordinary immigration cases, although the equivalent of (vi) for a spouse is whether family life was established knowing of the precariousness of the immigration situation.

19 It was long ago established that mixed nationality couples have no right to set up home in whichever country they choose: see *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471. Once they have done so, however, the factors relevant to judging the proportionality of any interference with their right to respect for their family lives have quite recently been rehearsed in *Rodrigues da Silva, Hoogkamer v The Netherlands* (2006) 44 EHRR 729, para 39:

"Article 8 does not entail a general obligation for a state to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a state's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the person involved and the general interest [the reference is to *Gul v Switzerland* (1996) 22 EHRR 93, para 38]. Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the

A ties in the contracting state, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e g a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion [the reference is to *Solomon v The Netherlands* (Application No 44328/98) (unreported) given 5 September 2000]. Another important consideration will also be whether family life was
B created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8 [the reference is to
C *Mitchell v United Kingdom* (Application No 40447/98) (unreported) given 24 November 1998; *Ajayi v United Kingdom* (Application No 27663/95) (unreported) given 22 June 1999]."

Despite the apparent severity of these words, the court held that there had been a violation on the facts of the case. A Brazilian mother came to the Netherlands in 1994 and set up home with a Dutch national without ever
D applying for a residence permit. In 1996 they had a daughter who became a Dutch national. In 1997 they split up and the daughter remained with her father. It was eventually confirmed by the Dutch courts that it was in her best interests to remain with her father and his family in the Netherlands even if this meant that she would have to be separated from her mother. In practice, however, her care was shared between the mother and the paternal
E grandparents. The court concluded at para 44 that, notwithstanding the mother's "cavalier attitude to Dutch immigration rules",

> "In view of the far reaching consequences which an expulsion would have on the responsibilities which the first applicant has as a mother, as well as on her family life with her young daughter, and taking into account that it is clearly in Rachael's best interests for the first applicant
F to stay in the Netherlands, the court considers that in the particular circumstances of the case the economic well-being of the country does not outweigh the applicants' rights under article 8, despite the fact that the first applicant was residing illegally in the Netherlands at the time of Rachael's birth."

20 It is worthwhile quoting at such length from the court's decision in
G *Rodrigues da Silva* because it is a relatively recent case in which the reiteration of the court's earlier approach to immigration cases is tempered by a much clearer acknowledgement of the importance of the best interests of a child caught up in a dilemma which is of her parents' and not of her own making. This is in contrast from some earlier admissibility decisions in which the Commission (and on occasion the court) seems to have concentrated more on the failings of the parents than upon the interests of
H the child, even if a citizen child might thereby be deprived of the right to grow up in her own country: see, for example, *O and OL v United Kingdom* (Application No 11970/86) (unreported) 13 July 1987; *Sorabjee v United Kingdom* [1996] EHRLR 216; *Jaramillo v United Kingdom* (Application No 24865/94) (unreported) 23 October 1995 and *Poku v United Kingdom*

(1996) 22 EHRR CD 94. In *Poku*, the Commission repeated, at p 97, that "in previous cases the factor of citizenship has not been considered of particular significance". These were, however, cases in which the whole family did have a real choice about where to live. They may be contrasted with *Fadele v United Kingdom* (1991) 70 DR 159, in which British children aged 12 and 9 at the date of the decision had lived all their lives in the United Kingdom until they had no choice but to go and live in some hardship in Nigeria after their mother died and their father was refused leave to enter. The Commission found their complaints under articles 3 and 8 admissible and a friendly settlement was later reached: see p 162.

The UNCRC and the best interests of the child

21 It is not difficult to understand why the Strasbourg court has become more sensitive to the welfare of the children who are innocent victims of their parents's choices. For example, in *Neulinger v Switzerland* (2010) 28 BHRC 706, para 131 the court observed that

> "the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken . . . of 'any relevant rules of international law applicable in the relations between the parties', and in particular the rules concerning the international protection of human rights."

The court went on to note, at para 135, that "there is currently a broad consensus—including in international law—in support of the idea that in all decisions concerning children, their best interests must be paramount".

22 The court had earlier, in paras 49–56, collected references in support of this proposition from several international human rights instruments: from the second principle of the United Nations Declaration on the Rights of the Child 1959; from article 3.1 of the Convention on the Rights of the Child 1989 ("UNCRC"); from articles 5(b) and 16.1(d) of the Convention on the Elimination of All Forms of Discrimination against Women 1979; from General Comments 17 and 19 of the Human Rights Committee in relation to the International Covenant on Civil and Political Rights 1966; and from article 24 of the European Union's Charter of Fundamental Rights. All of these refer to the best interests of the child, variously describing these as "paramount", or "primordial", or "a primary consideration". To a United Kingdom lawyer, however, these do not mean the same thing.

23 For our purposes the most relevant national and international obligation of the United Kingdom is contained in article 3.1 of the UNCRC: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and, as a result, section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in

relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions "are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom".

24 Miss Carss-Frisk acknowledges that this duty applies, not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves. This means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of article 8.2. Both the Secretary of State and the tribunal will therefore have to address this in their decisions.

25 Further, it is clear from the recent jurisprudence that the Strasbourg court will expect national authorities to apply article 3.1 of UNCRC and treat the best interests of a child as "a primary consideration". Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration". Miss Joanna Dodson QC, to whom we are grateful for representing the separate interests of the children in this case, boldly argued that immigration and removal decisions might be covered by section 1(1) of the Children Act 1989:

> "When a court determines any question with respect to— (a) the upbringing of a child; or (b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration."

However, questions with respect to the upbringing of a child must be distinguished from other decisions which may affect them. The UNHCR, in its Guidelines on Determining the Best Interests of the Child (May 2008), explains the matter neatly, at para 1.1:

> "The term 'best interests' broadly describes the well-being of a child . . . The CRC neither offers a precise definition, nor explicitly outlines common factors of the best interests of the child, but stipulates that: the best interests must be the determining factor for specific actions, notably adoption (article 21) and separation of a child from parents against their will: article 9; the best interests must be a primary (but not the sole) consideration for all other actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies see: article 3."

This seems to me accurately to distinguish between decisions which directly affect the child's upbringing, such as the parent or other person with whom she is to live, and decisions which may affect her more indirectly, such as decisions about where one or both of her parents are to live. Article 9 of UNCRC, for example, draws a distinction between the compulsory separation of a child from her parents, which must be necessary in her best interests, and the separation of a parent from his child, for example, by detention, imprisonment, exile, deportation or even death.

26 Nevertheless, even in those decisions, the best interests of the child must be a primary consideration. As Mason CJ and Deane J put it in the case

of *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 292 in the High Court of Australia: A

> "A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it."

As the Federal Court of Australia further explained in *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133, para 32: B

> "[The tribunal] was required to identify what the best interests of Mr Wan's children required with respect to the exercise of its discretion and then to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration." C

This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. D The important thing, therefore, is to consider those best interests first. That seems, with respect, to be the correct approach to these decisions in this country as well as in Australia.

27 However, our attention was also drawn to General Comment No 6 of the United Nations Committee on the Rights of the Child (2005), on the Treatment of Unaccompanied and Separated Children Outside their E Country of Origin. The context, different from ours, was the return of such children to their countries of origin even though they could not be returned to the care of their parents or other family members: para 85. At para 86, the Committee observed:

> "Exceptionally, a return to the home country may be arranged, after careful balancing of the child's best interests and other considerations, if F the latter are rights-based and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non-rights based arguments such as those relating to general migration control, cannot override best interests considerations."

28 A similar distinction between "rights-based" and "non-rights-based" G arguments is drawn in the UNHCR Guidelines: see para 3.6. With respect, it is difficult to understand this distinction in the context of article 8.2 of the Human Rights Convention. Each of the legitimate aims listed there may involve individual as well as community interests. If the prevention of disorder or crime is seen as protecting the rights of other individuals, as it appears that the CRC would do, it is not easy to see why the protection of H the economic well-being of the country is not also protecting the rights of other individuals. In reality, however, an argument that the continued presence of a particular individual in the country poses a specific risk to others may more easily outweigh the best interests of that or any other child than an argument that his or her continued presence poses a more general

A threat to the economic well-being of the country. It may amount to no more than that.

Applying these principles

29 Applying, therefore, the approach in the *Wan* case to the assessment of proportionality under article 8.2, together with the factors identified in
B Strasbourg, what is encompassed in the "best interests of the child"? As the United Nations High Commission for Refugees says, it broadly means the well-being of the child. Specifically, as Lord Bingham indicated in *EB (Kosovo)* [2009] AC 1159, it will involve asking whether it is reasonable to expect the child to live in another country. Relevant to this will be the level of the child's integration in this country and the length of absence from the other country; where and with whom the child is to live and the
C arrangements for looking after the child in the other country; and the strength of the child's relationships with parents or other family members which will be severed if the child has to move away.

30 Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a
D nationality (article 7) and to preserve her identity, including her nationality: article 8. In *Wan* 107 FCR 133, para 30 the Federal Court of Australia pointed out that, when considering the possibility of the children accompanying their father to China, the tribunal had not considered any of the following matters, which the court clearly regarded as important:

> "(a) the fact that the children, as citizens of Australia, would be
> E deprived of the country of their own and their mother's citizenship, 'and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle' (*Vaitaiki v Minister for Immigration and Ethnic Affairs* (1998) 150 ALR 608, 614); (b) the resultant social and linguistic disruption of their childhood as well as the loss of their homeland; (c) the loss of educational opportunities available to the children in Australia; and
> F (d) their resultant isolation from the normal contacts of children with their mother and their mother's family."

31 Substituting "father" for "mother", all of these considerations apply to the children in this case. They are British children; they are British, not just through the "accident" of being born here, but by descent from a British parent; they have an unqualified right of abode here; they have lived here all
G their lives; they are being educated here; they have other social links with the community here; they have a good relationship with their father here. It is not enough to say that a young child may readily adapt to life in another country. That may well be so, particularly if she moves with both her parents to a country which they know well and where they can easily reintegrate in their own community (as might have been the case, for example, in *Poku* 22 EHRR CD 94: para 20, above). But it is very different
H in the case of children who have lived here all their lives and are being expected to move to a country which they do not know and will be separated from a parent whom they also know well.

32 Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise

if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults. As Jacqueline Bhaba (in "The 'Mere Fortuity of Birth'? Children, Mothers, Borders and the Meaning of Citizenship", in *Migrations and Mobilities: Citizenship, Borders and Gender* (2009), edited by Seyla Benhabib and Judith Resnik), has put it, at p 193:

> "In short, the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond. Yet children, particularly young children, are often considered parcels that are easily movable across borders with their parents and without particular cost to the children."

33 We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the tribunal rightly pointed out, the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her. On the facts, it is as least as strong a case as *Edore v Secretary of State for the Home Department* [2003] 1 WLR 2979, where Simon Brown LJ held that "there really is only room for one view": para 26. In those circumstances, the Secretary of State was clearly right to concede that there could be only one answer.

Consulting the children

34 Acknowledging that the best interests of the child must be a primary consideration in these cases immediately raises the question of how these are to be discovered. An important part of this is discovering the child's own views. Article 12 of UNCRC provides:

> "1. States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> "2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

35 There are circumstances in which separate representation of a child in legal proceedings about her future is essential: in this country, this is so when a child is to be permanently removed from her family in her own best interests. There are other circumstances in which it may be desirable, as in some disputes between parents about a child's residence or contact. In most cases, however, it will be possible to obtain the necessary information about the child's welfare and views in other ways. As I said in *EM (Lebanon) v*

Secretary of State for the Home Department (AF (A Child) intervening) [2009] AC 1198, para 49:

> "Separate consideration and separate representation are, however, two different things. Questions may have to be asked about the situation of other family members, especially children, and about their views. It cannot be assumed that the interests of all the family members are identical. In particular, a child is not to be held responsible for the moral failures of either of his parents. Sometimes, further information may be required. If the Child and Family Court Advisory and Support Service or, more probably, the local children's services authority can be persuaded to help in difficult cases, then so much the better. But in most immigration situations, unlike many ordinary abduction cases, the interests of different family members are unlikely to be in conflict with one another. Separate legal (or other) representation will rarely be called for."

36 The important thing is that those conducting and deciding these cases should be alive to the point and prepared to ask the right questions. We have been told about a pilot scheme in the Midlands known as the Early Legal Advice Project ("ELAP"). This is designed to improve the quality of the initial decision, because the legal representative can assist the "caseowner" in establishing all the facts of the claim before a decision is made. Thus cases including those involving children will be offered an appointment with a legal representative, who has had time to collect evidence before the interview. The Secretary of State tells us that the pilot is limited to asylum claims and does not apply to pure article 8 claims. However, the two will often go hand in hand. The point, however, is that it is one way of enabling the right questions to be asked and answered at the right time.

37 In this case, the mother's representatives did obtain a letter from the children's school and a report from a youth worker in the Refugee and Migrant Forum of East London ("Ramfel"), which runs a Children's Participation Forum and other activities in which the children had taken part. But the immigration authorities must be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so. While their interests may be the same as their parents' this should not be taken for granted in every case. As the Committee on the Rights of the Child said, in General Comment No 12 (2009) on the Right of the Child to be Heard, para 36:

> "in many cases . . . there are risks of a conflict of interest between the child and their most obvious representative (parent(s)). If the hearing of the child is undertaken through a representative, it is of utmost importance that the child's views are transmitted correctly to the decision-maker by the representative."

Children can sometimes surprise one.

Conclusion

38 For the reasons given, principally in paras 26 and 30–33 above, I would allow this appeal.

LORD HOPE OF CRAIGHEAD DPSC

39 I am in full agreement with the reasons that Baroness Hale of Richmond JSC has given for allowing this appeal.

40 It seems to me that the Court of Appeal fell into error in two respects. First, having concluded that the children's British citizenship did not dispose of the issues arising under article 8 [2009] EWCA Civ 691 at [16]–[22], they did not appreciate the importance that was nevertheless to be attached to the factor of citizenship in the overall assessment of what was in the children's best interests. Second, they endorsed the view of the tribunal that the question whether it was reasonable to expect the children to go with their mother to Tanzania, looked at in the light of its effect on the father and the mother and in relation to the children, was to be judged in the light of the fact that both children were conceived in the knowledge that the mother's immigration status was precarious: para 26.

41 The first error may well have been due to the way the mother's case was presented to the Court of Appeal. It was submitted that the fact that the children were British citizens who had never been to Tanzania trumped all other considerations: para 16. That was, as the court recognised, to press the point too far. But there is much more to British citizenship than the status it gives to the children in immigration law. It carries with it a host of other benefits and advantages, all of which Baroness Hale JSC has drawn attention to and carefully analysed. They ought never to be left out of account, but they were nowhere considered in the Court of Appeal's judgment. The fact of British citizenship does not trump everything else. But it will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country with a parent who has no right to remain here, especially if the effect of doing this is that they will inevitably lose those benefits and advantages for the rest of their childhood.

42 The second error was of a more fundamental kind, which lies at the heart of this appeal. The tribunal found that the mother knew full well that her immigration status was precarious before T was born. On looking at all the evidence in the round, it was not satisfied that her decisions to have her children were not in some measure motivated by a belief that having children in the United Kingdom of a British citizen would make her more difficult to remove. It accepted that the children were innocent of the mother's shortcomings. But it went on to say that the eventual need to take a decision as to where the children were to live must have been apparent both to the father and the mother ever since they began their relationship and decided to have children together. It was upon the importance of maintaining a proper and efficient system of immigration in this respect that in the final analysis the tribunal placed the greatest weight. The best interests of the children melted away into the background.

43 The Court of Appeal endorsed the tribunal's approach. When it examined the effect on the family unit of requiring the children to go with the mother to Tanzania, it held that this had to be looked at in the context of the fact that the children were conceived when the mother's immigration status was precarious: para 26. It acknowledged that what was all-important was the effect upon the children: para 27. But it agreed with the tribunal that the decision that the children should go with their mother was a very valid decision. The question whether this was in their best interests was not addressed.

A **44** There is an obvious tension between the need to maintain a proper and efficient system of immigration control and the principle that, where children are involved, the best interests of the children must be a primary consideration. The proper approach, as was explained in *Wan v Minister for Immigration and Multicultural Affairs* 107 FCR 133, para 32, is, having taken this as the starting point, to assess whether their best interests are B outweighed by the strength of any other considerations. The fact that the mother's immigration status was precarious when they were conceived may lead to a suspicion that the parents saw this as a way of strengthening her case for being allowed to remain here. But considerations of that kind cannot be held against the children in this assessment. It would be wrong in principle to devalue what was in their best interests by something for which C they could in no way be held to be responsible.

LORD KERR OF TONAGHMORE JSC

45 I have read and agree with the judgments of Baroness Hale of Richmond JSC and Lord Hope of Craighead DPSC. For the reasons they have given, I too would allow the appeal.

46 It is a universal theme of the various international and domestic D instruments to which Baroness Hale JSC has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that E course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different F result.

47 The significance of a child's nationality must be considered in two aspects. The first of these is in its role as a contributor to the debate as to where the child's best interests lie. It seems to me self-evident that to diminish a child's right to assert his or her nationality will not normally be in his or her best interests. That consideration must therefore feature in the G determination of where the best interests lie. It was also accepted by the Secretary of State, however, (and I think rightly so) that if a child is a British citizen, this has an independent value, freestanding of the debate in relation to best interests, and this must weigh in the balance in any decision that may affect where a child will live. As Baroness Hale JSC has said, this is not an inevitably decisive factor but the benefits that British citizenship brings, as so H aptly described by Lord Hope DPSC and Baroness Hale JSC, must not readily be discounted.

Appeal allowed.

SHIRANIKHA HERBERT, Barrister

ANNEX AA

United Kingdom House of Lords Decisions

Judgments - Em (Lebanon) (Fc) (Fc) V Secretary of State For The Home Department Appellate Committee

HOUSE OF LORDS

SESSION 2007-08

[2008] UKHL 64

on appeal from: [2006] EWCA Civ 1531

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

EM (Lebanon) (FC) (Appellant) (FC) v Secretary of State for the Home Department (Respondent)

Appellate Committee

Lord Hope of Craighead

Lord Bingham of Cornhill

Baroness Hale of Richmond

11417

Lord Carswell

Lord Brown of Eaton-under-Heywood

Counsel

Appellant:

Frances Webber

Stephanie Harrison

(Instructed by J M Wilson Solicitors)

First Intervener (ALF)

Henry Setright QC

Teertha Gupta

Margaret Phelan

(Instructed by Dawson Cornwell)

Respondent:

Monica Carss-Frisk QC

Nicola Greaney

(Instructed by Treasury Solicitors)

Second Intervener (Justice and Liberty)

Rabinder Singh QC

Raza Husain

(Instructed by Freshfields Bruckhaus Deringer LLP)

Hearing date:

21 and 22 JULY 2008

ON

WEDNESDAY 22 OCTOBER 2008

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

11418

IN THE CAUSE

EM (Lebanon) (FC) v Secretary of State for the Home Department (Respondent)

[2008] UKHL 64

LORD HOPE OF CRAIGHEAD

My Lords,

1. After the conclusion of the hearing, and following deliberation, the parties were informed that the appeal would be allowed for reasons to be given later. The following are my reasons for inviting the House to allow the appeal, to set aside the orders below and to quash the Secretary of State's decision that the appellant and her son must be returned to Lebanon.

2. The case for allowing the appellant and her son to remain in this country on humanitarian grounds is compelling. That is shown by the facts that my noble and learned friend Lord Bingham of Cornhill has described. But the appellant does not wish to rely on the Secretary of State's discretion. She claims that she has a right to remain here under article 8 of the European Convention on Human Rights read in conjunction with article 14. So the question is whether she has established that she and her son would run a real risk of a flagrant denial of the right to respect for their family life guaranteed to her by those articles if they were to be removed from this country to Lebanon.

3. I take the wording of the test to be applied to determine whether there would be a flagrant denial of this right from what Judges Bratza, Bonello and Hedigan said in their joint partly dissenting opinion in Mamatkulov and Askarov v Turkey (2005) 41 EHRR 25, 537-539. That was a case where political dissidents claimed that they would not receive a fair trial if they were extradited to Uzbekistan because, among other things, torture was routinely used to secure guilty verdicts and because suspects were frequently denied access to a lawyer. Their case was that they ran a real risk of a flagrant denial of justice. In para O-III14 the judges said:

> "In our view, what the word 'flagrant' is intended to convey is a breach of the principles of fair trial guaranteed by article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article."

In paras O-III17 and O-III19 they used the expression "a real risk" to describe the standard which the evidence has to achieve in order to show that the expulsion or extradition of the individual would, if carried out, violate the article.

4. I have gone directly to what those judges said about the test in Mamatkulov rather than to what was said in R (Ullah) v Special Adjudicator, Do v Immigration Appeal Tribunal [2004] 2 AC 323 and R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368 for several reasons. First, their description of it is the most up to date guidance that is available from Strasbourg. Second, it combines in a simple formula the approach described in Devaseelan v Secretary of State for the Home Department

[2003] Imm AR 1, para 111 referred to with approval by Lord Bingham of Cornhill and Lord Carswell in paras 24 and 69 of Ullah with Lord Steyn's use of the expression "the very essence of the right" in para 50 of Ullah. And, third, it shows that Carnwath LJ in the Court of Appeal [2007] UKHRR 1, paras 37-38 was, with great respect, wrong to regard words such as "complete denial" or "nullification" on the one hand and "flagrant breach" or "gross invasion" on the other as indicating different tests. Attempts to explain or analyse the formula should be resisted, in the absence of further guidance from Strasbourg. There is only one test, although I think that how it is to be applied in an article 8 read with article 14 case needs some explanation. The use by the partly dissenting judges of the expression "a real risk" is also significant. It shows that what was said about the standard of proof in the context of article 3 in Soering v United Kingdom (1989) 11 EHRR 439, para 91, applies to cases such as this where the rights in issue are among the qualified rights to be found elsewhere in the Convention. **11419**

5. There is however one aspect of this case which I have found particularly difficult. The appellant came to this country as a fugitive from Shari'a law. Her son had reached the age of seven when, under the system that regulates the custody of a child of that age under Shari'a law in Lebanon, his physical custody would pass by force of law to his father or another male member of his family. Any attempt by her to retain custody of him there would be bound to fail. This is simply because the law dictates that a mother has no right to the custody of her child after that age. She may or may not be allowed what has been described as visitation. That would give her access to her son during supervised visits to a place where she could see him. But under no circumstances would his custody remain with her. The close relationship that exists between mother and child up to the age of custodial transfer cannot survive under that system of law where, as in this case, the parents of the child are longer living together when the child reaches that age. There is a real risk in all these cases that the very essence of the family life that mother and child have shared together up to that date will be destroyed or nullified.

6. This system was described by counsel during the argument as arbitrary and discriminatory. So it is, if it is to be measured by the human rights standards that we are obliged to apply by the Convention. The mutual enjoyment by parent and child of each other's company is a fundamental element of family life. Under our law non-discrimination is a core principle for the protection of human rights. The fact is however that Shari'a law as it is applied in Lebanon was created by and for men in a male dominated society. The place of the mother in the life of a child under that system is quite different under that law from that which is guaranteed in the Contracting States by article 8 of the Convention read in conjunction with article 14. There is no place in it for equal rights between men and women. It is, as Lord Bingham points out, the product of a religious and cultural tradition that is respected and observed throughout much of the world. But by our standards the system is arbitrary because the law permits of no exceptions to its application, however strong the objections may be on the facts of any given case. It is discriminatory too because it denies women custody of their children after they have reached the age of custodial transfer simply because they are women. That is why the appellant removed her child from that system of law and sought protection against its effects in this country.

7. It seems to me that the Strasbourg court's jurisprudence indicates that, in the absence of very exceptional circumstances, aliens cannot claim any entitlement under the Convention to remain here to escape from the discriminatory effects of the system of family law in their

country of origin. There is a close analogy between this case and N v United Kingdom (Application No 26565/05) (unreported, BAILII: [2008] ECHR 453) 27 May 2008 which followed the decision of this House in N v Secretary of State for the Home Department (Terrence Higgins Trust intervening) [2005] 2 AC 296. **11420**

8. In N's case the appellant was found after her arrival in this country from Uganda to have an AIDS-defining illness for which she was still receiving beneficial medical treatment when the appeal was heard. She claimed that the treatment that she needed would not be available to her in Uganda and she would die within a matter of months if she were to be returned to that country, whereas she could expect to live for decades if she were to remain in this country. That being so, it was argued, the United Kingdom would be in breach of its obligations under article 3 of the Convention if she were to be returned to Uganda. As Lord Nicholls of Birkenhead said in para 1, the appeal raised a question of profound importance about the obligations of the United Kingdom in respect of the expulsion of people with HIV/AIDS. The cruel reality was that if the appellant were to be returned to Uganda her ability for obtain the necessary medication was at best problematic. In para 4 Lord Nicholls described her position as similar to having a life-support machine switched off. Yet the House, with considerable misgivings in what was plainly a very sad case, dismissed her appeal.

9. Following that decision the appellant lodged an application against the United Kingdom in Strasbourg. The Grand Chamber declared her application inadmissible. In para 42 of the decision it said:

> "Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling."

In para 44 the Grand Chamber recalled that, although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights.

> "Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of article 3 in the Convention system, for the court to retain a degree of flexibility to prevent expulsion in very exceptional cases, article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States."

10. That was a case about article 3, not one of the qualified Convention rights. Yet even in such a case, where there was a very real risk that the harm that would result from the applicant's expulsion to the inferior system of health care in her country of origin would reach the severity of treatment prescribed by that article, the court held that, other than in very exceptional cases, there was no obligation under the Convention to allow her to remain here. This was because it was not the intention of the Convention to provide protection against disparities in social and economic rights. To hold otherwise, even in an article 3 case, would place too great a burden on the Contracting States. Similar observations about the limits that must be set on practical grounds to the qualified obligations that they have undertaken in the area of civil and political rights are to be found in F v United Kingdom (Application No 17341/03) (unreported, BAILII: [2004] ECHR 723) 22 June 2004 and Z and T v United Kingdom (Application No 27034/05) (unreported) 28 February 2006. These decisions were not available to the House when it was considering the cases of Ullah [2004] 2 AC 323 and Razgar [2004] 2 AC 368, the judgments in which were delivered on 17 June 2004.

11. In F v United Kingdom the applicant was an Iranian citizen who had claimed asylum here on the basis that he feared persecution as a homosexual. His application for asylum was rejected. But he claimed that there would be a breach of article 8 if he were to be removed to Iran because a law in that country prohibited adult consensual homosexual activity. His application was declared inadmissible by the Strasbourg court. At p 12 of its decision the court observed that its case law had found responsibility attaching to Contracting States in respect of expelling persons who were at risk of treatment contrary to articles 2 and 3 of the Convention. It said that this was based on the fundamental importance of these provisions, whose guarantees it was imperative to render effective in practice: Soering v United Kingdom (1989) 11 EHRR 439, para 88. But it went on to say this:

> "Such compelling considerations do not automatically apply under the other provisions of the Convention. On a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention."

12. In Z and T v United Kingdom the applicants were citizens of Pakistan. They were also Christians. They feared that they would be subjected to attack by Muslim extremists if they were to be returned to Pakistan because they were Christians. The case raised a question as to the approach to be taken to article 9 rights that were allegedly at risk on expulsion. It was argued that the flagrant denial test should not be applied, as this would fail to respect the primacy of the applicants' religious rights. The Strasbourg court rejected this argument. It found that, even assuming that article 9 was capable of being engaged in the case of the expulsion of an individual by a Contracting State, the applicants had not shown that they were personally at risk or were members of such a vulnerable or threatened group, or in such a precarious position as Christians, as might disclose a flagrant violation of article 9 of the Convention. But at p 7 of its judgment the court said that it considered that very limited assistance, if any, could be obtained from article 9 by itself:

> "Otherwise it would be imposing an obligation on Contracting States effectively to act as indirect guarantors of freedom of worship for the rest of the world. If, for example, a country outside the umbrella of the Convention

were to ban a religion but not impose any measure of persecution, prosecution, deprivation of liberty or ill-treatment, the court doubts that the Convention could be interpreted as requiring a Contracting State to provide the adherents of that banned sect with the possibility of pursuing that religion freely and openly on their own territories. While the court would not rule out the possibility that the responsibility of the returning state might in exceptional circumstances be engaged under article 9 of the Convention where the person concerned ran a real risk of flagrant violation of that article in the receiving state, the court shares the view of the House of Lords in the Ullah case that it would be difficult to visualise a case in which a sufficiently flagrant violation of article 9 would not also involve treatment in violation of article 3 of the Convention."

The reference in the last sentence endorses Lord Carswell's observation in para 67 of his opinion in Ullah [2004] 2 AC 323 that he found it difficult to envisage a case, bearing in mind the flagrancy principle, in which there could be a sufficient interference with the article 9 rights which did not also come within the article 3 exception.

13. Running through these three recent cases is a recognition by the Strasbourg court that, while the Contracting States are obliged to protect those from other jurisdictions who can show that for whatever reason they will suffer persecution or are at real risk of death or serious ill-treatment or will face arbitrary detention or a flagrant denial of a fair trial in the receiving country, limits must be set on the extent to which they can be held responsible outside the areas that are prescribed by articles 2 and 3 and by the fundamental right under article 6 to a fair trial. Those limits must be seen against the background of the general principle of international law that states have the right to control the entry, residence and expulsion of aliens. In N v United Kingdom a distinction was drawn between civil and political rights on the one hand and rights of a social or economic nature on the other. Despite its fundamental importance in the Convention system, article 3 does not have the effect of requiring a Contracting State to guarantee free and unlimited health care to all aliens who are without a right to stay within its jurisdiction. In F v United Kingdom, an article 8 case, a distinction of a different kind was drawn. On the one hand there are those guarantees which, as they are of fundamental importance, must always be rendered effective in practice. On the other there are the qualified rights of a civil or political nature which, on a purely pragmatic basis, the Contracting States cannot be required to guarantee for the rest of the world outside the umbrella of the Convention.

14. As this case shows, the principle that men and women have equal rights is not universally recognised. Lebanon is by no means the only state which has declined to subscribe to article 16(d) of the United Nations Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 which declares that States Parties shall ensure, on a basis of equality of men and women, the same rights and responsibilities as parents, irrespective of their marital status, in all matters relating to their children and that in all cases the interests of the children shall be paramount. For the time being that declaration remains in most, if not all, Islamic states at best an aspiration, not a reality. As the court said in Soering, para 91, there is no question of adjudicating on or establishing the responsibility of the receiving state, whether under general international law, under the Convention or otherwise. Everything depends on the extent to which responsibility can be placed on the Contracting States. But they did not undertake to guarantee to men and

women throughout the world the enjoyment without discrimination of the rights set out in the Convention or in any other international human rights instrument. Nor did they undertake to alleviate religious and cultural differences between their own laws and the family law of an alien's country of origin, however extreme their effects might seem to be on a family relationship.

15. The guidance that is to be found in these decisions indicates that the Strasbourg court would be likely to hold that, except in wholly exceptional circumstances, aliens who are subject to expulsion cannot claim an entitlement to remain in the territory of a Contracting State in order to benefit from the equality of treatment as to respect for their family life that they would receive there which would be denied to them in the receiving state. The return of a woman who arrives here with her child simply to escape from the system of family law of her own country, however objectionable that system may seem in comparison with our own, will not violate article 8 read with article 14. Domestic violence and family breakdown occur in Muslim countries just as they do elsewhere. So the inevitable result under Shari'a law that the separated mother will lose custody of her child when he reaches the age of custodial transfer ought, in itself, to make no difference. On a purely pragmatic basis the Contracting States cannot be expected to return aliens only to a country whose family law is compatible with the principle of non-discrimination assumed by the Convention.

16. How then can one distinguish between those cases where a violation of articles 8 and 14 that results from applying Shari'a law will be flagrant from those where it will not? It is hard to envisage a case where the way the law deals with a child custody case will also violate article 3. The possibility of a violation of that article may have a part to play in the assessment in more extreme article 9 religious persecution cases, as Lord Carswell's observation in Ullah, para 67 and its adoption by the Strasbourg court in Z and T, p 7, indicate. That may be the case in some article 8 cases, as in F. But it is likely to be absent in article 8 plus article 14 cases where the complaint is about the effects of discriminatory family law on the relationship that exists between individuals. It has not been suggested in this case that there is a risk that the application of the Shari'a law would result in persecution of the appellant approaching the level prescribed by article 3. So that check as to whether a flagrant breach has been established cannot be relied on in the assessment.

17. There remains the observation that the Grand Chamber made in N v United Kingdom, 27 May 2008, para 42, that an issue under article 3 may be raised only in a very exceptional medical treatment case where the humanitarian grounds against the removal are compelling. D v United Kingdom (1997) 24 EHRR 423, where the applicant was critically ill and close to death, was such a case. This suggests that the key to identifying those cases where the breach of articles 8 and 14 will be flagrant lies in an assessment of the effects on both mother and child of destroying or nullifying the family life that they have shared together. The cases where that assessment shows that the violation will be flagrant will be very exceptional. But where the humanitarian grounds against their removal are compelling, it must follow that there is an obligation not to remove. The risk of adding one test to another is obvious. But in the absence of further guidance from Strasbourg as to how the flagrancy test is to be applied in article 8 cases, I would adopt that approach in this case.

18. As I said as the outset of this opinion, the case for allowing the appellant and her son to remain in this country on humanitarian grounds is compelling. This is particularly so when the effects on the child are take into account. His mother has cared from him since his birth.

He has a settled and happy relationship with her in this country. Life with his mother is the only family life he knows. Life with his father or any other member of his family in Lebanon, with whom he has never had any contact, would be totally alien to him. This enables me to conclude that this is a very exceptional case and that there is a real risk of a flagrant denial of their article 8 rights if the appellant and her child were to be returned to Lebanon. I would allow the appeal.

LORD BINGHAM OF CORNHILL

My Lords,

19. By article 8 of the European Convention on Human Rights, given domestic effect by the Human Rights Act 1998, everyone in this country has the right to respect for their family life, which may be the subject of interference by a public authority only if the interference is lawful, proportionate and directed to a legitimate end. The enjoyment of this right is, by article 14, to be secured without discrimination on any ground such as sex. The appellant claims that if she and her son AF are removed from this country to Lebanon on the direction of the respondent Secretary of State, her right to respect for her family life will be infringed and will be so on a discriminatory basis attributable to her being a woman. This claim rests not on any treatment she or AF will suffer in this country but on the consequences if she and her son are returned to Lebanon. Thus this is what has been described as a foreign case: the only conduct by a British authority of which the appellant complains is her removal to a place where she will suffer these consequences. Her challenge is directed to the decision to remove her. The burden lying on a claimant in a foreign case such as this is, the appellant acknowledges, a very exacting one. But she contends that, on the exceptional facts of her case, and recognising the interests of AF, she discharges it. The courts below held that she did not. The appellant submits that those courts did not correctly understand and apply the test laid down by the authorities, and that the interests of AF (who was first given leave to intervene in the House) should be taken into account. Her submissions are supported by AF, and also by JUSTICE and Liberty.

20. The appellant EM is a Lebanese national now aged 36. She came to this country on 30 December 2004 with her son AF, the second intervener, who was born on 16 July 1996 and is now aged 12. She claimed asylum.

21. The appellant is Muslim and married in Lebanon according to Muslim rites. Her evidence, accepted as true in these proceedings, is that during her marriage her husband subjected her to violence, beating her, trying to throw her off a balcony and trying, on one occasion at least, to strangle her. She had a mental breakdown. Her husband was imprisoned for theft from her father's shop and, later, for failing to support AF. He ended her first pregnancy by hitting her on the stomach with a heavy vase, saying he did not want children. On the day AF was born he came to the hospital with his family to take the child away to Saudi Arabia, but was prevented from doing so. He has not seen AF since.

22. The appellant divorced her husband in Lebanon because of his violence. Under the prevailing law the father retained legal custody of AF, but the divorce court ruled that the child should remain in the appellant's care until he reached the age of seven. Thereafter, Islamic law as applied in Lebanon entitled the father to require that physical custody should be transferred to himself or to a male member of his family.

23. After the divorce the appellant supported herself and AF by running a hairdressing salon. When AF was approaching the age of seven she began trying to leave the country to avoid having the child taken from her. After AF's birthday, she moved out of her parents' house and lived in hiding to prevent his removal from her care. Her former husband issued proceedings in the Lebanese court. The police attended at her parents' house and her former husband harassed them. The appellant and her child left Lebanon with the assistance of an agent, leaving the country on 20 December 2004. It appears that, if she returned to Lebanon, she would be at risk of imprisonment on a charge of kidnapping AF.

24. There was unchallenged evidence before the lower courts of Islamic law as applied in Lebanon in custody cases where (as in this case) the husband or both parties are Muslim. Even during the seven year period when a child is cared for by the mother, the father retains legal custody and may decide where the child lives and whether the child may travel with the mother. In the absence of consent by the father, the transfer to the father at the stipulated age is automatic: the court has no discretion in the matter and may not consider whether transfer is in the best interests of the child. As a result, women are often constrained to remain in abusive marriages for fear of losing their children. If the father were found to be unfit as a parent, the child would be passed to the paternal grandfather or some other member of the father's extended family, not to the mother. The evidence was that in this situation the mother might, or might not, have contact with the child. The parent with physical custody cannot be compelled to send the child to the other parent's home on visits, but if ordered by the court must bring the child to a place where the mother could see him or her. A custody hearing, if held in Lebanon, would not consider whether custody should remain with the mother but only the appropriateness of allowing the appellant to have access to AF during supervised visits.

25. The appellant's application for asylum was refused by the Secretary of State in a letter of 21 February 2005, largely devoted to issues arising under the Refugee Convention. But the Secretary of State considered, and rejected, her claim under article 8 of the European Convention on Human Rights, ruling that she had not demonstrated a real risk of mistreatment such as to engage article 8. It was not accepted that she would be unable to obtain a reasonable, fair and impartial administration of her case in both the religious and civil courts.

26. The appellant exercised her right of appeal. In a decision dated 8 June 2005 the Immigration Judge (Mr C J Deavin) found that the appellant did not have a well-founded fear of persecution for a (Refugee) Convention reason, and so rejected her asylum claim. He also held (para 94) that she could not choose where she wished to lead her life, and that her removal would not engage article 8. In para 95 of his Decision he said:

> "It is likely, of course, that her child will be taken away from her, in accordance with the law of the land, but there is every likelihood that she will be allowed visitation rights. It is unrealistic on her part to expect to have the child entirely to herself."

27. On an application for reconsideration of this decision, a Senior Immigration Judge (Mr Andrew Jordan) thought it arguable that inadequate consideration had been given to whether removal would violate the appellant's human rights and (perhaps) those of AF, if those were justiciable. He was also troubled at the prospect that the case had to be considered on the basis of the appellant's rights, paying scant regard to those of AF and, in

particular, his best interests. He acknowledged the difficulty of ruling on the best interests of AF in the absence of the father. He was also concerned about certain aspects of the asylum claim. He ordered reconsideration. 11426

28. The matter then came before the Asylum and Immigration Tribunal (Mr C M G Ockelton, Deputy President, Mr N W Renton, Senior Immigration Judge, and Mr D R Humphrey, Immigration Judge) which gave its Determination and Reasons on 22 November 2005. The AIT first considered, and rejected, the appellant's asylum claim. With reference to her claim under article 8, the AIT referred to recent decisions of the House in R (Ullah) v Special Adjudicator [2004] UKHL 26, [2004] 2 AC 323 and R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27, [2004] 2 AC 368, which (para 15) established that "The appellant can only succeed if she can show that the country to which she returns has a flagrant disregard for the rights protected by article 8". The tribunal continued (para 16):

> "On the material before us, that is clearly not so. There is a judicial system, to which the appellant has access. The system of family law to which she, by her religion, is subject, is one which in this respect she does not like: but that does not permit her to choose the law of another country, nor does it permit us to say that it is a system to which nobody should be subject. As a result, we cannot say that the removal of the appellant and her son to Lebanon would itself constitute a breach of the rights they have under article 8 while they remain in the jurisdiction of this country. After their removal, they simply have no such rights: they are subject to the law of their own country, which is not a party to the European Convention on Human Rights."

The tribunal refused leave to appeal against its decision but Buxton LJ granted it on one ground, later enlarged. The appellant's claim to asylum lapsed.

29. The appellant's appeal to the Court of Appeal came before Carnwath and Gage LJJ and Bodey J, each of whom gave judgments: [2007] UKHRR 1. In his leading judgment, Carnwath LJ made detailed reference to four authorities in particular: Ullah and Razgar, mentioned above, In re J (A Child) (Custody Rights: Jurisdiction) [2005] UKHL 40, [2006] 1 AC 80, and Marckx v Belgium (1979) 2 EHRR 330. The critical divide between the parties was as to the appropriate test in a foreign case under article 8 and its application to the facts of the appellant's case. For the appellant Ms Webber contended that her right to have her claim to custody reviewed on a non-discriminatory basis would be completely denied or nullified if she and AF were returned to Lebanon. Ms Greaney, for the Secretary of State, criticised this as too narrow a formulation of the appellant's right. Article 8 protected the right to family life. Although the appellant would lose custody of her son, this did not establish that she would lose all contact with him. Thus her enjoyment of family life with her child, though severely restricted, would not be completely denied or nullified. Carnwath LJ said (paras 36-40):

> "36. With considerable misgivings, I am forced to the conclusion that Miss Greaney is correct. My misgivings are due principally to the natural reluctance of an English judge to send a child back to a legal system where a crucial custody issue will be decided without necessary reference to his welfare. That would be an overriding consideration in other jurisdictions, but it is not suggested that it can be determinative in the context of asylum law.

37. In addition I have not found it easy to give effect to the different expressions which have been used to define the test. If 'complete denial' or 'nullification' is the test, I agree with Miss Greaney's analysis. The right in question is the right protected by article 8, of which custody is but one important aspect. On the evidence her article 8 right would not be completely denied.

38. However, one finds many other formulations in the passages of high authority cited above: 'flagrant denial', 'gross violation', 'flagrant violation of the very essence of the right', 'flagrant, gross or fundamental breach', 'gross invasion of [her] most fundamental human rights', 'particularly flagrant breaches'. To my mind there is a difference in ordinary language between 'complete denial' of the rights guaranteed by article 8, and 'flagrant breach' or 'gross invasion' of those rights. In short, the former is quantitative; the latter qualitative.

39. If one or more of the latter expressions provided the test, I would find it difficult to think they are not satisfied in this case. This is not a case where the answer could realistically be affected by representations from the receiving state (a factor mentioned by Lord Bingham of Cornhill in Ullah, para 24). The parent/child relationship is a fundamental aspect of the rights guaranteed by article 8, perhaps the most fundamental; in Lord Steyn's words, it goes to 'the very essence' of the right to family life. The ability to participate in that relationship on an equal basis to the father is similarly fundamental to the rights guaranteed by article 14. Those rights are also recognised as fundamental by the wider international community. The facts disclose the almost certain prospect of an open 'breach' or 'violation' of those rights. A breach which is open, unmitigated, and in Convention terms indefensible can fairly be described as 'flagrant' in the ordinary use of that word.

40. However, I am persuaded that that is not the right approach. The word 'flagrant' was first used in Soering v United Kingdom (1989) 11 EHRR 439 not, I think, as a definitive test, but to illustrate the extreme circumstances which would be needed to bring the Convention into play in a 'foreign' case. As Lord Bingham of Cornhill pointed out in Ullah, the Strasbourg case-law reveals no examples of cases which have been held to meet that test. The different expressions used in the domestic cases have been used for a similar purpose. Linguistic analysis and comparison is unlikely to be helpful. Lord Bingham of Cornhill's adoption of the Devaseelan formula, with the agreement of the whole House, was clearly intended to provide a single authoritative approach. Applying that test, I conclude that the appeal on this central issue must fail."

The appellant's appeal under article 14 of the European Convention was also rejected.

30. Gage LJ reached the same conclusion, also with misgiving. He noted (para 54) that the well-established principle of domestic law which requires the welfare of the child to be treated as paramount was agreed to be irrelevant, and continued:

"55. For my part I have not found this an easy case. On the one hand to deny a mother the right to care for her child seems totally wrong. Judge Martens in a different context described the right to care for 'your own children' as 'a fundamental element of an elementary right' (see Gül v Switzerland (1996) 22 EHRR 93). To deny this right offends against all principles of fairness to a party involved in litigation over the custody of her child or children. It will undoubtedly place a substantial obstacle in the way of this appellant maintaining and fostering her relationship with her son. It is an entirely arbitrary rule without any apparent justification.

56. On the other hand I see the force of the submission made on behalf of the respondent that not all the appellant's rights as a mother will be denied. She will have rights of visitation and will not lose contact with her son. In that sense her rights cannot be said to be completely nullified.

57. In my judgment this is a case, as envisaged by Lord Carswell in Ullah, where the concept of flagrant breach or violation is not easy to apply. Not without some hesitation, I have concluded that the risk of such breaches of her human rights as may occur in respect of the appellant's right to care for her son are not sufficient to be categorised as flagrant. In reaching this conclusion, in my view, the appellant's rights of visitation/contact must be taken into account and set against the denial of the right to custody/residence of her child. It is important to note that we are considering her rights and not those of her son. There is no reason to suppose that the Shari'a Court will prevent the appellant from seeing her son. The form and nature of visitation rights remain undefined but in my judgment it must be supposed that the appellant will continue to be permitted to see her son. In that way her ability to maintain her relationship with him will still exist, albeit on a less intense level than before. In the circumstances I would hold, as the AIT held, that the risk of breaches of her article 8 and 14 rights in all the circumstances are not such as can be said to be flagrant. For the avoidance of doubt I would also hold that the discrimination against her on grounds of gender in the Shari'a Court whether considered as a breach of her article 8 rights or separately as a breach of article 14 rights, is not sufficient to tip the balance so as to cross the high threshold required.

58. For these reasons and the reasons given by Carnwath LJ, with which I agree, I would dismiss this appeal, and dispose of the applications as he proposes. This not an outcome for which I have any enthusiasm."

31. Acknowledging the right to care for one's child as "a fundamental element of an elementary human right" (as quoted by Baroness Hale of Richmond, in Razgar [2004] 2 AC 368, para 53), Bodey J regarded the anticipated interference with the appellant's right to respect for her family life to be flagrant, both by virtue of article 8 read alone and especially when read with article 14 (paras 66, 76). But applying what he understood to be the correct test, he concluded with express misgivings that the appellant could not cross the threshold to obtain relief (paras 66, 71, 76, 80-82).

Ullah

32. In R (Ullah) v Special Adjudicator, Do v Immigration Appeal Tribunal [2004] 2 AC 323 the appellants sought to resist removal to Pakistan and Vietnam respectively on the ground that they would be unable to practise their religion in those countries as guaranteed by article 9 of the European Convention. Thus, as in the present case, the appellants' claims rested not on the conduct of the British authorities (save in removing her) but on the expected consequences in the foreign country. Theirs were foreign cases in the same sense as the appellant's. The question in the appeal was whether removal could be resisted in reliance on any article of the Convention other than article 3. That removal could be resisted in a foreign case engaging article 3 was clearly established by well-known authority, notably Soering v United Kingdom (1989) 11 EHRR 439 and Chahal v United Kingdom (1996) 23 EHRR 413. But could other articles of the Convention be relied on? The Court of Appeal [2002] EWCA Civ 1856, [2003] 1 WLR 770, para 64, had held that where the Convention was invoked on the sole ground of the treatment to which an alien, refused the right to enter this country or remain here, was likely to be subjected by the receiving state, and that treatment was not sufficiently severe to engage article 3, the English court was not required to recognise that any other article of the Convention was or might be engaged. The decision of the Secretary of State in such cases was not subject to the constraints of the Convention. **11429**

33. Although separate opinions were delivered, the members of the House were at one in giving two answers to the question. First, they held that articles other than article 3, including article 8, could in principle be engaged in relation to the removal of an individual from this country: paras 21, 35, 39 - 49, 52, 53, 62, 67. Secondly, they held that the threshold of success in such a case was a very high one. In para 24 of my opinion, to which much argument was addressed in the present case, in the courts below and in argument before the House, I expressed myself as follows:

> "24. While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for existing extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment: Soering, para 91; Cruz Varas, para 69; Vlvarajah, para 103. In Dehwari, para 61 (see para 15 above) the Commission doubted whether a real risk was enough to resist removal under article 2, suggesting that the loss of life must be shown to be a 'near certainty'. Where reliance is placed on article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state: Soering, para 113 (see para 10 above); Drodz, para 110; Einhorn, para 32; Razaghi v Sweden; Tomic v United Kingdom. Successful reliance on article 5 would have to meet no less exacting a test. The lack of success of applicants relying on articles 2, 5 and 6 before the Strasbourg court highlights the difficulty of meeting the stringent test which that court imposes. This difficulty will not be less where reliance is placed on articles such as 8 or 9, which provide for the striking of a balance between the right of the individual and the wider interests of the community even in a case where a serious interference is shown. This is not a balance which the Strasbourg court ought ordinarily to strike in the first instance, nor is it a balance which that court is well placed to assess in the absence of

representations by the receiving state whose laws, institutions or practices are the subject of criticism. On the other hand, the removing state will always have what will usually be strong grounds for justifying its own conduct: the great importance of operating firm and orderly immigration control in an expulsion case; the great desirability of honouring extradition treaties made with other states. The correct approach in cases involving qualified rights such as those under articles 8 and 9 is in my opinion that indicated by the Immigration Appeal Tribunal (Mr C M G Ockelton, deputy president, Mr Allen and Mr Moulden) in Devaseelan v Secretary of State for the Home Department [2003] Imm AR 1, para 111:

'The reason why flagrant denial or gross violation is to be taken into account is that it is only in such a case - where the right will be completely denied or nullified in the destination country - that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state.'"

Lord Steyn (para 50) said:

"It will be apparent from the review of Strasbourg jurisprudence that, where other articles may become engaged, a high threshold test will always have to be satisfied. It will be necessary to establish at least a real risk of a flagrant violation of the very essence of the right before other articles could become engaged."

Lord Walker of Gestingthorpe agreed with my opinion (para 52) and Baroness Hale of Richmond with those of myself, Lord Steyn and Lord Carswell, while deferring detailed analysis of article 8 to R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368, which was heard by the same committee immediately following Ullah. Lord Carswell, in paras 69-70 of his opinion, said:

"69. The adjective 'flagrant' has been repeated in many statements where the court has kept open the possibility of engagement of articles of the Convention other than article 3, a number of which are enumerated in para 24 of the opinion of Lord Bingham of Cornhill in the present appeal. The concept of a flagrant breach or violation may not always be easy for domestic courts to apply - one is put in mind of the difficulties which they have had in applying that of gross negligence - but it seems to me that it was well expressed by the Immigration Appeal Tribunal in Devaseelan v Secretary of State for the Home Department [2003] Imm AR 1, 34, para 111, when it applied the criterion that the right in question would be completely denied or nullified in the destination country. This would harmonise with the concept of a fundamental breach, with which courts in this jurisdiction are familiar.

70. If it could be said that in principle article 9 is capable of engagement, it does not seem to me that the case of either appellant comes within the possible parameters of a flagrant, gross or fundamental breach of that article such as to amount to a denial or nullification of the rights conferred by it. I

accordingly agree that both appeals should be dismissed."

11431

The difficulty of resisting removal in reliance on article 9 was evidenced by the rejection of the appellants' claims on the facts. In Razgar the answers given in Ullah were treated as laying down the relevant principles (paras 2, 26, 32, 37, 41-42, 66, 72) although opinion was divided on the application of those principles to the facts of that case.

The threshold test

34. It was not submitted in argument that the threshold test laid down in Ullah misrepresented or understated the effect of the Strasbourg authority as it stood then or stands now. It is true, as Carnwath LJ pointed out in the Court of Appeal (para 38), that different expressions have at different times been used to describe the test, but these have been used to describe the same test, not to lay down a different test. Nor, as I would understand the joint partly dissenting opinion of Judges Bratza, Bonello and Hedigan in Mamatkulov and Askarov v Turkey (2005) 41 EHRR 25, 537, para OIII 14, did they envisage a different test when they said, with reference to article 6 (omitting footnotes):

> "While the court has not to date found that the expulsion or extradition of an individual violated, or would if carried out violate, article 6 of the Convention, it has on frequent occasions held that such a possibility cannot be excluded where the person being expelled has suffered or risks suffering a flagrant denial of a fair trial in the receiving country. What constitutes a 'flagrant' denial of justice has not been fully explained in the court's jurisprudence but the use of the adjective is clearly intended to impose a stringent test of unfairness going beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of article 6 if occurring within the Contracting State itself. As the court has emphasised, article 1 cannot be read as justifying a general principle to the effect that a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. In our view, what the word 'flagrant' is intended to convey is a breach of the principles of fair trial guaranteed by article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article."

35. In adopting and endorsing the test formulated by the AIT in Devaseelan I did not in para 24 of my opinion in Ullah [2004] 2 AC 323 understand that tribunal to be distinguishing a "flagrant denial or gross violation" of a right from a complete denial or nullification of it but rather to be assimilating those expressions. This was how the point had been put to the House by the Attorney General for the Secretary of State, as is evidenced from the report of his argument (p 337D):

> "If other articles can be engaged the threshold test will require a flagrant breach of the relevant right, such as will completely deny or nullify the right in the destination country: see Devaseelan v Secretary of State for the Home Department [2003] Imm AR 1. A serious or discriminatory interference with the right protected would be insufficient."

It is difficult, with respect, to see how the point could be put more clearly, and any attempt

at paraphrase runs the risk of causing confusion.

11432

The right to respect for family life

36. The importance of the right to respect for family life has been recognised in Strasbourg and domestic jurisprudence. The Strasbourg case law has recognised the bond which arises at birth between child and parent (Ahmut v Netherlands (1996) 24 EHRR 62, para 60) and reference has been repeatedly made to "the mutual enjoyment by parent and child of each other's company" as "a fundamental element of family life" (McMichael v United Kingdom (1995) 20 EHRR 205, para 86; Johansen v Norway (1997) 23 EHRR 33, para 52; Bronda v Italy (2001) 33 EHRR 4, para 51; P, C and S v United Kingdom (2002) 35 EHRR 31, para 113). Judge Martens, in a dissenting judgment, has described the right to care for one's own children as "a fundamental element of an elementary human right" (Gül v Switzerland (1996) 22 EHRR 93, 120, para 12). More general statements are found in the domestic case law. In M v Secretary of State for Work and Pensions [2006] UKHL 11, [2006] 2 AC 91, para 5, reference was made to "the love, trust, confidence, mutual dependence and unconstrained social intercourse which are the essence of family life". In Huang v Secretary of State for the Home Department [2007] UKHL 11, [2007] 2 AC 167, para 18, it was said:

> "Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives".

My noble and learned friend Baroness Hale has said (In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening) [2008] UKHL 35, [2008] 3 WLR 1, para 20) that "Taking a child away from her family is a momentous step, not only for her, but for her whole family …"

37. Families differ widely, in their composition and in the mutual relations which exist between the members, and marked changes are likely to occur over time within the same family. Thus there is no pre-determined model of family or family life to which article 8 must be applied. The article requires respect to be shown for the right to such family life as is or may be enjoyed by the particular applicant or applicants before the court, always bearing in mind (since any family must have at least two members, and may have many more) the participation of other members who share in the life of that family. In this context, as in most Convention contexts, the facts of the particular case are crucial.

38. The question to be determined in this appeal is accordingly this: whether, on the particular facts of this case, the removal of the appellant and AF to Lebanon will so flagrantly violate her, his and their article 8 rights as to completely deny or nullify those rights there. This is, as Ms Carss-Frisk QC for the Secretary of State emphasised, a very hard test to satisfy, never found to be satisfied in respect of any of the qualified Convention rights in any reported Strasbourg decision.

The present case

39. It seems likely that, following her marriage, the appellant's immediate family consisted of

herself and her husband. It would have been the life of that family which would have fallen within the purview of article 8 had the Convention applied in Lebanon, which it did (and does) not. But there has been no familial contact between the appellant and her husband since the birth of AF, and AF has never seen his father since the day he was born. Nor has he had any contact with any of his father's relatives. Thus, realistically, the only family which exists now or has existed for the last five years at least consists of the appellant and AF. It is the life of that family which is in issue: Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39, [2008] 3 WLR 166. 11433

40. It is no doubt a feature of their family life together that the appellant renders for AF the sort of services which a mother ordinarily does render for a growing adolescent. But it would be wrong to regard the relationship between the appellant and AF as simply one in which the mother renders services for the son. The evidence makes plain that the bond between the two is one of deep love and mutual dependence. It cannot be replaced by a new relationship between AF and a father who has inflicted physical violence and psychological injury on the mother, who has been sent to prison for failing to support him, whom he has never consciously seen and towards whom AF understandably feels strongly antagonistic. Nor can it be replaced by a new relationship with an unknown member or members of the father's family.

41. Two members of the Court of Appeal, although taking no account of AF's right, appear to have held that the appellant's article 8 right would be flagrantly violated if she were returned to Lebanon, but felt unable to conclude that her right would be completely denied or nullified. As indicated above, these expressions do not propound different tests. But it is in my opinion clear that on return to Lebanon both the appellant's and AF's right to respect for their family life would not only be flagrantly violated but would also be completely denied and nullified. In no meaningful sense could occasional supervised visits by the appellant to AF at a place other than her home, even if ordered (and there is no guarantee that they would be ordered), be described as family life. The effect of return would be to destroy the family life of the appellant and AF as it is now lived.

42. Considerable emphasis was laid in argument for the appellant and the second interveners on the arbitrary and discriminatory character of the family law applied in Lebanon, and it is plain that this would fall foul of both article 8 and article 14. But Lebanon is not a party to the European Convention, and this court has no standing to enforce observance of other international instruments to which Lebanon is party. Its family law reflects a religious and cultural tradition which, in one form or another, is respected and observed throughout much of the world. This country has no general mandate to impose its own values on other countries who do not share them. I would therefore question whether it would avail the appellant to rely on the arbitrary and discriminatory character of the Lebanese custody regime had she not shown, as in my opinion she has, that return to Lebanon would flagrantly violate, or completely deny and nullify, her and AF's right to respect for their family life together.

43. The Court of Appeal and the courts below were disadvantaged by the absence of representations on behalf of AF. The hearing before the House has underscored the importance of ascertaining and communicating to the court the views of a child such as AF. In the great majority of cases the interests of the child, although calling for separate consideration, are unlikely to differ from those of an applicant parent. If there is a genuine

conflict, separate representation may be called for, but advisers should not be astute to detect a conflict where the interests of parent and child are essentially congruent. **11434**

44. For these reasons I would allow the appeal, set aside the orders below and quash the Secretary of State's decision. The appellant and the Secretary of State are invited to make written submissions on costs within 14 days.

BARONESS HALE OF RICHMOND

My Lords,

45. As to the test to be applied in these cases, I have nothing to add to what is said by my noble and learned friend, Lord Bingham of Cornhill, in paragraph 34 of his opinion. In the words of Judges Bratza, Bonello and Hedigan in Mamatkulov and Askarov v Turkey (2005) 41 EHRR 25, 537, para OIII 14, ". . . what the word 'flagrant' is intended to convey is a breach . . . which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed . . . " So far as we are aware, Strasbourg has never yet found that test to be satisfied in a case where the breach of article 8 would take place in the foreign country to which a family is to be expelled, rather than as the result of the expulsion of one of its members (as in, eg, Al-Nashif v Bulgaria (2002) 36 EHRR 655). The possibility is, however, acknowledged, both in Bensaid v United Kingdom (2001) 33 EHRR 10, 219-220, paras 46-49, and in the dissenting opinion of Judges Tulkens, Bonello and Spielmann in N v United Kingdom (Application No 16565/05) (unreported) 27 May 2008, p 31, para 26.

46. In this case, the only family life which this child has ever known is with his mother. If he were obliged to return to a country where he would inevitably be removed from her care, with only the possibility of supervised visits, then the very essence of his right to respect for his family life would be destroyed. And it would be destroyed for reasons which could never be justified under article 8(2) because they are purely arbitrary and pay no regard to his interests. The violation of his right is in my view of greater weight than the violation of his mother's right. Children need to be brought up in a stable and loving home, preferably by parents who are committed to their interests. Disrupting such a home risks causing lasting damage to their development, damage which is different in kind from the damage done to a parent by the removal of her child, terrible though that can be.

47. That is what makes this case so different from the general run of child abduction cases. In the general run of such cases, a family life of some sort has been established in the country of origin and it is the abduction rather than the return which has interfered with that family life. In this case there was no family life established in the Lebanon between this child and his father or his father's family. A family lawyer in this country might raise an eyebrow at the fact that the mother was able to keep her child entirely away from his father. But the evidence is that, not only was he extremely violent towards her, but also that he had little or no interest in his own child. Be that as it may, from the child's point of view, we have to deal with the situation as it now is. To deprive him of his mother's care and place him in the care of people who are complete strangers to him and who have shown so little concern for his welfare would be to deprive him of the only family life he has or has ever had. The discriminatory laws of Lebanon are the reason why that is a real risk in this case. They are also the reason why the interference cannot be justified. But it is the effect upon the essence of the child's right with which we have to be concerned.

48. It has been a great help to be able to consider this case from the child's point of view. In the oral hearing where we considered the child's application to intervene, the Secretary of State acknowledged that the child might have a separate article 8 claim of his own. Our recent decisions in Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39, [2008] 3 WLR 166 and Chikwamba v Secretary of State for the Home Department [2008] UKHL 40, [2008] 1 WLR 1420 have made it clear that, not only the Secretary of State, but also the asylum and immigration appeal tribunal, must take account of the article 8 rights of all those who are affected by their decisions. This means, as Lord Bingham says in para 43 of his opinion, that they call for separate consideration.

49. Separate consideration and separate representation are, however, two different things. Questions may have to be asked about the situation of other family members, especially children, and about their views. It cannot be assumed that the interests of all the family members are identical. In particular, a child is not to be held responsible for the moral failures of either of his parents. Sometimes, further information may be required. If the Child and Family Court Advisory and Support Service or, more probably, the local children's services authority can be persuaded to help in difficult cases, then so much the better. But in most immigration situations, unlike many ordinary abduction cases, the interests of different family members are unlikely to be in conflict with one another. Separate legal (or other) representation will rarely be called for.

50. For these reasons, which are merely a family lawyer's post-script to those given by Lord Bingham, I too would allow this appeal.

LORD CARSWELL

My Lords,

51. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Bingham of Cornhill. I agree so entirely with his reasons and conclusions that it would be superfluous to do more than add a few observations of my own.

52. In deciding this appeal by the application of article 8 of the European Convention on Human Rights the House is applying the domestic law of this country, as it is bound to do. We have to do so by reference to the values enshrined in the Convention, the common values of the states who are members of the Council of Europe. We are not passing judgment on the law or institutions of any other state. Nor are we setting out to make comparisons, favourable or unfavourable, with Shari'a law, which prevails in many countries, reflecting, as Lord Bingham has said (para 42), the religious and cultural tradition of those countries. For this reason I share the doubts expressed by Lord Bingham and by my noble and learned friend Lord Hope of Craighead about the appellant's right to rely on a claim of discrimination under article 14 of the Convention. I am satisfied, on the other hand, that she has established a good claim under article 8.

53. Where the Court of Appeal went wrong was in misinterpreting the expressions of opinion of the House in R (Ullah) v Special Adjudicator [2004] UKHL 26, [2004] 2 AC 323 and R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27, [2004] 2 AC 368. The test to be applied in this case, which belongs to the class described as "foreign cases", is whether the action of the United Kingdom authorities in removing the appellant to Lebanon would constitute a flagrant breach of her rights contained in article 8

of the Convention. The Court of Appeal concluded that for the test to be satisfied the appellant's article 8 rights had to be completely denied or nullified, with the consequence that if she retained any vestige of those rights her claim must fail. That formula is excessively restrictive and sets the bar too high. **11436**

54. I entirely agree with Lord Bingham (para 35) that any attempt at paraphrase of the test runs the risk of causing confusion, and I do not propose to make any such attempt. It is instructive, however, to re-examine what the members of the Appellate Committee said in Ullah and Razgar, which will reaffirm that the correct test (as set out in Mamatkulov and Askarov v Turkey (2005) 41 EHRR 25) is the destruction of the very essence of the right guaranteed by article 8.

55. The members of the Committee in Ullah were all in agreement in their approach to the test to be applied. Lord Bingham at para 24 referred with approval to the formula of the Immigration Appeal Tribunal in Devaseelan v Secretary of State for the Home Department [2002] UKIAT 702, [2003] Imm AR 1, para 111:

> "The reason why flagrant denial or gross violation is to be taken into account is that it is only in such a case—where the right will be completely denied or nullified in the destination country—that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state."

It may be noted, however, that he did so in the same paragraph as his consideration of the test applied under articles 2 and 3 of the Convention, defined by the European Court of Human rights as a "near-certainty" or "real risk". Lord Steyn stated in para 50, after a review of the Strasbourg case-law:

> "It will be apparent from the review of Strasbourg jurisprudence that, where other articles may become engaged, a high threshold test will always have to be satisfied. It will be necessary to establish at least a real risk of a flagrant violation of the very essence of the right before other articles could become engaged."

56. In para 69 of my opinion in Ullah I also expressed approval of the IAT's formulation of the test in Devaseelan, but added significantly that this would harmonise with the concept of a fundamental breach. In Razgar (which was heard along with Ullah) at para 72 I used the phrase "a very grave state of affairs, amounting to a flagrant or fundamental breach of the article, which in effect constitutes a complete denial of his rights" (emphasis added). I returned to the topic in Government of the United States of America v Montgomery (No 2) [2004] UKHL 37, [2004] 1 WLR 2241. In para 26 of my opinion, with which the other members of the House agreed, I stated:

> "In the Ullah case and the Razgar case the House accepted the validity of these propositions, but also underlined the extreme degree of unfairness which would have to be established for an applicant to make out a case of indirect effect. It was of opinion that it would have to amount to a virtually complete denial or nullification of his article 6 rights, which might be expressed in terms familiar to lawyers in this jurisdiction as a fundamental breach of the obligations contained in the article."

57. It may be seen from the expressions of opinion which I have quoted that it was not the intention of the House in either Ullah or Razgar to define the standard of flagrancy in the absolute terms adopted by the Court of Appeal in the present case. This accords with the views of Judges Bratza, Bonello and Hedigan in Mamatkulov (2005) 41 EHRR 25, para OIII 14, quoted by Lord Bingham at para 34 above, where they expressed the test in familiar Strasbourg terms of "destruction of the very essence" of the right guaranteed. The test therefore remains as set out in Ullah and Razgar and does not require redefinition or paraphrase, still less amendment. If correctly applied it forms a correct and workable means of determining "foreign cases", though it remains clear that it is a stringent test, which will only be satisfied in very exceptional cases.

58. When it comes to applying it in the present case, I have no hesitation in reaching the conclusion, for the reasons summarised by Lord Bingham in paras 39 and 40, that the appellant's article 8 rights would be flagrantly violated if she were removed to Lebanon. The facts of the case are very exceptional and, as my noble and learned friend Lord Brown of Eaton-under-Heywood says, provide compelling humanitarian grounds against removal. I should be prepared so to hold even without taking into account the effect upon the child AF, but when that is added into the scale -- as it is now clear that it should be taken into account - the conclusion is even more clear.

59. I would therefore allow the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

60. I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Bingham of Cornhill and Lord Hope of Craighead. I agree with them entirely and for the reasons they give I too would allow this appeal and make the order proposed. I agree not least with what Lord Bingham says in para 42 of his opinion, a view echoed in paras 14 and 15 of Lord Hope's opinion. It is certainly not the arbitrary and discriminatory character of the rule of Sharia law dictating that at the age of seven a child's physical custody automatically passes from the mother to the father (or another male member of his family) —wholly incompatible though such a rule is with certain of the basic principles underlying the Convention—which, uniquely thus far in the jurisprudence both of Strasbourg and the UK courts, qualifies this particular "foreign" case as one for protection under article 8. Rather it is the highly exceptional facts of the case (as set out in my Lords' opinions) which in combination provide utterly compelling humanitarian grounds against removal.

ANNEX BB

SCHEME FOR THE TRANSFER OF CONVICTED OFFENDERS WITHIN THE COMMONWEALTH

GENERAL PRINCIPLES

1. A person convicted and sentenced to a term of imprisonment in one country ("the sentencing country") for an offence may be transferred, in accordance with the provisions of this scheme, to another country ("the administering country") in order that he may serve the remainder of that sentence in that other country.

DEFINITIONS

2. For the purposes of this Scheme -

(a) each of the following is a separate country, that is to say -

(i) each sovereign and independent country within the Commonwealth, together with any dependent territories which that country designates, and

(ii) each country within the Commonwealth which, although not sovereign and independent, is not designated for the purposes of the preceding sub-paragraph;

(b) (i) "administering country" means the country to which the convicted offender" may be, or has been, transferred in order to serve his sentence;

(ii) "convicted offender" means a person upon whom a sentence has been imposed.

(iii) "judgement" means a decision or order of a court or tribunal imposing a sentence;

(iv) "sentence" means any punishment or measure involving deprivation of liberty ordered by a court or tribunal for a determinate period of time in the exercise of its criminal jurisdiction;

(v) "sentencing country" means the country in which the sentence was imposed on the convicted offender who may be, or has been, transferred.

TRANSFER OF CONVICTED OFFENDER

3. (1) A convicted offender to whom this Scheme may apply shall be informed by the sentencing country of the substance of the Scheme.

(2) A convicted offender may only be transferred following a request by either the sentencing country or the administering country, but the convicted offender may apply for transfer.

(3) When a convicted offender applies for his transfer, the country which receives that application shall, as soon as practicable, so inform the other country.

CONDITIONS FOR TRANSFER

4. (1) A convicted offender may be transferred under the Scheme only on the following conditions

(a) if that person -

(i) is a national of the administering country, notwithstanding that he may also be a national of any other country, including the sentencing country, or

(ii) has close ties with the administering country of a kind that may be recognised by that country for the purposes of this Scheme; and

(b) if the judgment is final; and

(c) if at the time of receipt of the request for transfer, the convicted offender still has at least six months of the sentence to serve or if the sentence is indeterminate; and

(d) if the transfer is consented to by the convicted offender or, where in view of his age or his physical or mental condition one of the two countries considers it necessary, by a person entitled to act on behalf of the convicted offender; and

(e) if the sentencing and administering countries agree to the transfer.

(2) In exceptional cases it is open to the sentencing and administering countries to agree to a transfer even if the time to be served by the sentenced person is less than that specified in sub-paragraph (l)(c).

(3) A country may, at any time, define as far as it is concerned the term "national" for the purposes of this Scheme.

OBLIGATIONS TO FURNISH INFORMATION

5. (1) For the purposes of enabling a decision to be made on a request or an application under this Scheme, the sentencing country shall send the following information and documents to the administering country, unless either country has already decided that it will not agreed to the transfer -

(a) the name, date and place of birth of the convicted offender;

(b) his address, if any, in the administering country;

(c) a certified copy of the judgment and a copy or account of the law on which it is based;

(d) a statement of the facts upon which the conviction and sentence were based;

(e) the nature, duration and date of commencement of the sentence;

(f) whenever appropriate, any medical or social reports on the convicted offender, information about his treatment in the sentencing country and any recommendation for his further treatment in the administering country; and

(g) any other information which the administering country may specify as required in all cased to enable it to consider the possibility of transfer and to enable it to inform the prisoner and the sentencing country of the full consequences of transfer for the prisoner under its law.

(2) The administering country, if requested by the sentencing country, shall send to it a document or statement indicating whether the convicted offender satisfies the requirements of paragraph 4(1)(a).

REQUESTS AND REPLIES

6. (1) Requests and applications for transfer and replies shall be made in writing.

(2) Communications between sentencing and administering countries shall be conducted through the channels notified in pursuance of paragraph 19.

SUPPORTING DOCUMENTS

7. Except as provided in paragraph 5(1)(c), documents sent in accordance with this Scheme need not be certified.

CONSENT AND ITS VERIFICATION

8. (1) The sentencing country shall ensure that the person required to give consent to the transfer in accordance with paragraph 4(1)(d) does so voluntarily and in writing with full knowledge of the legal consequences thereof. The procedure for such consent shall be governed by the law of the sentencing country.

(2) The sentencing country shall afford an opportunity to the administering country to verify that the consent is given In accordance with the conditions set out in sub-paragraph (1).

NOTIFICATION OF DECISIONS

9. A convicted offender shall be informed, in writing, of any action taken by the sentencing country or the administering country, as well as of any decision taken by either country, on a request for his transfer.

EFFECT OF TRANSFER FOR SENTENCING COUNTRY

10. The enforcement of the sentence by the administering country shall, to the extent that it has been enforced, have the effect of discharging that sentence in the sentencing country.

EFFECT OF TRANSFER FOR ADMINISTERING COUNTRY

11. (1) The competent authorities of the administering country shall continue the enforcement of the sentence immediately or through a court or administrative order under the conditions set out in paragraph 12.

(2) Subject to the provisions of paragraph 13, the enforcement of the sentence shall be governed by the law of the administering country

and that country alone shall be competent to take all appropriate decisions.

(3) Any country which, according to its national law cannot avail itself of the procedure referred to in sub-paragraph (1) to enforce measures imposed in another country on a person who, for reasons of mental condition, has been held not criminally responsible for the commission of an offence, and which is prepared to receive such a person for further treatment, may indicate the procedure it will follow in such a case.

CONTINUED ENFORCEMENT

12. (1) The administering country shall be bound by the legal nature and duration of the sentence as determined by the sentencing country.

(2) If, however, the sentence is by its nature or duration incompatible with the law of the administering country, or its law so requires, that country may, by court or administrative order, adapt the sanction to a punishment or measure prescribed by its own law. As to its nature the punishment or measure shall, as far as possible, correspond with that imposed by the judgment of the sentencing country. It shall not aggravate, by its nature or duration, the sanctions imposed in the sentencing country.

PARDON, AMNESTY, COMMUTATION, REVIEW

13. (1) Unless the sentencing and the administering countries otherwise agree the sentencing country alone may grant pardon, amnesty or commutation of the sentence in accordance with its constitution or other laws.

(2) The sentencing country alone may decide on any application for review of the judgment.

TERMINATION OF ENFORCEMENT

14. The administering country shall terminate enforcement of the sentence as soon as it is informed by the sentencing country of any decision or measure as a result of which the sentence ceases to be enforceable.

INFORMATION ON ENFORCEMENT

15. (1) The administering country shall notify the sentencing country -

(a) when it considers enforcement of the sentence to have been completed; or

(b) if the convicted offender escapes from custody before enforcement of the sentence has been completed.

(2) The sentencing country may, at any time, request a special report from the administering country concerning the enforcement of the sentence.

TRANSIT

16. Each country shall afford reasonable co-operation in facilitating the transit through its territory of convicted offenders who are being transferred between other countries pursuant to this Scheme. Advance notice of such transit shall be given by the country intending to make the transfer.

COSTS

17. The cost of the transfer of a convicted offender shall be defrayed by the sentencing country and the administering country in such proportions as they may agree either generally or in regard to any particular transfer.

TEMPORAL APPLICATION

18. The Scheme shall be applicable to the enforcement of sentences imposed before as well as after its adoption.

ACCEPTANCE OF SCHEME

19. Any country which enacts legislation to give effect to this Scheme shall notify the Commonwealth Secretary-General of that fact and shall inform him of the proper channel for communication and deposit with him a copy of the legislation.

ANNEX CC

The authority exceeds 30 pages

UNODC
United Nations Office on Drugs and Crime

11446

Handbook on the International Transfer of Sentenced Persons

CRIMINAL JUSTICE HANDBOOK SERIES

11447

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

Handbook on the International Transfer of Sentenced Persons

UNITED NATIONS
New York, 2012

There is also a strong humanitarian argument for transfer if the prison conditions and regimes in the sentencing State are particularly poor or are not in line with international minimum standards.[26] Such humanitarian concerns may be heightened by the particular circumstances of individual prisoners. For example, the sentenced person may be pregnant (see box 1) or ill (see box 2); hygiene may be poor and proper treatment may not be available in the country where such a sentenced person is being held prisoner.

Box 1. Prisoner transfer as humanitarian assistance for pregnant prisoners

A 20-year-old British citizen was sentenced to life imprisonment in the Lao People's Democratic Republic in June 2009 for smuggling heroin into the country while en route to Australia. She had originally faced the death penalty but, in order to avoid that sentence, she became pregnant while in prison. At the time of her conviction and sentence, the Governments of the United Kingdom of Great Britain and Northern Ireland and the Lao People's Democratic Republic were in the process of finalizing a bilateral prisoner transfer agreement. The agreement was brought into effect administratively by the two Governments before it was finalized in order to assist the prisoner, who had requested to be transferred back to the United Kingdom in order to have better prison conditions for herself and in which to give birth.[a]

[a]*Orobator v. Governor of Her Majesty's Prison Holloway and Secretary of State for Justice*, case No. CO/9527 [2010] EWHC 58 (Admin).

Box 2. Humanitarian transfer for ill prisoners

Mexico and the United States of America have a very active prisoner transfer programme. There are so many prisoners transferred between the two countries each year that transfer dates are scheduled quarterly, a year in advance, even before specific prisoners are identified for transfer. Ordinarily, the transfers occur via El Paso, Texas, in the United States. Mexican officials collect the American prisoners approved for transfer in Monterrey, Nuevo León, Mexico, and then fly them to El Paso. In El Paso, the Mexican prisoners approved for transfer are collected and returned to Mexico. Rarely are special transfers arranged. On one occasion, an American in custody in Mexico became severely ill. He practised a religion that prohibited blood transfusions. The prisoner lost one of his legs because of his illness and his kidneys began to fail. Even though he was approved for transfer by both Mexico and the United States, he was too ill to board a plane for the usual transfer. As an alternative, Mexico and the United States agreed to a special transfer and the prisoner was returned to the United States by ambulance.

Finally, the humanitarian argument is also applicable to the needs of the family and dependants of a sentenced person who is held in a foreign prison while they remain in their country of origin. Research suggests that prisoners' families face an array of challenges as a consequence of their family

[26]Council of Europe, Parliamentary Assembly, Social and Health and Family Affairs Committee, "Operation of the Council of Europe Convention on the Transfer of Sentenced Persons: critical analysis and recommendations", document 9137 (2001), para. 15.

member's imprisonment that include marital difficulties, financial and housing problems, social stigma and victimization, loneliness, anxiety and emotional hardship. Prisoners' children may experience psychological harm and develop behavioural problems.[27] Such indirect consequences of imprisonment are highly likely to be exacerbated by the imprisonment of a family member abroad.

The need to take humanitarian concerns into account is recognized by the Inter-American Convention on Serving Criminal Sentences Abroad. Article V provides that:

> In taking a decision on the transfer of a sentenced person, the States parties may consider, among other factors … the state of health of the sentenced person; and the family, social or other ties the sentenced person may have in the sentencing State and the receiving State.

C. Law enforcement and international cooperation

There are many significant law enforcement benefits to the transfer of sentenced persons. If there is no prisoner transfer programme, the vast majority of foreign nationals in custody in a sentencing State will eventually be repatriated by means of deportation and the receiving countries have no control over the timing and mode of the convicted person's arrival in their country or over what the person will do, and have no information regarding the offence committed. This is not beneficial to the sentencing State or the administering State.

The benefits for the sentencing State are that it can remove a foreign national prisoner at the expense of the administering State rather than by deportation and can free up resources that can be devoted to its own prisoners and their rehabilitative needs. Finally, by being transferred, a prisoner has the opportunity to re-establish and strengthen his or her ties to the administering State, which reduces the chance that he or she will return to the sentencing State and reoffend.

The administering State benefits by receiving detailed information about the offence of which the prisoner was convicted, the prisoner's prior record (if any) in the sentencing State and the prisoner's adjustment to life in prison. This sort of detailed information is not available when a prisoner is deported at the end of his or her sentence. This may be particularly important, for example, in the case of a sex offender who may need to be placed on a register of sex offenders in the administering State after his or her release. Additionally, the administering State is given the opportunity of using its criminal justice system to exercise some control over the prisoner prior to and following release into the community. The administering State can assist the prisoner in reintegrating into society, using the tools available through its criminal justice system, thus indirectly benefiting crime prevention and law enforcement.

The transfer of sentenced persons is seen to be an important means of cooperation to prevent and combat crime, which is the purpose of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988,[28] the United Nations Convention against

[27] See Mills and Codd, "Prisoners' families and offender management: mobilizing social capital", p. 16; Shirley Klein, Geannina Bartholomew and Jeff Hibbert, "Inmate family functioning", *International Journal of Offender Therapy and Comparative Criminology*, vol. 46, No. 1 (February 2002), p. 98; and Open Society Justice Initiative, *The Socioeconomic Impact of Pretrial Detention* (New York, 2011). Available from www.soros.org/initiatives/justice/articles_publications/publications/socioeconomic-impact-detention-20110201/socioeconomic-impact-pretrial-detention-02012011.pdf (accessed 26 January 2012).

[28] United Nations, *Treaty Series*, vol. 1582, No. 27627.

ANNEX DD

11451

Convention on the Transfer of Sentenced Persons

(ETS No. 112)

Français

Explanatory Report

1. The Convention of the Transfer of Sentenced Persons, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Crime Problems (CDPC), was opened for signature on 21 March 1983.

2. The text of the explanatory report prepared on the basis of that committee's discussions and submitted to the Committee of Ministers of the Council of Europe does not constitute an instrument providing an authoritative interpretation of the text of the Convention although it may facilitate the understanding of the Convention's provisions.

Introduction

1. At their 11th Conference (Copenhagen, 21 and 22 June 1978), the European Ministers of Justice discussed the problems posed by prisoners of foreign nationality, including the question of providing procedures for their transfer so that they may serve their sentence in their home country. The discussion resulted in the adoption of Resolution No. 1, by which the Committee of Ministers of the Council of Europe is invited to ask the European Committee on Crime Problems (CDPC), inter alia, "to consider the possibility of drawing up a model agreement providing for a simple procedure for the transfer of prisoners which could be used between member States or by member States in their relations with non-member States".

2. Following this initiative, the creation of a Select Committee of Experts on Foreign Nationals in Prison was proposed by the CDPC at its 28th Plenary Session in March 1979 and authorised by the Committee of Ministers at the 306th meeting of their Deputies in June 1979.

3. The committee's principal tasks were to study the problems relating to the treatment of foreigners in prison and to consider the possibility of drawing up a model agreement providing for a simple procedure for the transfer of foreign prisoners. With regard to the latter aspect, the CDPC (at its 29th Plenary Session in March 1980) authorised the Select Committee, at its own request, to prepare a multilateral convention rather than a model agreement, provided it would not conflict with the provisions of existing European conventions.

4. The Select Committee was composed of experts from fifteen Council of Europe member States (Austria, Belgium, Denmark, France, Federal Republic of Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom). Canada and the United States of America as well as the Commonwealth Secretariat and the International Penal and Penitentiary Foundation were represented by observers. Mr. J. J. Tulkens (the Netherlands) was elected Chairman of the Select Committee. The secretariat was provided by the Directorate of Legal Affairs of the Council of Europe.

5. The draft for a Convention on the Transfer of Sentenced Persons was prepared during the Select Committee's first five meetings, held from 3 to 5 October 1979, 4 to 6 March 1980, 7 to 10 October 1980,1 to 4 June 1981 and 1 to 4 December 1981 (enlarged meeting to which experts from all member States were invited). In addition, a drafting group met from 7 to 9 October 1980 (during the Select Committee's 3rd meeting) and from 24 to 26 November 1980.

6. The draft convention was finalised by the CDPC at its 31st Plenary Session in May 1982 and forwarded to the Committee of Ministers. **11452**

7. At the 350th meeting of their Deputies in September 1982, the Committee of Ministers approved the text of the convention. At their 354th meeting in December 1982, the Ministers'Deputies decided to open it for signature on 21 March 1983.

General considerations

8. The purpose of the Convention is to facilitate the transfer of foreign prisoners to their home countries by providing a procedure which is simple as well as expeditious. In that respect it is intended to complement the European Convention on the International Validity of Criminal Judgments of 28 May 1970 which, although allowing for the transfer of prisoners, presents two major shortcomings: it has, so far, been ratified by only a small number of member States, and the procedure it provides is not conducive to being applied in such a way as to ensure the rapid transfer of foreign prisoners.

With a view to overcoming the last-mentioned difficulty, due to the inevitable administrative complexities of an instrument as comprehensive and detailed as the European Convention on the International Validity of Criminal Judgments, the Convention on the Transfer of Sentenced Persons seeks to provide a simple, speedy and flexible mechanism for the repatriation of prisoners.

9. In facilitating the transfer of foreign prisoners, the convention takes account of modern trends in crime and penal policy. In Europe, improved means of transport and communication have led to a greater mobility of persons and, in consequence, to increased internationalisation of crime. As penal policy has come to lay greater emphasis upon the social rehabilitation of offenders, it may be of paramount importance that the sanction imposed on the offender is enforced in his home country rather than in the State where the offence was committed and the judgment rendered. This policy is also rooted in humanitarian considerations: difficulties in communication by reason of language barriers, alienation from local culture and customs, and the absence of contacts with relatives may have detrimental effects on the foreign prisoner. The repatriation of sentenced persons may therefore be in the best interests of the prisoners as well as of the governments concerned.

10. The convention distinguishes itself from the European Convention on the International Validity of Criminal Judgments in four respects:

– With a view to facilitating the rapid transfer of foreign prisoners, it provides for a simplified procedure which, in its practical application, is likely to be less cumbersome than that laid down in the European Convention on the International Validity of Criminal Judgments.

– A transfer may be requested not only by the State in which the sentence was imposed ("sentencing State"), but also by the State of which the sentenced person is a national ("administering State"), thus enabling the latter to seek the repatriation of its own nationals.

– The transfer is subject to the sentenced person's consent.

– The Convention confines itself to providing the procedural framework for transfers. It does not contain an obligation on Contracting States to comply with a request for transfer; for that reason, it was not necessary to list any grounds for refusal, nor to require the requested State to give reasons for its refusal to agree to a requested transfer.

11. Unlike the other conventions on international co-operation in criminal matters prepared within the framework of the Council of Europe, the Convention on the Transfer of Sentenced Persons does not carry the word "European" in its title. This reflects the draftsmen's opinion that the instrument should be open also to like-minded democratic States outside Europe. Two such States – Canada and the United States of America – were, in fact, represented on the Select Committee by observers and actively associated with the elaboration of the text.

Commentaries on the articles of the Convention

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Article 1 – Definitions

12. Article 1 defines four terms which are basic to the transfer mechanism which the Convention provides.

13. The definition of "sentence" a makes clear that the Convention applies only to a punishment or measure which involves deprivation of liberty, and only to the extent that it does so, regardless of whether the person concerned is already serving his sentence or not.

14. It follows from the definition of "judgment" b that the Convention applies only to sentences imposed by a court of law.

15. The two States involved in the transfer of a sentenced person are defined as "sentencing State" and "administering State" c and d.

Article 2 – General principles

16. Paragraph 1 contains the general principle which governs the application of the Convention. Its wording is inspired by Article 1.1 of the European Convention on Mutual Assistance in Criminal Matters. The reference to "the widest measure of co-operation in respect of the transfer of sentenced persons" is intended to emphasise the convention's underlying philosophy: that it is desirable to enforce sentences in the home country of the person concerned.

17. Paragraph 2 refers the sentencing State to the possibility, afforded by the Convention, of having the sentenced person transferred to another Contracting State for the purpose of enforcing the sentence. That other State, that is the "administering State", is – by virtue of Article 3.1.a – the State of which the sentenced person is a national.

Although the sentenced person may not formally apply for his transfer (see paragraph 3), he may express his interest in being transferred under the Convention, and he may do so by addressing himself to either the sentencing State or the administering State.

18. According to paragraph 3, transfers may be requested by either the sentencing State or the administering State. This provision signifies an important departure from the rule of the European Convention on the International Validity of Criminal Judgments that only the sentencing State is entitled to make the request. It acknowledges the interest which the prisoner's home country may have in his repatriation for reasons of cultural, religious, family and other social ties.

Article 3 – Conditions for transfer

19. The first paragraph of Article 3 enumerates six conditions which must be fulfilled if a transfer is to be effected under the terms of the Convention.

20. The first condition a is that the person to be transferred is a national of the administering State. In an effort to render the application of the convention as easy as possible, the reference to the sentenced person's nationality was preferred to including in the convention other notions which, in their practical application, might give rise to problems of interpretation as, for instance, the terms "ordinarily resident in the other State" and "the State of origin" used in Article 5 of the European Convention on the International Validity of Criminal Judgments.

It is not necessary for the person concerned to be a national of only the administering State. Contracting States may decide to apply the convention, when appropriate, in cases of double or multiple nationality even when the other nationality (or one of the other nationalities) is that of the sentencing State. It is to be noted, however, that even where all the conditions for transfer are satisfied, the requested State remains free to agree or not to agree to a requested transfer. A sentencing State is therefore free to refuse a requested transfer if it concerns one of its own nationals.

Paragraph 1.a is to be read in conjunction with paragraph 4 which grants Contracting States the possibility to define, by means of a declaration, the term "national".

This possibility, corresponding with that provided in Article 6.1.b of the European Convention on Extradition, is to be interpreted in a wide sense: the provision is intended to enable Contracting States to extend the application of the convention to persons other than "nationals" within the strict meaning of their nationality legislation as, for instance, stateless persons or citizens of other States who have established roots in the country through permanent residence.

21. The second condition b is that the judgment must be final and enforceable, for instance because all available remedies have been exhausted, or because the time-limit for lodging a remedy has expired without the parties having availed themselves of it. This does not preclude the possibility of a later review of the judgment in the light of fresh evidence, as provided for under Article 13.

22. The third condition c concerns the length of the sentence still to be served. For the convention to be applicable, the sentence must be of a duration of at least six months at the time of receipt of the request for transfer, or be indeterminate.

Two considerations have led to the inclusion of this condition: the first is that the convention is conceived as an instrument to further the offender's social rehabilitation, an objective which can usefully be pursued only where the length of the sentence still to be served is sufficiently long. The second reason is that of the system's cost-effectiveness; the transfer of a prisoner is costly, and the considerable expenses incurred by the States concerned must therefore be proportionate to the purpose to be achieved, which excludes recourse to a transfer where the person concerned has only a short sentence to serve.

In exceptional cases, however, Contracting States may – in application of paragraph 2 – agree to a transfer even though the time to be served is less than that specified, as the general rule, in paragraph 1.c. The introduction of this element of flexibility was deemed useful to cover cases where the aforementioned two considerations do not fully apply, for instance where the prospects of rehabilitation are favourable despite a sentence of less than six months or where the transfer can be effected expeditiously and at low cost, for example between neighbouring States.

23. The fourth condition d is that the transfer must be consented to by the person concerned. This requirement which is not contained in the European Convention on the International Validity of Criminal Judgments constitutes one of the basic elements of the transfer mechanism set up by the convention. It is rooted in the convention's primary purpose to facilitate the rehabilitation of offenders: transferring a prisoner without his consent would be counter-productive in terms of rehabilitation.

This provision is to be read in conjunction with Article 7 which contains rules on the way in which consent is to be given and on the possibility for the administering State to verify that consent has been given in accordance with the conditions laid down in that article.

Consent is to be given by the sentenced person's legal representative in cases where one of the two States considers it necessary in view of the age or of the physical or mental condition of the sentenced person. The reference to the sentenced person's "legal representative" is not meant to imply that the representative must be legally qualified; it includes any person duly authorised by law to represent the sentenced person, for example a parent or someone specially authorised by the competent authority.

24. The fifth condition e is intended to ensure compliance with the principle of dual criminal liability.

The condition is fulfilled if the act which gave rise to the judgment in the sentencing State would have been punishable if committed in the administering State and if the person who performed the act could, under the law of the administering State, have had a sanction imposed on him.

For the condition of dual criminal liability to be fulfilled it is not necessary that the criminal offence be precisely the same under both the law of the administering State and the law of the sentencing State. There may be differences in the wording and legal classification. The basic idea is that the essential constituent elements of the offence should be comparable under the law of both States.

25. The sixth condition f confirms the convention's basic principle that a transfer requires the

agreement of the two States concerned.

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26. Paragraph 3 is to be seen in connection with Article 9 which grants the administering State a choice between two enforcement procedures: it may either continue enforcement or convert the sentence. If requested, it must inform the sentencing State as to which of these two procedures it will follow (Article 9, paragraph 2). The general rule is, therefore, that the administering State may choose between the two enforcement procedures in each individual case.

If, however, a Contracting State wishes to exclude, in a general way, the application of one of the two procedures, it can do so under the provisions of paragraph 3: by way of a declaration, it may indicate that it intends to exclude the application of either the "continued enforcement procedure" or the "conversion procedure" in its relations with other Contracting States. As the declaration made under paragraph 3 applies to the "relations with other parties" it enables the State making such a declaration to exclude one of the two enforcement procedures not only where it is in the position of the administering State but also where it is the sentencing State; in the latter case the declaration would have the effect of making that State's agreement to a requested transfer dependent on the administering State not applying the excluded procedure.

Article 4 – Obligation to furnish information

27. Article 4 concerns the transmission of various elements of information to be furnished during the course of the transfer proceedings to the sentenced person, the administering State, and the sentencing State. The provision applies to three different phases of the procedure: paragraph 1 concerns information by the sentencing State to the sentenced person on the substance of the convention; paragraphs 2 to 4 refer to information between the two States concerned after the sentenced person has expressed an interest in being transferred; paragraph 5 concerns information to be given to the sentenced person on the action or decision taken with regard to a possible transfer.

28. According to paragraph 1, any sentenced person who may be eligible for transfer under the convention shall be informed, by the sentencing State, of the convention's substance. This is to make the sentenced person aware of the possibilities for transfer offered by the convention and the legal consequences which a transfer to his home country would have. The information will enable him to decide whether he wishes to express an interest in being transferred. It is to be noted, however, that the sentenced person cannot himself make the formal request for transfer; it follows from Article 2.3 that transfer may be requested only by the sentencing or the administering State.

The information to be given to the sentenced person must be in a language he understands.

29. Paragraphs 2 and 3 apply where the sentenced person has expressed an interest to the sentencing State in being transferred under the convention. In that event, the sentencing State informs the State of which the sentenced person is a national that he has expressed an interest in being transferred. This information has to be provided as soon as practicable after the judgment becomes final and enforceable, and it must include the elements enumerated in paragraph 3.

30. The principal purpose of conveying this information to the authorities (including the consular authorities) of the person's home country is to enable that State to decide whether it wants to request a transfer, the assumption being that normally the sentenced person's home country will take the initiative to have its own national repatriated.

31. If the sentenced person has expressed his interest in a transfer not to the sentencing State, but to the State of which he is a national, paragraph 4 applies: in that case, the sentencing State provides the information referred to in paragraph 3 only upon the express request of the State of which the person is a national.

32. By virtue of paragraph 5, the sentenced person who has expressed an interest in being transferred must be kept informed, in writing, of the follow-up action taken in his case. He must, for instance, be told whether the information referred to in paragraph 3 has been sent to his home country, whether a request for transfer has been made and by which State, and whether a decision has been taken on the request.

Article 5 – Requests and replies

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33. This article specifies the form and the channels of transmission to be used for requests for transfer and replies thereto.

34. Requests and replies must be made in writing (paragraph 1). They must, in principle, be transmitted between the respective Ministries of Justice (paragraph 2), but Contracting States may declare that they will use other ways of transmission as, for instance, the diplomatic channel (paragraph 3).

35. In line with the convention's aim to provide a procedure for the speedy transfer of sentenced persons, paragraph 4 requires the requested State promptly to inform the requesting State whether it agrees to the requested transfer.

Article 6 – Supporting documents

36. Article 6 States which supporting documents must be provided, on request, by the administering State to the sentencing State (paragraph 1), and by the sentencing State to the administering State (paragraph 2). These documents must be provided before the transfer is effected. As regards the documents to be provided by the sentencing State, they may be sent to the administering State either together with the request for transfer or afterwards; they need not be sent if either State has already indicated that it will not agree to the transfer.

37. In addition, paragraph 3 provides that either of the two States may request any of the documents or statements referred to in paragraph 1 or 2 before making a request for transfer or taking a decision on whether or not to agree to the requested transfer. This provision is intended to avoid setting the transfer procedure in motion when there are doubts as to whether all the conditions for transfer are satisfied. The sentencing State may, for instance, wish to ascertain beforehand – that is before making a request for transfer or before agreeing to a requested transfer – whether the sentenced person is a national of the administering State, or the administering State may wish to ascertain beforehand that the sentenced person consented to his transfer.

Article 7 – Consent and its verification

38. The sentenced person's consent to his transfer is one of the basic elements of the transfer mechanism established by the convention. It was therefore deemed necessary to impose an obligation on the sentencing State to ensure that the consent is given voluntarily and with full knowledge of the legal consequences which the transfer would entail for the person concerned, and to give the administering State an opportunity to verify that consent has been given in accordance with these conditions.

39. Under paragraph 2, the administering State is entitled to that verification either through a Consul or through another official on which the two States agree.

40. As the convention is based on the principle that enforcement in the administering State requires the sentenced person's prior consent, it was not considered necessary to lay down a rule of speciality to the effect that the person transferred under the convention with a view to the enforcement of a sentence may not be proceeded against or sentenced or detained for an offence other than that relating to the enforcement for which the transfer has been effected. Other conventions which provide for this rule of speciality, as, for instance, the European Convention on Extradition in its Article 14 or the European Convention on the International Validity of Criminal Judgments in its Article 9, do not require the consent of the person concerned, so that in those cases the rule of speciality is a necessary safeguard for him.

The absence of a speciality rule should be included in the information on the substance of the convention which is to be given to sentenced persons under Article 4.1.

Article 8 – Effects of transfer for sentencing State

41. This article safeguards the application of the principle of ne bis in idem in respect of the enforcement of the sentence after a transfer has been effected.

42. To avoid the sentenced person's serving a sentence for the same acts or omissions more than once, Article 8 provides that enforcement in the sentencing State is suspended at the moment when the authoities of the administering State take the sentenced person into charge (paragraph 1), and that the sentencing State may no longer enforce the sentence once the administering State considers enforcement to have been completed (paragraph 2).

Article 9 – Effect of transfer for administering State

43. This article concerns the enforcement of the sentence in the administering State. It states the general principles which govern enforcement; the details of the different enforcement procedures are regulated in Articles 10 and 11.

44. According to paragraph 1, the administering State may choose between two ways of enforcing the sentence: it may either continue the enforcement immediately or through a court or administrative order (Article 10), or convert the sentence, through a judicial or administrative procedure, into a decision which substitutes a sanction prescribed by its own law for the sanction imposed in the sentencing State (Article 11). It is to be noted, however, that in accordance with Article 3.3, Contracting States have the possibility to exclude, in a general way, the application of one of these two procedures.

45. If requested, the administering State must inform the sentencing State as to which of these two procedures it intends to apply (paragraph 2). This obligation has been imposed on the administering State because the information may have a bearing on the sentencing State's decision on whether or not to agree to a requested transfer.

46. The basic difference between the "continued enforcement" procedure under Article 10 and the "conversion of sentence" procedure under Article 11 – commonly called "exequatur" – is that, in the first case, the administering State continues to enforce the sanction imposed in the sentencing State (possibly adapted by virtue of Article 10, paragraph 2), whereas, in the second case, the sanction is converted into a sanction of the administering State, with the result that the sentence enforced is no longer directly based on the sanction imposed in the sentencing State.

47. In both cases, enforcement is governed by the law of the administering State (paragraph 3). The reference to the law of the administering State is to be interpreted in a wide sense; it includes, for instance, the rules relating to eligibility for conditional release. To make this clear, paragraph 3 states that the administering State alone shall be competent to take all appropriate decisions.

48. Paragraph 4 refers to cases where neither of the two procedures can be applied in the administering State because the enforcement concerns measures imposed on a person who for reasons of mental condition has been held not criminally responsible for the commission of the offence. The provision allows the administering State, if it is prepared to receive such a person for further treatment, to indicate, by way of a declaration addressed to the Secretary General of the Council of Europe, the procedures which it will follow in such cases.

Article 10 – Continued enforcement

49. Where the administering State opts for the "continued enforcement" procedure, it is bound by the legal nature as well as the duration of the sentence as determined by the sentencing State (paragraph 1): the first condition ("legal nature") refers to the kind of penalty imposed where the law of the sentencing State provides for a diversity of penalties involving deprivation of liberty, such as penal servitude, imprisonment or detention. The second condition ("duration") means that the sentence to be served in the administering State, subject to any later decision of that State on, for example, conditional release or remission, corresponds to the amount of the original sentence, taking into account the time served and any remission earned in the sentencing State up to the date of transfer.

50. If the two States concerned have different penal systems with regard to the division of penalties or the minimum and maximum lengths of sentence, it might be necessary for the administering State to adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. Paragraph 2 allows that adaptation within certain limits: the adapted punishment or measure must, as far as possible, correspond with that imposed by the sentence to

be enforced; it must not aggravate, by its nature or duration, the sanction imposed in the sentencing State; and it must not exceed the maximum prescribed by the law of the administering State. In other words: the administering State may adapt the sanction to the nearest equivalent available under its own law, provided that this does not result in more severe punishment or longer detention. As opposed to the conversion procedure under Article 11, under which the administering State substitutes a sanction for that imposed in the sentencing State, the procedure under Article 10.2 enables the administering State merely to adapt the sanction to an equivalent sanction prescribed by its own law in order to make the sentence enforceable. The administering State thus continues to enforce the sentence imposed in the sentencing State, but it does so in accordance with the requirements of its own penal system.

Article 11 – Conversion of sentence

51. Article 11 concerns the conversion of the sentence to be enforced, that is the judicial or administrative procedure by which a sanction prescribed by the law of the administering State is substituted for the sanction imposed in the sentencing State, a procedure which is commonly called "exequatur". The provision should be read in conjunction with Article 9.1. b. It is essential for the smooth and efficient functioning of the convention in cases where, with regard to the classification of penalties or the length of the custodial sentence applicable for similar offence, the penal system of the administering State differs from that of the sentencing State.

52. The article does not regulate the procedure to be followed. According to paragraph 1, the conversion of the sentence is governed by the law of the administering State.

53. However, as regards the extent of the conversion and the criteria applicable to it, paragraph 1 states four conditions to be observed by the competent authority of the administering State.

54. Firstly, the authority is bound by the findings as to the facts insofar as they appear – explicitly or implicitly – from the judgment pronounced in the sentencing State a. It has, therefore, no freedom to evaluate differently the facts on which the judgment is based; this applies to "objective" facts relating to the commission of the act and its results, as well as to "subjective" facts relating, for instance, to premeditation and intent on the part of the convicted person. The reason for this condition is that the substitution by a sanction of a different nature or duration does not imply any modification of the judgment; it merely serves to obtain an enforceable sentence in the administering State.

55. Secondly, a sanction involving deprivation of liberty may not be converted into a pecuniary sanction b. This provision reflects the fact that the Convention applies only to the transfer of sentenced persons, "sentence" being defined in Article 1. a as a punishment or measure involving deprivation of liberty. However, it does not prevent conversion to a non-custodial sanction other than a pecuniary one.

56. Thirdly, any period of deprivation of liberty already served by the sentenced person must be deducted from the sentence as converted by the administering State c. This provision applies to any part of the sentence already served in the sentencing State as well as any provisional detention served during remand in custody prior to conviction, or any detention served during transit.

57. Fourthly, the penal position of the sentenced person must not be aggravated d. This prohibition refers not only to the length of the sentence, which must not exceed that imposed in the sentencing State, but also to the kind of sanction to be enforced: it must not be harsher than that imposed in the sentencing State. If, for instance, under the law of the administering State the offence carries a more severe form of deprivation of liberty than that which the judgment imposed (e.g. penal servitude or forced labour instead of imprisonment), the administering State is precluded from enforcing this harsher kind of sanction. In addition, paragraph 1. d provides, in respect of the length of the sentence to be enforced, that the authority which converts that sentence is not bound by any minimum which its own law may provide for the same offence, that is, that it is allowed not to respect that minimum with the result that it can enforce the sanction imposed in the sentencing State even if it is less than the minimum laid down in its own law.

58. As the conversion procedure may take some time, paragraph 2 requires the administering State, if the procedure takes place after the transfer of the sentenced person, to keep that person

in custody or otherwise ensure his presence in the administering State, pending the outcome of that procedure. **11459**

Article 12 – Pardon, amnesty, commutation

59. Whereas Article 9.3 makes the administering State solely responsible for the enforcement of the sentence, including any decisions related to it (e.g. the decision to suspend the sentence), pardon, amnesty or commutation of the sentence may be granted by either the sentencing or the administering State, in accordance with its Constitution or other laws.

Article 13 – Review of judgment

60. This article provides that the sentencing State alone has the right to take decisions on applications for review of the judgment. The exclusive competence of the sentencing State to review the judgment is justified by the fact that, technically speaking, review proceedings are not part of enforcement so that Article 9.3 does not apply. The object of an application for review is to obtain the re-examination of the final sentence in the light of any new elements of fact. As the sentencing State alone is competent to re-examine the materiality of facts, it follows necessarily that only that State has jurisdiction to examine such an application, especially as it is better placed to obtain new evidence on the point at issue.

61. The term "review" within the meaning of Article 13 covers also proceedings which in some States may result in a new examination of the legal aspects of the case, after the judgment has become final.

62. The sentencing State’s competence to decide on any application for review should not be interpreted as discharging the administering State from the duty to enable the sentenced person to seek a review of the judgment. Both States must, in fact, take all appropriate steps to guarantee the effective exercise of the sentenced person’s right to apply for a review.

Article 14 – Termination of enforcement

63. Article 14 concerns the termination of enforcement by the administering State in cases where the sentence ceases to be enforceable as a result of any decision or measure taken by the sentencing State (e.g. the decisions referred to in Articles 12 and 13). In such cases, the administering State must terminate enforcement as soon as it is informed by the sentencing State of any such decision or measure.

Article 15 – Information on enforcement

64. This article provides for the administering State to inform the sentencing State on the state of enforcement: a when it considers enforcement of the sentence to have been completed (e.g. sentence served, remission, conditional release, pardon, amnesty, commutation); b if the sentenced person has escaped from custody before completion of the sentence; and c whenever the sentencing State requests a special report.

65. It is to be noted that the information to be supplied by virtue of Article 15. a may be provided either for each individual case or by means of periodical – for example annual – reports covering, for a given period, all cases in which completion of sentence has occurred.

Article 16 – Transit

66. This article has been drafted on the lines of Article 21 of the European Convention on Extradition and Article 13 of the European Convention on the International Validity of Criminal Judgments. It lays down rules governing the transit of persons passing from the sentencing State to the administering State through the territory of another Contracting State.

67. Paragraph 1 imposes an obligation on Contracting States to grant requests for transit, in accordance with their national law, but this obligation is subject to a double condition: the request for transit must be made by another Contracting State, and that State must have agreed with another Contracting State or with a third State to the transfer of the sentenced person. The latter condition means that the obligation to grant transit becomes effective only when the sentencing

and the administering State have agreed on the transfer of the sentenced person.

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68. It is to be noted that the obligation to grant transit applies only where the request emanates from a Contracting State. If it is made by a third State, paragraph 4 applies. It contains an option, not an obligation: a request for transit may be granted if the requesting third State has agreed with another Contracting State to the transfer of the sentenced person.

69. Paragraph 1 does not exclude the transit of a national of the State of transit, but paragraph 2. a entitles a Contracting State to refuse transit if the person concerned is one of its own nationals. This applies also where transit is to be effected by air and the State concerned has made the declaration under paragraph 7.

Paragraph 2. b entitles a Contracting State to refuse to grant transit if the offence for which the sentence was imposed is not an offence under its own law.

70. As regards the channels of communication for requests for transit and replies, paragraph 3 makes the provisions of Article 5, paragraphs 2 and 3, applicable: in principle, requests and replies must pass through the Ministries of Justice of the two States concerned, but Contracting States may declare that they will use other ways of transmission.

71. Paragraph 5 provides for the State of transit to hold the sentenced person in custody only for such time as transit through its territory requires.

72. Paragraph 6 concerns the sentenced person's immunity from arrest and prosecution in the State of transit. It provides that the State requested to grant transit may be asked to give an assurance to the effect that the sentenced person will enjoy immunity in respect of any offence committed or sentence imposed prior to his departure from the territory of the sentencing State, with the exception of custody which the transit State may impose in application of paragraph 5. There is, however, no obligation on the State of transit to give such an assurance.

73. Paragraph 7 deals with transit by air where no landing in the territory of the State of transit is scheduled. In such cases, no request for transit is required. Contrary to the provisions of Article 21.4. a of the European Convention on Extradition which require notification of the transit State in such cases, paragraph 6 of Article 16 leaves it to each Contracting State to decide, by means of a declaration, whether it wishes to require such notification.

Article 17 – Languages and costs

74. This article deals with the questions of language (paragraphs 1 to 3), certification (paragraph 4), and costs (paragraph 5).

75. With regard to the languages to be used for the purposes of applying the Convention, Article 17 distinguishes between the information exchanged between the two States concerned in accordance with Article 4, paragraphs 2 to 4, which must be furnished in the language of the recipient State or in one of the official languages of the Council of Europe (paragraph 1), and requests for transfer and supporting documents for which it is stated that no translation is required (paragraph 2), unless the State concerned has declared that it requires requests for transfer and supporting documents to be accompanied by a translation (paragraph 3).

76. Paragraph 4 provides that with the exception of the copy of the judgment imposing the sentence – referred to in Article 6.2. a – supporting documents transmitted in application of the convention need not be certified.

77. As concerns costs, paragraph 5 provides that they shall be borne by the administering State, with the exception of those costs which are incurred exclusively in the territory of the sentencing Sstate. By precluding Contracting States from claiming refund from each other of any expenses incurred during the transfer procedure, the provision intends to facilitate the practical application of the Convention.

The administering State, however, is not prevented from seeking to recover all or part of the cost of transfer from the sentenced person.

Articles 18 to 25 – Final clauses

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78. With the exception of Articles 18 and 19, the provisions contained in Articles 18 to 25 are, for the most part, based on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers of the Council of Europe at the 315th meeting of their Deputies in February 1980. Most of these articles do not therefore call for specific comments, but the following points, relating to Articles 18,19,21,22 and 23, require some explanation.

79. Articles 18 and 19 have been drafted on the precedent established in Articles 19 and 20 of the Convention on the Conservation of European Wildlife and Natural Habitats of 19 September 1979 which allow for signature, before the Convention's entry into force, not only by the member States of the Council of Europe, but also by non-member States which have participated in the elaboration of the Convention. These provisions are intended to enable the maximum number of interested States, not necessarily members of the Council of Europe, to become Contracting Parties as soon as possible. As similar considerations apply in the case of the convention on the Transfer of Sentenced Persons, Article 18 provides that it is open for signature by the member States of the Council of Europe as well as by non-member States which have participated in its elaboration. The provision is intended to apply to two non-member States, Canada and the United States of America, which were represented on the Select Committee by observers and actively associated with the elaboration of the Convention. They may sign the Convention, just as the member States of the Council of Europe, before its entry into force. According to Article 18.2, the Convention enters into force when three member States have expressed their consent to be bound by it. Non-member States other than those referred to in Article 18.1 may, by virtue of Article 19, be invited by the Committee of Ministers to accede to the Convention, but only after its entry into force and after consultation of the Contracting States.

80. Article 21 ensures the convention's full temporal application. It enables Contracting States to avail themselves of the transfer mechanism with regard to any enforcement which falls within the convention's scope of application and which is to be effected after its entry into force, regardless of whether the sentence to be enforced has been imposed before or after that date.

81. Article 22 intends to ensure the smooth co-existence of the convention with other treaties – multilateral or bilateral – providing for the transfer of detained persons.

Paragraph 1 concerns extradition treaties and other treaties providing for the transfer of detained persons for purposes of confrontation or testimony. Paragraph 2 safeguards the continued application of agreements, treaties or relations relating to the transfer of sentenced persons, including uniform legislation as it exists, for instance, within the Nordic co-operation. Paragraph 3 concerns complementary agreements concluded in application of Article 64.2 of the European Convention on the International Validity of Criminal Judgments. Paragraph 4 applies where a request for transfer falls within the scope of both the present convention and the European Convention on the International Validity of Criminal Judgments or any other instrument on the transfer of sentenced persons. In such a case, the requesting State must indicate on the basis of which instrument it makes the request. Such indication is binding on the requested State.

82. Article 23 which makes the European Committee on Crime Problems of the Council of Europe the guardian over the application of the convention follows the precedents established in other European conventions in the penal field, namely in Article 28 of the European Convention on the Punishment of Road Traffic Offences, in Article 65 of the European Convention on the International Validity of Criminal Judgments, in Article 44 of the European Convention on the Transfer of Proceedings in Criminal Matters, in Article 7 of the Additional Protocol to the European Convention on Extradition, in Article 10 of the Second Additional Protocol to the European Convention on Extradition, in Article 10 of the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, and in Article 9 of the European Convention on the Suppression of Terrorism. The reporting requirement which Article 23 lays down is intended to keep the European Committee on Crime Problems informed about possible difficulties in interpreting and applying the convention so that it may contribute to facilitating friendly settlements and proposing amendments to the convention which might prove necessary.

ANNEX EE

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

OFFICE OF THE PRESIDENT

Before Judge: Dennis C. M. Byron
President of the Tribunal

Registrar: Adama Dieng

Date: 13 February 2008

THE PROSECUTOR

v.

Georges RUGGIU

Case No. ICTR-97-32-A26

DECISION ON THE ENFORCEMENT OF SENTENCE

Article 26 of the Statute & Rule 103(A) of the Rules of Procedure and Evidence

INTRODUCTION

1. On 1st June 2000, Georges Ruggiu was convicted on a guilty plea by Trial Chamber I for the crimes of (i) direct and public incitement to commit genocide, and, (ii) persecution as a crime against humanity.[1] Georges Ruggiu was sentenced to twelve years for each respective crime, with the sentences to be served concurrently.[2] As the judgement was not appealed by any of the parties, it became final on 2nd July 2000. Since that time, Georges Ruggiu has remained in the United Nations Detention Facility in Arusha (Tanzania), pending a determination on where his sentences will be enforced.

2. On 21 May 2007, Judge Dennis C. M. Byron was elected President of the Tribunal.

3. On 24 January 2008, the Registrar submitted a confidential memorandum to the President in relation with the enforcement of the sentence in this case ("Memorandum").[3]

DELIBERATIONS

4. Article 26 of the Statute of the Tribunal on Enforcement of Sentences provides:

> Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.

5. Rule 103 of the Rules on Place of Imprisonment reads as follows:

> (A) Imprisonment shall be served in Rwanda or any State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons for the serving of sentences. Prior to a decision on the place of imprisonment, the Chamber shall notify the Government of Rwanda.

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1 *The Prosecutor v. Georges Ruggiu*, Case No. ICTR-97-32-I, Judgement and Sentence (TC1), 1 June 2000, para. 24.

2 See *The Prosecutor v. Georges Ruggiu*, Case No. ICTR-97-32-I, Judgement and Sentence (TC1), 1 June 2000, p. 19.

3 Confidential Interoffice Memorandum from the Registrar to the President, Ref. ICTR/RO/01/08/18-wc, *Georges Omar Ruggiu – Submission Concerning the States in which the Sentence of the Persons Convicted by ICTR can be carried out in accordance with the Practice Direction of May 2000*, 24 January 2008. Attached to the Memorandum, among other materials are: a Note Verbale to the Government of Rwanda, a Sentence of the Court of Appeals of Rome, the Agreement between the United Nations and the Italian Republic on the Enforcement of Sentences and Diplomatic exchange between the Republic of Italy and the ICTR Registrar.

(B) Transfer of the convicted person to that State shall be effected as soon as possible after the time limit for appeal has elapsed.

6. From these provisions, it appears that:

(i) the sentence shall be served either (a) in Rwanda or (b) in a State which has expressed to the Security Council its willingness to that effect;

(ii) the imprisonment shall be in accordance with the applicable law of the State;

(iii) the Tribunal shall maintain supervision over the enforcement; and

(iv) the Government of Rwanda shall be notified before the President makes his/her determination.

7. In addition to the Statute and the Rules, there is a Practice Direction issued by the President on 10 May 2000.[4] This Practice Direction, *prima facie*, appears contrary to Rule 103(A) in its wording. However the jurisdiction granted to the President of the Tribunal in that Practice Direction was already an established practice in 2000.[5] The President notes that since the Practice Direction was issued, Trial Chambers have consistently referred to such jurisdiction of the President. The Practice Direction is therefore the result of an agreed practice which now constitutes the legal framework for the designation of the Enforcement

[4] Practice Direction on the Procedure for Designation of the State in Which a Convicted Person is to Serve His/Her Sentence of Imprisonment, 10 May 2000.

[5] See: *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement and Sentence (TC1), 27 January 2000 ("RULES that the imprisonment shall be served in a State designated by the President of the Tribunal in consultation with the Trial Chamber; the Government of Rwanda and the designated State shall be notified of such designation by the Registrar"); *Le Procureur c. Georges Anderson Nderubumwe Rutaganda*, Affaire No. ICTR-96-3-T, Jugement et sentence (TC1), 6 décembre 1999 ("DÉCIDE que la peine d'emprisonnement sera exécutée dans un État désigné par le Président du Tribunal, en consultation avec la Chambre de première instance, et que le Greffier informera le Gouvernement rwandais et l'État désigné du lieu d'emprisonnement"); *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Sentence (TC2), 21 May 1999 ("DECIDES that Kayishema and Ruzindana shall serve their sentences in a State designated by the President of the Tribunal, in consultation with this Chamber; ORDERS the Registrar to convey via letter or note verbal information regarding the designation to the designated State and the Government of Rwanda; ORDERS the Registrar to convey information to the designated State regarding the date of arrest and custody credits of Ruzindana in accordance with Rule 101(D)"); *The Prosecutor v. Omar Serushago*, Case No. ICTR-98-39-S, Sentence (TC1), 5 February 1999 ("RULES that imprisonment shall be served in a State designated by the President of the Tribunal, in consultation with the Trial Chamber and the said designation shall be conveyed to the Government of Rwanda and the designated State by the Registry"); *Le Procureur c. Jean-Paul Akayesu*, Affaire No. ICTR-96-4-T, Décision relative à la condamnation (TC1), 2 octobre 1998 ("DECIDE QUE la peine d'emprisonnement sera exécutée dans un Etat désigné par le Président du Tribunal, en consultation avec.la Chambre de première instance, et que le Greffier informera le Gouvernement rwandais et l'Etat désigné du lieu d'emprisonnement"); and *Le Procureur c. Jean Kambanda*, Affaire No. ICTR-97-23-S, Jugement portant condamnation (TC1), 4 septembre 1998 ("DECIDE QUE la peine d'emprisonnement sera exécutée dans un Etat désigné par le Président du Tribunal, en consultation avec.la Chambre de première instance, et que le Greffier informera le Gouvernement rwandais et l'Etat désigné du lieu d'emprisonnement").

State. It is worth noting that while Rule 103 differs slightly in its wording from the equivalent ICTY provision, a similar ICTY Practice Direction was issued on 9 July 1998[6] which granted identical jurisdiction to the President.

8. Apart from the abovementioned legal framework established by specific instruments of the Tribunal, other instruments also apply to the enforcement of sentences decided by the Tribunal established by the United Nations, namely: the Standard Minimum Rules for the Treatment of Prisoners,[7] the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment,[8] and the Basic Principles for the Treatment of Prisoners.[9] Although these instruments are not binding acts, and the rules and principles therein stated are not in effect in all States, they nonetheless constitute what the States have agreed on as being the minimum best practices in imprisonment.

9. The United Nations is an universal organization where the States have agreed:

> 3. To achieve international cooperation […] in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
>
> 4. To be a center for harmonizing the actions of nations in the attainment of these common ends.[10]

10. Consequently, the United Nations as an international actor, and its agencies, especially International Criminal Tribunals, ought to adhere to these agreed standard minimum rules.

11. Moreover, the Agreement between the United Nations and the Republic of Italy specifically refers to those three instruments as guiding the Agreement.

12. Finally, and in accordance with those guiding principles, the President shall take into account the individual circumstances of the convicted person in his/her decision-making process. It is logical for the President to consider such circumstances, because these

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[6] Practice Direction on the Procedure for the International Tribunal's Designation of the State in Which a Convicted Person is to Serve his/her Sentence of Imprisonment, 9 July 1998, Document No. IT/137.

[7] United Nations Economic and Social Council Resolutions 663 C (XXIV), 31 July 1957, and 2067 (LXII), 13 May 1977.

[8] United Nations General Assembly Resolution 43/173, 9 December 1988.

[9] United Nations General Assembly Resolution 45/111, 14 December 1990.

[10] Article 1 of the Charter of the United Nations, 26 June 1945, 59 *Stat*. 1031, entered into force 24 October 1945.

circumstances will also influence the determination of the President as to which State will enforce the sentence.

13. Georges Ruggiu was born on 12 October 1957 in Belgium, but has two nationalities (Belgian and Italian). He has been in detention since 23 July 1997. Due to his particular medical circumstances, he requires ongoing medical care. He is in good nutritional state. He is a Muslim.

14. In the practice of the Tribunal, any State willing to have sentences of the Tribunal enforced in its territory enters into an agreement with the United Nations to that effect. The President considers that the existence of such an agreement complies with the requirement in Article 26 that the State indicates to the Security Council its willingness for such enforcement.

15. The Republic of Italy has entered into such an agreement with the United Nations on 17 March 2004.[11]

16. The President notes that the Government of Italy was duly consulted by the Registrar and has engaged in domestic proceedings for the enforcement of the sentences of Georges Ruggiu. On 4 October 2007, the Fourth Criminal Section of the Appeals Court of Rome declared "the recognition of the sentence in view of the execution of the reclusion in Italy, of the International Criminal Tribunal for Rwanda dated 1.6.2000 in which Ruggiu Omar Georges has been convicted to twelve years of imprisonment for genocide and persecution for racial reasons".[12]

17. The President therefore considers that it will be appropriate for Georges Ruggiu to serve his sentence in Italy.

18. While Article 26 does not make it binding for sentences to be served in Rwanda, Rule 103(A) adds a requirement that prior to his/her decision, the President, through the Registrar, shall notify the Government of Rwanda prior to making a decision on the place of imprisonment. The Government of Rwanda was duly notified on 23 January 2008.

[11] Apart from Italy, five other States have signed such an agreement: Benin, France, Mali, Swaziland and Sweden.

[12] Corte Di Appello Di Roma, Sentenza No. 63/07. The quotation is an unofficial translation provided by the Tribunal.

FOR THOSE REASONS,

THE PRESIDENT

I. DECIDES that the sentences imposed on Omar Georges Ruggiu shall be enforced in the Republic of Italy;

II. RECALLS that such enforcement will be carried out in accordance with Italian law; and under the supervision of the Tribunal.

Arusha, 13 February 2008, done in English.

Dennis C. M. Byron
President

[Seal of the Tribunal]

ANNEX FF

11470

26.10.10 - ICTR/SWEDEN - BAGARAGAZA TRANSFERRED TO SWEDEN LAST JULY

Arusha, October 26, 2010 (FH) - Genocide-convict Michel Bagaragaza, who was sentenced to eight years in jail a year ago by the International Criminal Tribunal for Rwanda (ICTR), for the role he played in the 1994 Tutsi genocide, has been secretly transferred from Arusha to Sweden.

"The Registrar took care of his transfer on July 19, 2010, following a confidential decision taken on June 28, by ICTR President, designating Sweden as the State where the convict should execute the remainder of his sentence, "ICTR spokesman Roland Amoussouga revealed to Hirondelle News agency on Tuesday.

He added, "Michel Bagaragaza was transferred to a prison located hundreds kilometers from Stockholm", the Swedish capital.

The ICTR gave Bagaragaza, former head of the Rwandan Tea Authority, the custodial sentence on November 5, 2009, after pleading guilty for his role in the 1994 genocide.

He is the first ICTR convict to be sent to Sweden, a country which has signed with the UN an Agreement on the enforcement of sentences. Before his transfer, the convict was held in Arusha in an isolated area from other inmates.

Bagaragaza had special reasons to fear for his security. He had testified against several prominent personalities of the previous regime who were charged by the ICTR, notably Protais Zigiranyirazo.

However, his testimony as a "key witness" of the prosecution in Zigiranyirazo's case did not, at the end, convince the judges. Habyarimana's brother-in-law was acquitted on appeal in November 2009.

ER/GF/FK

ANNEX GG

The authority exceeds 30 pages

11472

Seventh Annual Report

of the President of the Special Court for Sierra Leone

7th

June 2009 to May 2010

SCSL
JUSTICE FREEDOM POLITICS

Seventh Annual Report

of the President of the Special Court for Sierra Leone

7th

June 2009 to May 2010

With the cooperation of the Executive Representative of the Secretary-General of the United Nations Integrated Peacebuilding Office in Sierra Leone (UNIPSIL), Mr. Michael von der Schulenburg and the United Nations Mission in The Democratic Republic of Congo (MONUC) , a military air transport plane and helicopter were put at the disposal of the Special Court for the purpose of transferring the prisoners and attendant security personnel from the detention facility in Freetown to the international airport in Lungi, Sierra Leone, and onwards to Kigali, Rwanda.

The prisoners, former *RUF* Interim Leader Issa Hassan Sesay, former *RUF* commander Morris Kallon and former *RUF* Chief of Security Augustine Gbao; former leaders of the *AFRC*, Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu; and former leaders of the Civil Defence Forces (*CDF*), Moinina Fofana and Allieu Kondewa were transferred to Rwanda on 31 October 2009 to serve their sentences. The transfer was effected without any incidents. This brought all judicial activities in Freetown to an end.

The Special Court however continues to pursue sentence enforcement agreements with countries both in Europe and Africa. The Special Court is grateful to the Republic of Rwanda for its assistance in staffing and maintaining the prison facility. The Special Court continues to raise the necessary funds in order to maintain minimum international standards and to pay for the eight prisoners' daily upkeep and maintenance for the full duration of all sentences, which, at the time of writing, amounts to 249 years combined[1], and for which funding will be required in the amount of 5.4 million USD.

The Special Court's fourth and final trial is that of *Prosecutor v. Charles Taylor,* taking place in The Hague. The Defence opened its case on 13 July 2009 and called the accused Charles Ghankay Taylor as its first witness on 14 July. As at 31 May 2010 the Defence had called 11 witnesses, in addition to Charles Taylor. The *Taylor* Defence currently projects that it will close its case in August 2010, following which the Prosecution may present a rebuttal case. The parties will then submit written briefs and present closing arguments pursuant to Rule 86 of the Rules of Procedure and Evidence.

The trial was transferred from Courtroom 2 of the International Criminal Court (ICC) to the courtroom of the Special Tribunal for Lebanon (STL) on 17 May 2010. The Special Court is grateful to both the ICC and the STL for their continued assistance in terms of the provision of courtroom and other facilities, a sentiment which was conveyed by President Kamanda to both the ICC and the STL Presidents during a working visit to The Hague in February 2010.

The Special Court continued to engage in extensive Legacy activities, which focused during the reporting period on the following projects: the Site Project (the project to assist the Government of Sierra Leone to develop the site of the Special Court after it reverts to the Government upon completion of the Court's mandate), the Witness Evaluation and Legacy Project, Communicating Justice (an Outreach Project in cooperation with BBC World Service Trust), the Archiving Project and capacity-building for legal associates and interns.

Ten residual functions of the Court were identified by the 'DONLON' Report released in December 2008, which the Special Court must make arrangements to fulfil. Primary among these are the responsibility to protect witnesses, to maintain the archives and to enforce the sentences of its convicts. The parties to the Agreement which created the Court, namely the United Nations and the Government of Sierra Leone, have initiated discussions on the structure and location of a residual mechanism that would take on the Court's obligations upon its closure. The role of the Special Court in these discussions has been to provide advice based on its experiences and practices, and to make any necessary arrangements to ensure a smooth transition to the residual mechanism. During the reporting period, President Kamanda met with the United Nations Assistant Under-Secretary General for

1 249 years is the combined total of number of years remaining to be served, rounded up to full years.

ANNEX HH

The authority exceeds 30 pages

TENTH ANNUAL REPORT

of the President of the
Special Court for Sierra Leone

June 2012 to May 2013

TENTH ANNUAL REPORT

of the President of the Special Court for Sierra Leone

10th

June 2012 to May 2013

RESIDUAL SPECIAL COURT FOR SIERRA LEONE

Proposed banner for homepage of new SCSL/RSCSL website

The Residual Special Court for Sierra Leone is created by an Agreement between the Government of Sierra Leone and the United Nations. According to that Agreement, the Government of Sierra Leone and the United Nations Secretary-General shall appoint 16 Judges to the RSCSL, who will serve on a roster and perform their duties as and when needed. A Registrar and Prosecutor will likewise be appointed. As the responsibilities of the RSCSL Judges and Prosecutor require them to work part-time, they will be remunerated on a *pro-rata* basis only for time actually devoted to RSCSL business. The Registrar will be appointed on a full time basis. The appointing authorities have indicated that these appointments will be made prior to September 2013. However, the RSCSL will not take on its official responsibilities until the closure of the SCSL.

At the beginning of 2012, the Registrar established the RSCSL Transition Working Group in order to coordinate work relating to the transition to the Residual Special Court and closure of the Special Court. The Working Group includes representatives from Chambers, the Office of the Prosecutor, the Defence Office, and all relevant Registry Sections. The Working Group is charged with reporting on the progress of the organs of the Court and sections of the Registry in order to monitor Progress toward transition to the RSCSL.

Article 6 of the Residual Agreement provides that the RSCSL shall have its principal seat in Sierra Leone. The Agreement also provides that the RSCSL shall carry out its functions from an interim seat in The Netherlands, with a Sub-Office in Sierra Leone for witness protection matters. An agreement for the RSCSL to share office space and an administrative and IT platform with the ICTY in The Hague is being finalized.

The Special Court's archive will become the property of the Residual Special Court at the Court's closure and will be co-located with the RSCSL at its interim seat in The Netherlands, pursuant to Article 7 of the RSCSL Agreement. To this end, the SCSL records and evidence were transferred from Freetown to The Hague in December 2010. The SCSL archive is stored in the Dutch National Archives, who preserve the records on a day-to-day basis. The records are managed by SCSL staff and in the future after the closure of the Court they will be managed by the RSCSL archivist. Special Court staff continue to archive the records of the Hague Sub-Office, records being created in Freetown and liaise with the Dutch National Archive to facilitate access to the records. The RSCSL will also facilitate access to the records for national prosecutorial authorities.

The RSCSL's Freetown office will respond to the needs and concerns of the Special Court's witnesses. Although any witness may contact the RSCSL for support, it is anticipated that of the 557 witnesses who testified, approximately 100 may require ongoing post-trial witness protection or support. The RSCSL staff will work closely with the Sierra Leone Police, in particular the Witness Protection Unit, to ensure that the concerns and needs of witnesses are adequately addressed. Should allegations of interference with witness protection orders arise, they will be referred to the Judges of the RSCSL for further action.

On 31 October 2009, the Special Court's eight convicted people were transferred to Mpanga Prison, Rwanda for sentence enforcement. Detention is managed by the Rwanda Prisons Service in accordance with international standards, under the supervision of the Special Court. The Special Court also facilitates visits by family members. In 2012 all eight prisoners were visited by family members. The visits were partially funded by the Court. The RSCSL will take on responsibility for yearly inspection of detention conditions and facilitating family visits after the Court's closure. Requests for pardon or commutation of sentence or early release on behalf of convicted persons made by States of Enforcement will be referred to the RSCSL. In accordance with Article 24 of the RSCSL Statute and Rules 123 and 124 of the Rules of Procedure and Evidence requests for pardon, commutation of sentence or early release will be determined by the RSCSL President in consultation with the Judges.

ANNEX JJ

RESIDUAL SPECIAL COURT FOR SIERRA LEONE
CHURCHILLPLEIN 1, 2517 JW • THE HAGUE • THE NETHERLANDS
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(BRANCH OFFICE) JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

Honourable Justice Philip Waki
President of the Residual Special Court for Sierra Leone

24 March 2014

Dear Hon. President Waki,

Re: Update on issues pertaining to SCSL prisoner Charles Taylor

I write to provide you with the following update with regard to the ongoing imprisonment of SCSL prisoner Charles Taylor at HM Frankland prison in Durham, United Kingdom.

Reference is made to my correspondence of 10 January, providing you with update regarding issues arising from Mr. Taylor's imprisonment. Reference is also made to the report enclosed in that correspondence from the investigation team comprising of Principal Defender Claire Carlton-Hanciles and Chief of Detention Paul Wright, who were sent on mission, in December 2013, to HM Frankland to investigate issues that had been brought to the attention of the Court.

In follow up to that correspondence, I wish to advise you of the following:

Family Visits

On 15 October 2013, Charles Taylor was transferred to the United Kingdom to serve his sentence at HM Frankland Prison in Durham, UK. On 29 November 2013, his wife, Mrs. Victoria Taylor and her two children, subsequently applied for a UK visa, and on 3 January 2014 her application was rejected due to deficiencies in the application as highlighted by the UK consular officer in the rejection letter. Following the rejection of her visa application, Mrs. Taylor notified the Court, through the Defence Officer, Ms. Claire Carlton-Hanciles of the rejection. Ms. Carlton-Hanciles reported the matter to the Registrar and the Registrar took immediate action and contacted the relevant UK authorities regarding the rejection. A series of consultations with UK authorities have been held at high level.

As a result of those consultations, the Court, via the Defence Officer, advised Mrs. Taylor to submit a fresh application and offered its assistance for the completion of the application form. The Defence Officer has been trying to work closely with Mrs Taylor to provide assistance in this regard. Additionally, the Court provided a letter of support in favour of Mrs. Taylor's application. (See attached).

The Defence Officer unsuccessfully continues to make frequent contacts with Mrs. Taylor to ensure that the application form is properly completed and submitted. Despite several follow ups, there has been little progress in moving forward with the completion and submission of Mrs Taylor's application form. Although the Court has offered its assistance to work closely with Mrs. Taylor, to date the Court has not been advised about when the fresh application form will be submitted by Mrs Taylor. More importantly, Mrs. Taylor has not advised the Court as to whether there are any difficulties in the completion of the visa application form, or requirements that she cannot fulfil that would necessitate the Court's intervention.

In light of the above, please be advised that in the absence of any feedback or greater willingness of Mrs Taylor to accept the Court's offer of assistance, it is very difficult for the Court to consider other course of action in this matter. In the meantime, the Defence Officer will be directed to continue to contact Mrs. Taylor and urge greater cooperation, since there is no reason to believe that her reapplication will be unsuccessful. High level talks with UK authorities will also continue in order to facilitate Taylor family visits.

Inspection and Monitoring of Conditions of imprisonment

Pursuant to an Exchange of letters between the Residual Special Court and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT"), the Court has requested a visit by the CPT to HM Frankland as soon as practicable. The Court is awaiting the CPT's response as to the timing of their visit. You will be advised as soon as this information becomes available.

I thank you for your consideration of this matter and send the renewed assurances of my highest consideration.

Yours sincerely,

Binta Mansaray
Acting Registrar
Residual Special Court for Sierra Leone

Cc: Justice Jon Kamanda, Vice-President of the RSCSL
John RWD Jones, QC
Claire Carlton-Hanciles, RSCSL Defense Officer

Encl: 12 February 2014 Letter to the UK Immigration Department from the RSCSL in support of Mrs Taylor's visa application

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Consular Officer
United Kingdom Immigration Service

12 February 2014

Dear Sir/Madam,

This letter is in support of the visa application of Mrs. Victoria Taylor, a Liberian citizen, and wife of former President of Liberia, Mr. Charles Taylor who is currently serving a sentence imposed by the Special Court for Sierra Leone at HM Frankland prison in the United Kingdom.

During the course of Charles Taylor's seven-year detention by the Special Court in The Hague, The Netherlands, Mrs. Victoria Taylor travelled often, under a Schengen Visa, to The Netherlands. Throughout the entire seven years, Victoria Taylor never overstayed her visa, and when she required an extension, she always went through the proper official channels to obtain the extension. At the end of her allotted time, she always returned to her home, in Liberia, where her children are also resident. Based on the Court's experience with Mrs. Victoria Taylor, it is our view that, if her application for a visa is granted, she will comply with the visa requirements related to the duration of her stay.

I hope the above information will assist in your kind consideration and determination with regard to the visa application for Mrs. Victoria Taylor, which has the full support of the Residual Special Court.

Yours sincerely,

Binta Mansaray
Acting Registrar
Residual Special Court for Sierra Leone

ANNEX LL

BALKAN TRANSITIONAL JUSTICE

NEWS 23 Dec 11

ICTY: Radislav Krstic Transferred Back to The Hague

Radislav Krstic, who was convicted by The Hague tribunal for aiding and abetting genocide in Srebrenica, was transferred back to the Scheveningen detention unit in The Hague from Great Britain where he was serving his sentence.

Denis Dzidic | BIRN Justice Report | Sarajevo

The International Criminal Tribunal for the former Yugoslavia (ICTY) was unable to comment on the reasons for transferring Krstic, but according to diplomatic sources it was due to “security issues”.

“Krstic was subject to constant provocations and he spent his whole time in his cell. In his former prison in Great Britain he was attacked, so he was transferred to another prison but there he was also subject to provocations”, BIRN’s Justice Report was told by diplomatic sources.

Krstic, former Commander of the Drina Corps of the Bosnian Serb Army (VRS) was sentenced to 35 years imprisonment in April 2004 for aiding and abetting genocide, extermination and persecution on political, racial and religious grounds in Srebrenica in July 1995.

He was transferred in December 2004 to the United Kingdom to serve his sentence.

According to unofficial information, Krstic was transferred to the Tribunal on December 15, and he will remain there until a decision is reached as to which country he will be sent to serve the remainder of his sentence.

Tags Bosnia and Herzegovina War Crime Trials ICTY Co-operation Srebrenica

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1 2 3 4 5 6 > >>

ANNEX MM

The authority exceeds 30 pages

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

GRAND CHAMBER

CASE OF RAMIREZ SANCHEZ v. FRANCE

(Application no. 59450/00)

JUDGMENT

STRASBOURG

4 July 2006

examined on 26 August 2003, but no follow-up to that appointment had been recommended.

144. The Court notes in this connection that the applicant refused the psychological counselling he was offered (see paragraph 70 above) and has not alleged that the treatment he received for his diabetes was inappropriate. Nor has he shown that his prolonged solitary confinement has led to any deterioration in his health, whether physical or mental.

Furthermore, the applicant himself stated in his observations in reply that he was in excellent mental and physical health (see paragraph 95 above).

145. The Court nevertheless wishes to emphasise that solitary confinement, even in cases entailing only relative isolation, cannot be imposed on a prisoner indefinitely. Moreover, it is essential that the prisoner should be able to have an independent judicial authority review the merits of and reasons for a prolonged measure of solitary confinement. In the instant case, that only became possible in July 2003. The Court will return to this point when it examines the complaint made under Article 13. It also refers in this connection to the conclusions of the CPT and of the Human Rights Commissioner of the Council of Europe (see paragraphs 83 and 85 above).

146. It would also be desirable for alternative solutions to solitary confinement to be sought for persons considered dangerous and for whom detention in an ordinary prison under the ordinary regime is considered inappropriate.

147. The Court notes with interest on this point that the authorities twice transferred the applicant to prisons in which he was held in normal conditions. It emerges from what the Government have said that it was as a result of an interview which the applicant gave over the telephone to a television programme in which he refused among other things to express any remorse to the victims of his crimes (he put the number of dead at between 1,500 and 2,000), that he was returned to solitary confinement in a different prison. The authorities do not, therefore, appear to have sought to humiliate or debase him by systematically prolonging his solitary confinement, but to have been looking for a solution adapted to his character and the danger he posed.

148. The Court notes that when the applicant was being held in normal conditions in Saint-Maur Prison, his lawyer sent a letter to the Registry of the Court in which she complained of "dangerous company, particularly in the form of drug addicts, alcoholics, and sexual offenders who are unable to control their behaviour" and alleged a violation of human rights.

Furthermore, the applicant complained during that period of being too far away from Paris, which, he said, made visits from his lawyers more difficult, less frequent and more costly and inevitably caused another form of isolation.

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Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the Confidential Case File.

Case Name: **The Prosecutor – v- Charles Ghankay Taylor**
Case Number: **SCSL-03-01-ES**
Document Index Number: **1396**
Document Date: **24 June2014**
Filing Date: **26 June2014**

Document Type: **Confidential Certificate**

Number of Pages: **15** Number from: **11490-11504**

☐Application
☐Order
☐Indictment
■**Motion**
☐Other
☐Correspondence

Document Title:
Public with Public and Confidential Annexes: Motion for Termination of Enforcement of Sentence in The United Kingdom and for transfer to Rwanda

Name of Officer:

Francess Ngaboh-Smart

Signed: