

# **Bringing Rwandan *Génocidaires* to Book**

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## BRINGING RWANDAN GENOCIDAIRES TO BOOK

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On September 2, 1998, the International Criminal Tribunal for Rwanda issued its first judgment<sup>1</sup>. The Tribunal, established by Security Council resolution pursuant to Chapter VII of the *Charter of the United Nations*, convicted Jean-Paul Akayesu of genocide and crimes against humanity for his role in the events of April-July 1994, when Akayesu served as bourgmestre or mayor of the commune of Taba, in central Rwanda.<sup>2</sup> A month later, on October 2, 1998, the Tribunal sentenced Akayesu to life imprisonment<sup>3</sup>. The *Akayesu* judgment addresses many important issues with respect to the interpretation of articles II and III of the *Convention for the Prevention and Punishment of the Crime of Genocide*,<sup>4</sup> which are incorporated without modification in the *Statute of the International Criminal Tribunal for Rwanda*.<sup>5</sup>

The *Akayesu* judgment was broadcast live by radio throughout Rwanda. The author, who was teaching criminal law at the University of Rwanda at the time, was able to observe the reaction of the Rwandan population. By and large, Rwandans were thrilled with the decision, which for them constituted recognition by a prestigious independent tribunal, whose impartiality was beyond question, as to the truth of the events in 1994. The Tribunal noted that in order to understand the charges against *Akayesu*, it was necessary to grasp the history of Rwanda and the background of genocide. After all,

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1 *Prosecutor v. Akayesu* (Case no. ICTR-96-4-T), Judgment, Sept. 2, 1998, (1998) 37 I.L.M. 1399.

2 On the Rwandan genocide, see: Philip GOUREVITCH, *We wish to inform you that tomorrow we will be killed with our families, Stories from Rwanda*, New York: Farrar Strauss and Giroux, 1998; Gerard PRUNIER, *The Rwanda Crisis: History of a Genocide*, New York: Columbia University Press, 1995; Colette BRAECKMAN, *Rwanda, Histoire d'un génocide*, Paris: Fayard, 1994; AFRICA RIGHTS, *Rwanda, Death, Despair and Defiance*, London, 1994; J.-P. CHRÉTIEN, J.-F. DUPAQUIER, M. KABANDA, J. NGARAMBE, *Rwanda: les médias du génocide*, Paris: Karthala, 1995; François-Xavier VERSCHAVE, *Complicité de génocide, La politique de la France au Rwanda*, Paris: La Découverte, 1994; Filip REYNTJENS, *L'Afrique des Grands Lacs en Crise*, Paris: Karthala, 1994; Jean-Denis MOUTON, "La crise rwandaise de 1994 et les Nations Unies", (1994) 40 A.F.D.I. 214.

3 *Prosecutor v. Akayesu* (Case no. ICTR-96-4-S), Sentence, Oct. 2, 1998.

4 (1951) 78 U.N.T.S. 277.

Akayesu was in a sense being held responsible for the entire genocide, just as the Jerusalem court, in 1961, had considered Eichmann to be responsible for a mass crime that was “a single comprehensive act, not to be split up into the acts or operations performed by sundry people at sundry times and in sundry places. One team of men carried it out in concert the whole time and everywhere”<sup>6</sup>. It followed, said the *Eichmann* Court, that a collaborator in the extermination of the Jews, who had knowledge of the plan for the “Final Solution”, was to be regarded “as an accomplice in the extermination of the millions who were destroyed during the years 1941-1945, irrespective of whether his actions extended over the entire extermination front or only over one or more sectors of it. His responsibility is that of a ‘principal offender’ who has committed the entire crime in conjunction with the others.”<sup>7</sup> For Rwandans, although Akayesu was a somewhat secondary figure in the genocide, his guilt was that of the crime taken as a whole.

At the time of de-colonization, in 1960, ethnic and political violence drove tens of thousands of Tutsi from the country. They established themselves in neighbouring countries, mainly in Uganda where they were gathered in refugee camps. Three decades later, after being frustrated in their demands to return home, which were constantly refused by the rulers in Rwanda, they invaded the country on its northern border. A three-year civil war came to an end in August 1993, with a peace accord providing for the return of the refugees and a democratic transition. But Hutu extremists, angered by a Tutsi-led coup in neighboring Burundi in October 1993, were determined to sabotage the peace accord. The *Akayesu* judgment described the build-up to genocide:

Meanwhile, anti-Tutsi propaganda on the media intensified. The [Radio-télévision libre Mille collines] constantly stepped up its attacks which became increasingly targeted and violent. At the end of March 1994, the transitional government was still not set up and Rwanda was on the brink of bankruptcy. International donors and neighbouring countries put pressure on the Habyarimana government to implement the Arusha Accords. On 6 April 1994, President Habyarimana and other heads of State of the region met in Dar-es-Salaam (Tanzania) to discuss the implementation of the peace accords. The aircraft carrying President Habyarimana and the Burundian President, Ntaryamirai, who were returning from the meeting, crashed around 8:30 pm near Kigali airport. All aboard were killed.

The Rwandan army and the militia immediately erected roadblocks around the city of Kigali. Before dawn on

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<sup>5</sup> U.N. Doc. S/RES/955 (1994), annex.

<sup>6</sup> *A.-G. Israel v. Eichmann*, (1968) 36 I.L.R. 5 (District Court, Jerusalem), para. 193.

<sup>7</sup> *Ibid.*, para. 194.

April 7 1994, in various parts of the country, the Presidential Guard and the militia started killing the Tutsi as well as Hutu known to be in favor of the Arusha Accords and power-sharing between the Tutsi and the Hutu. Among the first victims, were a number of ministers of the coalition government, including its Prime Minister, Agathe Uwilingiyimana (MDR), the president of the Supreme Court and virtually the entire leadership of the parti social démocrate (PSD). The constitutional vacuum thus created cleared the way for the establishment of the self-proclaimed Hutu-power interim government, mainly under the aegis of retired Colonel Théoneste Bagosora. Soldiers of the Rwandan Armed Forces (FAR) executed ten Belgian blue helmets, thereby provoking the withdrawal of the Belgian contingent which formed the core of UNAMIR. On April 21 1994, the UN Security Council decided to reduce the peace-keeping force to 450 troops. In the afternoon of 7 April 1994, [Rwandese Patriotic Front] troops left their quarters in Kigali and their zone in the north, to resume open war against the Rwandan Armed Forces. Its troops from the north moved south, crossing the demilitarized zone, and entered the city of Kigali on April 12 1994, thus forcing the interim government to flee to Gitarama. On April 12 1994, after public authorities announced over Radio Rwanda that "we need to unite against the enemy, the only enemy and this is the enemy that we have always known ... it's the enemy who wants to reinstate the former feudal monarchy", it became clear that the Tutsi were the primary targets. During the week of 14 to 21 April 1994, the killing campaign reached its peak. The President of the interim government, the Prime Minister and some key ministers traveled to Butare and Gikongoro, and that marked the beginning of killings in these regions which had hitherto been peaceful. Thousands of people, sometimes encouraged or directed by local administrative officials, on the promise of safety, gathered unsuspectingly in churches, schools, hospitals and local government buildings. In reality, this was a trap intended to lead to the rapid extermination of a large number of people. The killing of Tutsi which henceforth spared neither women nor children, continued up to 18 July 1994, when the [Rwandese Patriotic Front] triumphantly entered Kigali. The estimated total number of victims in the conflict varies from 500,000 to 1,000,000 or more.<sup>8</sup>

Akayesu did not himself dispute that genocide had taken place. Rather, he argued that he had been unable to prevent it.<sup>9</sup>

<sup>8</sup> *Prosecutor v. Akayesu*, *supra* note 1, paras. 45-50.

<sup>9</sup> *Ibid.*, para. 30: "In essence, the Defense case - insofar as the Chamber has been able to establish it - is that the Accused did not commit, order or participate in any of the killings, beatings or acts of sexual violence alleged in the Indictment. The Defense concedes that a genocide occurred in Rwanda and that massacres of Tutsi took place in Taba Commune, but it argues that the Accused was helpless to prevent them..."

Prosecution of genocide in Rwanda has both national and international dimensions. Akayesu's case is one of a handful of high-profile trials of prominent officials in the genocidal regime. But Rwanda's genocide had tens of thousands, perhaps hundreds of thousands, of "willing executioners." Accountability for their crimes remains the responsibility of the national judicial system.

### **Specialized Legislation to Prosecute the Perpetrators of Genocide**

In 1994, tens of thousands were arrested and thrown into what were already severely overcrowded prisons. The numbers continued to increase steadily, hitting a peak of somewhat more than 120,000 early in 1998<sup>10</sup>. The release of some prisoners has probably reduced these numbers somewhat but they remain well over 100,000. Trials began at the end of 1996, and to date the number of those that have proceeded does not exceed 1,000.<sup>11</sup> Several thousand have offered to plead guilty, hoping to benefit from major reductions in sentences that are allowed by the law in such cases, but most of the files of those concerned have yet to be treated by the authorities. The vast majority of the more than 100,000 prisoners, however, are still waiting grimly in grotesquely overcrowded prisons for trial dates to be fixed. In practice, under such circumstances the criminal law system cannot function properly. The numbers are simply too large, and there are other imperatives, notably social reconciliation. But the Rwandan civil war was no ordinary internal armed conflict. What emerges is a complex situation of mass crime where both humanitarian law models and criminal law models fall short. For while theoretically it is imperative that the more than 100,000 be judged according to ordinary criminal law for genocide and crimes against humanity, the task seems unrealistic, indeed impossible. Even in a highly developed country, the challenge would be daunting.

The problem of impunity for massive human rights violations has become an important concern of human rights activists and scholars in recent years.<sup>12</sup> In the name of

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<sup>10</sup> "Report on the situation of human rights in Rwanda submitted by the Special Representative, Mr. Michel Moussalli, pursuant to resolution 1997/66," U.N. Doc. E/CN.4/1998/60, para. 22.

<sup>11</sup> On reconstruction of Rwanda's judicial system and efforts to prosecute genocide suspects, see: William A. SCHABAS, "Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems", (1997) 8 *Criminal Law Forum* 523; Robert F. VAN LIEROP, "Rwanda Evaluation: Report and Recommendations," (1997) 31 *International Lawyer* 887; P.H. SENNETT, G.P. NOONE, "Working with Rwanda Toward the Domestic Prosecution of Genocide Crimes", (1997) 12 *St. John's J. Legal Comment* 425; Marc COUSINEAU, "L'établissement de l'État de droit au Rwanda: un but irréalisable", (1996-97) 28 *Ottawa Law Review* 171; Carla J. FERSTMAN, "Rwanda's Domestic Trials for Genocide and Crimes Against Humanity", (1997) 5 *Human Rights Brief* 1; Michael SCHARF, "Responding to Rwanda: Accountability Mechanisms in the Aftermath of Genocide", (1999) 52 *J. Int'l Affairs* 621.

<sup>12</sup> Naomi ROHT-ARRIAZA, ed., *Impunity and Human Rights in International Law and Practice*, New York, Oxford: Oxford University Press, 1995.

national reconciliation, resort to amnesty by certain regimes has deprived victims of the moral satisfaction that accompanies condemnation, and has often created obstacles to appropriate compensation.<sup>13</sup> Impunity has been seen as merely a perpetuation of human rights violations and, at worst, a virtual invitation to continue to pursue them. Many societies, conscious of the importance of combating impunity, yet fearful that criminal prosecutions may only revive or perpetuate tensions, have opted for means of accountability which are not strictly judicial, such as truth commissions.<sup>14</sup> But in Rwanda, this solution has so far seemed inappropriate, given the magnitude of the crimes and the scale upon which they were committed. The Rwandese president, Pasteur Bizimungu, highlighted the dilemma in his opening address at an international conference held in the Rwandan capital, Kigali, on October 31, 1995, when he called for innovative forms of justice while at the same time ruling out any possibility of amnesty. But is it practicable to judge 100,000 people for the crime of genocide and related crimes, in a judicial system whose personnel has been decimated and whose material infrastructure devastated? Can it be done while respecting the fundamental human rights of the accused, including the right while detained “to be treated with humanity and with respect for the inherent dignity of the human person”,<sup>15</sup> and to be tried “without undue delay”<sup>16</sup> by an “independent and impartial tribunal”?<sup>17</sup>

The 1995 Kigali Conference recommended that new mechanisms be created to deal with the genocide cases, including specialized chambers of the existing courts, a classification scheme to separate the main organizers of the genocide from criminals with lesser degrees of responsibility, and a unique approach aimed at encouraging offenders to confess in exchange for substantially reduced sentences.<sup>18</sup> The Rwandan Ministry of Justice proceeded to prepare legislation giving effect to the conference recommendations,

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<sup>13</sup> Robert K. GOLDMAN, “Amnesty Laws and International Law,” in COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L’HOMME, INTERNATIONAL COMMISSION OF JURISTS, *Rencontres internationales sur l’impunité des auteurs de violations graves des droits de l’homme*, Geneva: International Commission of Jurists, 1993, pp. 209-222; Juliane B. KOKOTT, “No Impunity for Human Rights Violations in the Americas (Inter-American Human Rights Commission Rulings on Argentinian, Uruguayan and El Salvadoran Amnesty Laws),” (1993) 14 *Human Rights Law Journal* 153.

<sup>14</sup> Priscilla HAYNER, “Fifteen Truth Commissions - 1974 to 1994: A Comparative Study”, (1994) 16 *Human Rights Quarterly* 597; Thomas BUERGENTHAL, “The United Nations Truth Commission for El Salvador”, (1994) 27 *Vanderbilt Journal of Transnational Law* 497; Mark ENSALACO, “Truth Commissions for Chile and El Salvador: A Report and Assessment”, (1994) 16 *Human Rights Quarterly* 656.

<sup>15</sup> *International Covenant on Civil and Political Rights*, (1976) 999 U.N.T.S. 171, art. 10§1.

<sup>16</sup> *Ibid.*, art. 14§3(c).

<sup>17</sup> *Ibid.*, art. 14§1.

<sup>18</sup> RWANDA, OFFICE OF THE PRESIDENT, *Recommendations of the Conference Held in Kigali from November 1<sup>st</sup> to 5<sup>th</sup>, 1995, on “Genocide, Impunity, and Accountability”: Dialogue for a National and International Response*, Kigali, 1995; Colette BRAECKMAN, *Terreur africaine*, Paris: Fayard,

and a draft law was approved by the Cabinet in April, 1996. The legislation then advanced to the National Assembly for adoption. It was reworked in a parliamentary committee in July 1996, and was finally adopted on August 30, 1996.<sup>19</sup> In early September, the Constitutional Court approved the new statute.

Strictly speaking, prosecutions for genocide could be based on the Rwandan *Code pénal* and the *Code de procédure pénale* without any amendments or changes being required. The Rwandan *Code pénal* contains all of the usual underlying criminal law infractions necessary to prosecute those responsible for genocide, including murder, rape and pillage, but the new international infractions of genocide and crimes against humanity were never incorporated in specific criminal law provisions. The preamble to the new legislation notes that although Rwanda ratified the relevant international treaties, specifically the *Convention for the Prevention and Punishment of the Crime of Genocide*,<sup>20</sup> the *Geneva Convention of August 12, 1949 Relative to the Protection of Civilians*<sup>21</sup> and its two additional protocols,<sup>22</sup> and the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*,<sup>23</sup> and published them in the *Official Gazette*, it did not provide penalties for the crimes contained therein. As a result, concludes the preamble, prosecutions must be based upon the existing *Code pénal*. But as Nehemiah Robinson noted in his seminal study of the *Genocide Convention*: “[f]rom the viewpoint of the minority groups, which are or may be exposed to acts described in the Convention, it makes a great difference whether those who commit these acts against them are prosecuted on that basis or only the basis of ‘ordinary’ violations of the criminal code.”<sup>24</sup> For this reason, the new Rwandan legislation links the prosecutions for “ordinary crimes” in the *Penal Code* with the international crimes of genocide and crimes against humanity.

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1996, pp. 323-337. The author participated in the Kigali Conference and delivered its conclusions and final report on November 5, 1995.

19 *Organic Law No. 08/96 of 30 August 1996 on the Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990*, J.O., 1996, Year 35, No. 17, p. 14.

20 *Supra* note 4.

21 *Geneva Convention of August 12, 1949 Relative to the Protection of Civilians*, (1950) 75 U.N.T.S. 287.

22 *Protocol Additional I to the 1949 Geneva Conventions and Relating to The Protection of Victims of International Armed Conflicts*, (1979) 1125 U.N.T.S. 3; *Protocol Additional II to the 1949 Geneva Conventions and Relating to The Protection of Victims of Non-International Armed Conflicts*, (1979) 1125 U.N.T.S. 609.

23 *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, (1970) 754 U.N.T.S. 73.

24 Nehemiah ROBINSON, *The Genocide Convention: A Commentary*, New York: Institute of Jewish Affairs, 1960, p. 33.



The specialized legislation adopted in 1996 defines four categories of offender.<sup>25</sup> The first category includes the organizers and planners of the genocide, persons in positions of authority within the military or civil infrastructure who committed or encouraged genocide, and persons who committed “odious and systematic” murders. This category accounts for a relatively small percentage of the total detained, and overlaps somewhat with those over whom the International Criminal Tribunal for Rwanda will attempt to establish jurisdiction. The second category covers those not in the first category who committed murder or serious crimes against the person that led to death. The third category comprises those who committed other serious crimes against the person, and the fourth category is made up of those who committed crimes against property.

The heart of the new legislation is what is called the “Confession and Guilty Plea Procedure.” In return for a full confession, offenders in the second, third and fourth categories benefit from a very substantial reduction in penalties. Confessions must include a complete and detailed description of the offences that the accused admits to, including information about accomplices and any other relevant fact. The prosecutor has three months in which to confirm the truth of the confession. Even if the prosecutor challenges the truth of the confession, the accused is entitled to submit the matter to the court which may overrule the decision of the prosecutor not to accept the confession. If the confession is unchallenged during this time, it becomes a guilty plea and the file proceeds to the sentencing phase.

A confession-based approach has already found considerable support in South Africa, where it is viewed as an appropriate way to help deal with many of the criminals of the apartheid regime.<sup>26</sup> The confession itself, irrespective of any eventual criminal sanction, is seen as an important source of justice for victims. Moreover, it facilitates clarification of the truth, and provides one of the firmest arguments against revisionism. In the South African program, a full confession provides the offender with immunity from prosecution, although the Rwandan proposals do not go this far. Plea bargaining, which is merely a pragmatic answer to crowded dockets intended to streamline judicial procedure developed by courts in many common law jurisdictions, also contributes some elements to the Rwandan approach. Plea bargaining has never been part of the Rwandan legal system, which is derived from Belgian penal law.

The new Rwandan legislation declares that sentences are to be imposed in accordance with the Rwandan *Code pénal*, subject to certain exceptions. Offenders in

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<sup>25</sup> See: *Prosecutor v. Kambanda*, (Case no. ICTR-97-23-S), Judgment and Sentence, Sept. 4, 1998, (1998) 37 I.L.M. 1411, para. 18.

<sup>26</sup> Lynn BERAT, “South Africa: Negotiating Change?”, in Naomi ROHT-ARRIAZA, ed., *supra* note 12, pp. 267-280.

Category I are to be sentenced to the death penalty. But even offenders in Category I can escape the death penalty by confessing, unless their names have already appeared on a list prepared by the Attorney General. The list was published in December 1996, and contained slightly fewer than 2,000 names. In the months that followed, several of those on the list were prosecuted, as well as many others described as Category I who had not confessed. While some were acquitted, or deemed to belong in other Categories, many were found guilty as Category I offenders and sentenced to death. In April 1997, Rwanda held public executions of twenty-two Category I offenders. The executions were criticized by the High Commission for Human Rights, Mary Robinson, and by a resolution of the African Commission of Human and Peoples Rights, as well as by non-governmental organizations such as Amnesty International.

In the case of offenders in Category II, the death penalty, which would otherwise be applicable in the case of homicide, is replaced by life imprisonment. This applies even to those who do not avail themselves of the confession and guilty plea procedure. It represents a very substantial development towards abolition of the death penalty. The suppression of capital punishment in the case of Category II offenders by the new Rwandan legislation is a welcome initiative that sits squarely within an important and rapidly emerging abolitionist trend within the African continent, perhaps best exemplified by the recent judgment of the South African Constitutional Court declaring capital punishment to be cruel, inhuman and degrading treatment or punishment.<sup>27</sup> Although the law is silent on this point, presumably the death penalty now ceases to apply for all other common law offenders who are not covered by the special genocide legislation. It seems inconceivable that in the future Rwandan courts will impose the death penalty for "ordinary" murders, when they are now forbidden to do it in the case of genocidal murders.

Category II offenders who take advantage of the confession and guilty plea procedure see their sentences reduced to a maximum of eleven and a minimum of seven years, if they enter the program prior to prosecution, and to a maximum of twelve to fifteen years, if they enter it subsequent to prosecution. Category III offenders in the program are subject to a maximum of one-third of the ordinary sentence, if they enter the program prior to accusation, and to one-half, if they enter it after. Category IV offenders shall not be imprisoned, and are subject only to compensation orders. Whether these reductions are sufficient to incite offenders to confess and plead guilty remains to be seen. For such a

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<sup>27</sup> *Makwanyane and Mchunu v. The State*, (1995) 16 *H.R.L.J.* 154 (Constitutional Court of South Africa). Also: William A. SCHABAS, "Abolition of the Death Penalty in Africa", in William A. SCHABAS, ed., *Sourcebook on the Abolition of the Death Penalty*, Boston: Northeastern University Press, 1997, pp. 30-65.

mechanism to be effective, the sentence offered must be low enough to induce an individual to participate. The incentive for the individual to settle his or her case is the knowledge that if the offer is not accepted within three years of the coming into force of the legislation, then that individual becomes subject to full-fledged prosecution under the ordinary law, and the risk of a much more severe sentence. Furthermore, by settling the case promptly, the individual begins immediately to purge the penalty phase of detention. Should the individual prefer to elect trial, Rwandan justice may be unable to offer such a possibility for a number of years, during which time there is every likelihood the individual would remain in detention. Offenders can, upon conviction, quickly become eligible for release on parole. The existing law fixes eligibility for parole at one-quarter of the sentence. However, the special genocide law recognizes that time served in preventive detention must be deducted from the sentence. Unfortunately, the law was not amended so that time served in preventive detention could also be part of the parole calculation. If this were the case, an individual could become immediately eligible for parole upon sentencing on this basis.

The success of the program depends on the skill of the prosecutors as well as on the presence of competent defense counsel who can assist the accused in evaluating the advantages and disadvantages of confession. Rwanda's defense bar was created by law in late 1996; it is made up of approximately 50 attorneys. Many Rwandans treat the issue of defense as an annoyance, foisted upon them by international human rights advocates. International human rights obligations require that Rwanda, to the extent that it uses the death penalty in the case of Category I offenders, must ensure that the accused receive competent representation from counsel remunerated by the State, where the accused is unable to finance his or her own defense. According to the Human Rights Committee, "...it is axiomatic that legal assistance must be made available to a convicted prisoner under sentence of death..."<sup>28</sup>

Rwandan lawyers have shown little interest in defending those accused of genocide, although there are some notable exceptions. A large part of the burden of defense has fallen to international non-governmental organizations, and specifically the Belgian-based *Avocats sans frontières*. Training programs have also been undertaken to prepare para-legals with appropriate skills, although the impact of this has yet to be felt and its success, while appealing on paper, is too early to be assessed. The law faculty of Rwanda's university reopened in 1996, and the first cohort of graduates should enter the system during 1999. A significant number of the graduates are English-speaking, training

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<sup>28</sup> *Reid v. Jamaica* (No. 250/1987), U.N. Doc. A/45/40, Vol. II, p. 85, 11 *H.R.L.J.* 319., para. 11.4. Also: *Grant v. Jamaica* (No. 353/1988), U.N. Doc. A/49/40, p. 50., para. 8.6.

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under a program financed by the United States Agency for International Development and administered by the law department of the University of Quebec at Montreal.

Another problem with the confession program may be that the “bargain” it proposes is still not sufficiently enticing to convince inmates to participate. Many thousands have confessed, but much larger numbers seem to be still unimpressed by what is offered. However, reducing the number of years in prison that will be required, even when the accused confesses, must also be presented to the groups of genocide survivors within Rwandan civil society. They are vocal and have considerably political influence and, to date, they have been quite intolerant of any compromise on this front.

The initial trials were greeted with an international chorus of condemnation of what journalists and other observers found to be summary trials and a lack of due process. They criticized such imperfections as the lack of witnesses or, when witnesses were called, the failure to permit cross-examination. Trials were short, often lasting only a few hours or a day. Much of the criticism was rooted in simple ignorance of the Rwandan judicial system, which is based on French and Belgian models. Under the inquisitorial system of criminal procedure, an instructing or investigating magistrate collects evidence and questions witnesses prior to the trial. The magistrate’s file is then submitted to the court, and trial really amounts to debates between the parties about the significance of the evidence. In exceptional cases, witnesses are called, but there is no cross-examination as we know it. Many critics of the Rwandan trials betrayed a judicial ethnocentrism. It was as if international fair trial standards had to correspond to common law rules.

I attended the January, 1997 trial of Froduald Karamira, as an observer for the International Secretariat of Amnesty International. From my standpoint, it had all appearances of fairness, and the presiding judge gave the accused and his lawyer every chance to rebut the charges. But Karamira’s so-called defense convinced nobody. It consisted essentially of accusations that the prosecution witnesses were liars. One witness, who was missing an ear and an eye, told the court how Karamira had manned a barricade close to his home in a Kigali suburb and ordered armed thugs to execute a defenseless woman. Another described how she had called Karamira on behalf of her employer, a Tutsi, asking him for protection. The Tutsi was a prominent local businessman and neighbor of Karamira. But Karamira hung up the phone and minutes later militia members came to the house to kill the unfortunate man and his family. Karamira denied accusations that he had fomented ethnic hatred. In fact, he had coined the phrase “Hutu Power” and mobilized racists in different political parties around a common program of genocide. When Karamira challenged the court to furnish proof, the Prosecutor played a damning tape recording of a racist speech Karamira had delivered in a Kigali soccer stadium.

While some of the early trials were unquestionably open to criticism for failure to respect all internationally-recognized rules of procedural fairness, the problems do not appear to be due so much to bad faith as to inexperience. By all accounts, there has been steady progress in terms of the quality of the trials. The High Commissioner for Human Rights reported, in 1997, that progress had been made, "including the increased number of witnesses testifying in court; the improvement in detainees' access to case files; and the increase in the granting of reasonable requests for adjournments."<sup>29</sup> The real problem is that there are simply not enough of them, something that surprises nobody who is familiar with the conditions in Rwanda and the daunting case load.

There is widespread frustration with the pace of justice within Rwanda, but a shortage of innovative solutions to the problems. In February 1997, vice-president Paul Kagame declared that alternative methods should be considered, such as community service. Since then, Rwandans involved in the justice system have been floating theories such as the revival of the "gachacha," a kind of informal, popular justice administered by local leaders within the community. Draft legislation is currently being prepared for consideration by the Cabinet and the National Assembly along these lines. While initially seductive, the idea of "popularizing" the prosecutions may lead to other problems. The Hutu majority within Rwanda is undoubtedly prepared to "forgive" those responsible for genocide more quickly than the Tutsi minority, and it is the former who will prevail if justice is handed over to community control.

Clearly, the confession program has not progressed as well as had been hoped. This is because of inexperienced personnel and, above all, a lack of defense counsel who could "sell" the idea to their clients. There have been many reports of prison officials administering the confession program, a sure recipe for failure. The foreign lawyers who have made a very respectable contribution to the trials themselves, arrive too late in the procedure to participate in the confession regime in any meaningful way. Most of them come from inquisitorial systems and are unfamiliar and uncomfortable with the philosophy of the program. That prisoners could be convinced to confess is proven by the fact that thousands have already come forward and admitted their crimes. In fact, there are so many confessions that prosecutors, who must verify the truth of them, are overwhelmed with the work. Once prisoners confess, they must be separated from the ordinary prison population with whom, to put it euphemistically, they are in "conflict of interest". Prison authorities have been slow to understand this basic principle. To conclude, while the numbers who

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<sup>29</sup> "Report of the United Nations High Commissioner for Human Rights on the Human Rights Field Operation in Rwanda," U.N. Doc. A/52/486, paras. 64-65. See also Decision 5(53) of the Committee for the Elimination of Racial Discrimination, adopted Aug. 18, 1998, para. 10.

have confessed show that the program can work, there remain important infrastructural obstacles that continue to ensure only a qualified success.

### **Rights of the Detained and Conditions Rwandese Prisons**

Much has been written about the fact that tens of thousands of prisoners are being held without charge, in the most appalling of conditions. The Rwandan public has been given the impression that western human rights activists are more concerned with the plight of those accused of genocide - who are, to be sure, still presumed innocent, but of whom a large number are probably guilty - than with rendering justice to the murderers. Such concerns may have been amplified by the apparent preoccupation of certain jurists and human rights activists with the fact that some 20% of those detained were said to be innocent. Yet in one interview, Luc Côté, former director of the United Nations' Butare field office, stated that "[m]ost of the arrests are founded on some type of evidence".<sup>30</sup>

In his 1995 report, Special Rapporteur René Degni-Segui commented on the legal status of the detainees, who then numbered an estimated 50,000. He described arrests and detention as "arbitrary," noting that they "blatantly flout both Rwandan legislation and the pertinent international provisions." Degni-Segui noted that under Rwandan legislation,

the arrest of a person presumed to have committed an offence must be carried out with an arrest warrant issued by the government procurator. The lawful period of detention is 48 hours. This may be extended, but not beyond five days. Beyond that period, if the prosecutor wishes to keep the arrested person in detention, he must bring him before the court of first instance, which will decide, in chambers, on pre-trial custody, which may extend to one month, or order release on bail or unconditional release if the case is dismissed. Almost all arrests and detentions carried out since the end of the hostilities have flouted the above-mentioned provisions, which in fact reflect the Basic Principles for the Treatment of Prisoners adopted by the United Nations.<sup>31</sup>

Three years later, Degni-Segui's successor, Michel Moussalli, was still lamenting "the large number of persons detained without dossiers setting out substantiated grounds for their arrest and detention." Moussalli added that "[t]his concern was shared by many of the government officials with whom the Special Representative met during his missions."<sup>32</sup>

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<sup>30</sup> Philip GOUREVITCH, "After the Genocide", *The New Yorker*, December 18, 1995, p. 78, at p. 90.

<sup>31</sup> "Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Segui, Special Rapporteur, under paragraph 20 of resolution S-3/1 of 25 May 1994", U.N. Doc. E/CN.4/1996/7, para. 66.

<sup>32</sup> "Report on the situation of human rights in Rwanda submitted by the Special Representative, Mr. Michel Moussalli, pursuant to resolution 1997/66," para. 22.

Moussalli noted: [e]fforts by some officials of the prison and communal detention centres to improve the situation did not go unnoticed. Measures designed to relieve some of the harshness of the conditions, such as allowing families of detainees to visit and bring them food and providing female detainees the opportunity to be with their small children on prison grounds but outside the prison walls, are to be commended and encouraged.”<sup>33</sup>

After more than two years of flagrant illegality in terms of the detention situation, on September 8, 1996, Rwanda promulgated new legislation suspending several provisions of the *Code of Criminal Procedure*, and authorizing detention of genocide suspects despite the irregularity of their files. It gave Rwandan authorities until the end of 1997 in order to prepare the arrest record for a suspect, which meant that an individual could be legally detained for more than three years without ever having a proper arrest record. The legislation also suspended the right to appeal decisions concerning pre-trial detention.<sup>34</sup> An earlier attempt by the National Assembly to regularize the situation of the tens of thousands of prisoners held illegally had been declared unconstitutional by the Constitutional Court.<sup>35</sup> Subsequently, an amendment to the Constitution was adopted aimed at securing any future legislative attempts from constitutional challenge.<sup>36</sup> The slow pace of preparation of prisoner files resulted in yet another legislative correction. A 1997 statute extended the period of time for which persons may be held in pre-trial detention; an individual detained prior to December 31, 1997 may not be held until December 31, 1999, without being informed of the reason for their arrest, without a provisional arrest warrant and without the benefit of a pre-trial detention hearing.<sup>37</sup>

Certainly, it would be preferable to process all of the accused promptly and to ensure that they are tried without delay. But that is simply a pipe dream, given the resources available. Realistically, the detention of large numbers of accused is likely to continue, possibly for a matter of years. The alternative would be simply to admit that the task of processing the files is impossible and to release large numbers of the accused, but such a measure would itself constitute a major human rights violation for it would merely promote impunity. An alternative would be to release large numbers on bail or some form of recognizance, but the security situation still makes this problematic for the Rwandan authorities. Indeed, as long as guerilla attacks continue, detention of many if not all of the suspects seems a foregone conclusion if only to prevent them from contributing to the campaign of terror directed at the rebuilding of Rwandan society.

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<sup>33</sup> *Ibid.*, para. 23.

<sup>34</sup> *Law 9/96 Relating to Provisional Modifications to the Criminal Procedure Code*, J.O. 18, Sept. 15, 1996, p. 8.

<sup>35</sup> *Constitutional Court Judgment 009 of July 26, 1995*.

<sup>36</sup> *Révision du 18 janvier 1996 de la Loi fondamentale*, J.O. 3, 1996, p. 3.

<sup>37</sup> *Law No. 16/97*.

To some extent, those detained fit the paradigm of prisoners in a non-international armed conflict. Historically, States have been reluctant to apply the same legal principles to internal armed conflicts as they do to international armed conflicts, notably when it comes to the treatment of prisoners. In international armed conflicts, prisoners of war are granted protected status, and as a general rule are repatriated following the close of hostilities.<sup>38</sup> Prisoners of war also enjoy an immunity from criminal prosecution for “acts of war,” even where these constitute criminal infractions under domestic law, providing that the laws of war are respected and that they do not commit “grave breaches” of humanitarian law.<sup>39</sup> In the case of internal armed conflict, the International Committee of the Red Cross attempted to extend the prisoner of war concept during negotiations surrounding adoption of *Additional Protocol II* to the *Geneva Conventions*, in the mid 1970s.<sup>40</sup> These were unsuccessful, and although States are entitled and even encouraged to extend this protection to combatants in civil wars,<sup>41</sup> there is no legal obligation to do so. Thus, combatants in a civil war remain liable for their breaches of ordinary criminal law.

As for the length of detention, this question should be put into perspective. Lengthy pre-trial detention is not unknown even in developed countries. In a recent case heard by the European Court of Human Rights, Switzerland was challenged by an individual who had waited four years in pre-trial custody before standing trial on an economic offence in which no violence was involved. The *European Convention on Human Rights* provides that detained persons “shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial”.<sup>42</sup> Switzerland had not even suggested that it was entitled to suspend the accused’s internationally-protected rights because of an emergency situation.<sup>43</sup> The European Court dismissed the complaint, ruling that no fundamental rights of the detained or the accused had been breached by a four-year period of pre-trial detention of a person who was still presumed of a non-violent crime.<sup>44</sup>

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38 *Geneva Convention of August 12, 1949 Relative to the Treatment of Prisoners of War*, (1950) 75 U.N.T.S. 135, art. 118.

39 *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990).

40 *Protocol Additional II to the 1949 Geneva Conventions and Relating to The Protection of Victims of Non-International Armed Conflicts*, (1979) 1125 U.N.T.S. 3.

41 *Geneva Convention of August 12, 1949 Relative to the Treatment of Prisoners of War*, *supra* note 4, art. 3 *in fine*.

42 *Convention for the Protection of Human Rights and Fundamental Freedoms*, (1955) 213 U.N.T.S. 221, E.T.S. 5, art. 5§3.

43 Pursuant to article 15§1 of the *Convention*, *ibid*.

44 *W. v. Switzerland*, January 26, 1993, Series A, Vol. 254..



## The International Criminal Tribunal for Rwanda

On November 8, 1994, the United Nations Security Council set up the International 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 1994 and 31 December 1994.<sup>45</sup> The Tribunal mirrors the tribunal set up the previous year by the Security Council to deal with similar offences in the former Yugoslavia.<sup>46</sup> Although the Security Council provided for a distinct six-judge Trial Chamber, the five-judge Appeal Chamber and the Prosecutor's

<sup>45</sup> See: Payam AKHAVAN, "The International Criminal Tribunal For Rwanda: The Politics and Pragmatics of Punishment", (1996) 90 *A.J.I.L.* 501; Payam AKHAVAN, "The International Criminal Tribunal for Rwanda," in Flavia LATTANZI, Elena SCISO, eds., *Dai Tribunali penali internazionali ad hoc a una corte permanente*, Naples: Editoriale Scientifica, 1996, pp. 191-202; Cécile APTEL, "The International Criminal Tribunal for Rwanda", (1997) 321 *Int'l Rev. Red Cross* 675; Christopher L. BLAKESLEY, "Atrocity and Its Prosecution: The *Ad Hoc* Tribunals for the Former Yugoslavia and Rwanda," in Timothy I.H. MCCORMACK, Gerry SIMPSON, eds., *The Law of War Crimes: National and International Approaches*, The Hague: Kluwer Law International, 1997, pp. 189-228; Olivier DUBOIS, "Rwanda's National Criminal Courts and the International Tribunal", (1997) 321 *Int'l Rev. Red Cross* 717; Gerhard ERASMUS, Nadine FOURIE, "The International Criminal Tribunal for Rwanda : Are all issues addressed? How does it compare to South Africa's Truth and Reconciliation Commission?", (1997) 321 *Int'l Rev. Red Cross* 705; Melissa GORDON, "Justice on Trial: The Efficacy of the International Tribunal for Rwanda", (1995) 1 *ILSA J. Int'l Comp. L.* 217; Frederik HARHOFF, "The Rwanda Tribunal: a presentation of some legal aspects", (1997) 321 *Int'l Rev. Red Cross* 665; L.D. JOHNSON, "The International Tribunal for Rwanda," (1996) 67 *Int'l. Rev. Penal L.* 211; Laity KAMA, "Le Tribunal pénal international pour le Rwanda et la répression des crimes de guerre," in Luigi CONDORELLI, Anne-Marie LA ROSA, Sylvie SCHERRER, eds., *Les Nations Unies et le droit international humanitaire*, Paris: Éditions Pedone, 1997, pp. 249-258; R.S., LEE, "The Rwanda Tribunal," (1996) 9 *Leiden J. Int'l L.* 37; Virginia MORRIS, , Michael P. SCHARF, *An Insider's Guide to the International Criminal Tribunal for Rwanda*, Irvington-on-Hudson, New York: Transnational Publishers, 1997; Mutoy MUBIALA, "Le Tribunal international pour le Rwanda : vraie ou fausse copie du Tribunal pénal international pour l'ex-Yougoslavie", (1995) *R.G.D.I.P.* 929; Chris Maina, PETER, " The International Criminal Tribunal for Rwanda: bringing the killers to book", (1997) 321 *Int'l Rev. Red Cross* 695; Marie-Claude ROBERGE, "Jurisdiction of the ad hoc Tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide", (1997) 321 *Int'l Rev. Red Cross* 651; Daphna SHRAGA, ZACKLIN, Ralph, "The International Criminal Tribunal for Rwanda", (1996) 7 *Eur. J. Int'l L.* 501; STRINGER, Douglas, "International Criminal Tribunal for Rwanda," (1997) 31 *International Lawyer* 621; SUNGA, Lyal, "The first indictments of the International Criminal Tribunal for Rwanda," (1997) 18 *H.R.L.J.* 329; M.-A. SWARTENBROEKX, "Le Tribunal pénal international pour le Rwanda", in J.-F. DUPAQUIER, ed., *La justice internationale face au drame rwandais*, Karthala: Paris, 1996, p. 10; Paul TAVERNIER, "The experience of the International Criminal Tribunals for the former Yugoslavia and for Rwanda", (1997) 321 *International Review of the Red Cross* 605; Brenda Sue THORNTON, "An International Criminal Tribunal for Rwanda: A Report from the Field", (1999) 52 *J. Int'l Affairs* 639; Mark R. VON STERNBERG, "A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the 'Elementary Dictates of Humanity,'" (1996) 22 *Brooklyn J. Int'l L.* 111; Mariann Meier WANG, "The International Tribunal for Rwanda: opportunities for clarification, opportunities for impact," (1995) 27 *Columbia Human Rights L. Rev.* 177.

<sup>46</sup> U.N. Doc. S/RES/827 (1993). See: M. Cherif BASSIOUNI, Peter MANIKAS, *The Law of the International Tribunal for the Former Yugoslavia*, New York: Transnational Publishers, 1996; Virginia MORRIS, Michael P. SCHARF, *An Insider's Guide to the International Criminal Tribunal*

Office are shared by the two tribunals. There are also important differences in the subject matter jurisdiction due to the fact that the Rwandan situation is undisputably that of an internal armed conflict, whereas the Yugoslav situation combines elements of international and international armed conflict.<sup>47</sup>

The Tribunal, which sits in Arusha, Tanzania, had a rocky beginning. Senior personnel in both the Registry and the Prosecutor's office were found to be negligent in the performance of their duties and there were even well-founded charges of corruption. In early 1996, following a devastating audit by Karl Paschke, head of the United Nations Office of Internal Oversight Services, the deputy prosecutor, Honoré Rokotomanana, and the Registrar, Andronico Adede, were replaced. Since then, the Tribunal has become considerably more dynamic. In May 1998, the acting prime minister during the genocide, Jean Kambanda, offered to plead guilty to the crime of genocide. The Tribunal accepted his plea and, in a judgment dated September 4, 1998, condemned him to life imprisonment.<sup>48</sup> Another accused, Omar Serushago, pleaded guilty in December 1998, and was sentenced to fifteen years detention in February 1999.<sup>49</sup> Several other important players in the genocide are in custody awaiting trial. They are aware that Kambanda has recorded 90 hours of incriminating testimony and that the case they will have to answer at trial will be a compelling one. Finally, there is the important conviction following a lengthy trial of Jean-Paul Akayesu, referred to at the beginning of this paper.

The statute of the tribunal gives the International Tribunal primacy over national courts, including those of Rwanda.<sup>50</sup> But the Security Council resolution creating the Rwanda tribunal also speaks of the need "to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects." The international tribunal is therefore called upon to play a constructive role in assisting the Rwandan judicial system to deal with genocide itself. In practice, the two parties have resolved disputes by negotiation and have avoided judicial or political confrontation. The International Tribunal has a large and active contingent of investigators in Rwanda, and they require the fullest cooperation from local authorities in order to facilitate their work. If the confession and guilty plea program begins to work, it will generate evidence about the genocide hierarchy that will be invaluable in the prosecutions at Arusha.

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47 *for the Former Yugoslavia*, New York: Transnational Publishers, 1995.  
*Prosecutor v. Tadic* (Case no. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, (1997) 105 I.L.R. 453, 35 I.L.M. 32.

48 *Supra* note 24.

49 *Prosecutor v. Serushago* (Case no. ICTR-98-39-S), Sentence, Feb. 2, 1999.

50 *Supra* note 5., art. 8§2.

The exclusion of the death penalty by the International Tribunal has been a particularly sore point with Rwanda. When the Statute was being adopted in 1994, Rwanda claimed there would be a fundamental injustice in exposing criminals tried by its domestic courts with execution if those tried by the international tribunal - presumably the masterminds of the genocide - would only be subject to life imprisonment.<sup>51</sup> “Since it is foreseeable that the Tribunal will be dealing with suspects who devised, planned and organized the genocide, these may escape capital punishment whereas those who simply carried out their plans would be subjected to the harshness of this sentence”, said Rwanda’s representative. “That situation is not conducive to national reconciliation in Rwanda.”<sup>52</sup> But to counter this argument, the representative of New Zealand reminded Rwanda that “[f]or over three decades the United Nations has been trying progressively to eliminate the death penalty. It would be entirely unacceptable - and a dreadful step backwards - to introduce it here.”<sup>53</sup>

Rwandans have frequently expressed their dissatisfaction with many aspects of the operations of the Tribunal, but the most recurring theme is that of capital punishment. Yet when I was in Rwanda in September, 1998, my law students were not obsessed with the disparity in punishment between Akayesu, for whom life imprisonment was the maximum, and Froduald Karamera, who was executed in April, 1998. They were, rather, imbued with the sentiment that justice had been done. Of course, if asked a leading question on the subject of the death penalty, most would have indicated it to be their preference. But when asked honestly for their impressions about the *Akaeysu* conviction, few volunteered what had been for years a virtual mantra of Rwandans about capital punishment. This suggests that international justice has more to do with the search for truth than with the thirst for revenge.

### **Universal Jurisdiction, International Justice and Extradition**

The offences of genocide and crimes against humanity make up the subject matter jurisdiction of both the special chambers of the Rwandan courts, established pursuant to the new legislation, and the International Criminal Tribunal for Rwanda. They are also deemed to be crimes of universal jurisdiction, and therefore may be judged by national courts having no territorial or personal jurisdiction over the offence, to the extent that domestic legislation permits this. In addition, these offences may also be subject to an obligation requiring States where the offenders are found to either try or extradite, *aut*

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51 U.N. Doc. S/PV.3453, p. 16.

52 *Ibid.*

53 *Ibid.*, p. 5.

*dedere aut judicare*.<sup>54</sup> Unfortunately, there are no conventional provisions in international law that clarify the notion of universal jurisdiction or the obligation to try or extradite in the case of genocide and crimes against humanity.<sup>55</sup> Nevertheless, there exists little doubt that they fall within customary international legal obligations. State practice since the Rwandan genocide has tended to confirm the existence of this obligation.

There have been scattered efforts to proceed with trials within foreign jurisdictions, pursuant to the principle of universal jurisdiction for international crimes. For example, four Rwandan officials were detained in Belgium, subject to prosecution before that country's courts, in actions initiated by individual victims acting as *parties civiles*.<sup>56</sup> There have also been attempts to exercise universal jurisdiction in France, although they have met with considerable frustration.<sup>57</sup> The French courts have taken the view that because article VI of the *Genocide Convention* states that those responsible for genocide are to be tried by the courts of the territory where the crime took place, they are therefore without jurisdiction. Yet the Israeli courts, in the *Eichmann* case, dismissed the same argument as being overridden by customary international law.

In Canada, the government has proceeded with the expulsion (and not the extradition) of a confidante of the assassinated Rwandan president, Leon Mugesera, because of a speech he gave in Kabaya, in Gisenyi Prefecture, on November 22, 1992, that has been cited in international reports as an incitement to genocide.<sup>58</sup> Mugesera's speech was very much of a turning point in the prelude to genocide, as the *Akayesu* judgment, cited above, noted.<sup>59</sup> Mugesera fled to Canada in 1993 where his networks with the university, government and development aid communities helped him obtain immigrant status. On July 11, 1996, adjudicator Pierre Turmel concluded that Mugesera's speech constituted an incitement to genocide and, as such, a crime against humanity that meant Mugesera was not entitled to claim refugee status within Canada. Turmel accepted the validity of a translation of the Mugesera speech prepared by a distinguished Rwandan scholar, Thomas Kamanzi, and dismissed that prepared by Eugène Shimamungu, a

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<sup>54</sup> M. Cherif BASSIOUNI, Edward WISE, *Aut dedere aut judicare*, Dordrecht: Martinus Nijhoff, 1995.  
<sup>55</sup> The *Convention for the Prevention and Punishment of the Crime of Genocide*, *supra* note 4, requires States "to grant extradition in accordance with their laws and treaties in force" (art. 7). It does not, however, recognize the principle of universal jurisdiction, although this was held to be a customary norm by the Jerusalem District Court in *A.G. Israel v. Eichmann*, (1968) 36 I.L.R. 18 (D.C.).  
<sup>56</sup> See: Eric GILLET, "Le génocide devant la justice," *Les temps modernes*, no. 583, July-August, 1995, at p. 228.  
<sup>57</sup> William BOURDON, "Détention et poursuites judiciaires en France", in Jean-François DUPAQUIER, ed., *La justice internationale face au drame rwandais*, Paris: Karthala, 1996, pp. 205-220.  
<sup>58</sup> William A. SCHABAS, "Détention et poursuites judiciaires au Canada", in Jean-François DUPAQUIER, *ibid.*, pp. 193-204.  
<sup>59</sup> *Supra* note 1, para. 39.

defense expert whose translation attempted to portray the speech as inoffensive politicking. Adjudicator Turmel also concluded that Mugesera's own testimony was riddled with contradictions. He determined that the report of the International Commission of Inquiry, which was released in March, 1993 and which drew the attention of the international community not only to the Mugesera speech as such but also to the more general danger of genocide in Rwanda, was "credible and probative."<sup>60</sup> He said: "After analysing the speech and considering all of the evidence presented, I determine that Mr Mugesera gave a speech that constituted incitement to violence and ethnic hatred, an invitation to hunt down political opponents and to murder Tutsis."<sup>61</sup> Furthermore, "I conclude that he acted intentionally, and that his behaviour was part of a vast policy of discrimination, of destabilization and of ethnic cleansing set up by the MRND [dominant Rwandan political party, led by president Juvénal Habyarimana, of which he was one of the leading spokesmen]."<sup>62</sup>

Adjudicator Turmel's ruling was upheld by the Appeal Division of the Immigration and Refugee Board in November, 1998.<sup>63</sup> But because Mugesera is also recognized as a refugee, further proceedings are required to strip him of this status before he can be expelled. The decision by the Immigration and Refugee Board constitutes neither an exercise of universal jurisdiction nor or the obligation to try or extradite. At present, the Canadian government seeks only to have Mugesera excluded from the country, and not to see that he is brought to book. Canadian legislation was amended in 1987 in order to permit the exercise of universal jurisdiction, but efforts to prosecute war criminals have been unsuccessful and the Ministry of Justice now appears to have abandoned further efforts.

Rwanda has requested that Canada extradite Mugesera. Canadian law requires the existence of an applicable extradition treaty, and none is currently in force between Canada and Rwanda. However, Rwanda has also asked that Canada execute such a treaty. Given the obligation in the *Convention on the Prevention and Punishment of the Crime of Genocide* to grant extradition, Canada is not entitled, as a question of international law, to refuse such international legal cooperation. Extradition treaties may be executed even after the offenses have taken place. There is no issue of retroactivity, because the new treaty seeks to govern events in the future, even if it relates to crimes committed before its coming

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<sup>60</sup> *In re: Mugesera and Minister of Citizenship and Immigration*, File No. QML-95-00171, Decision of July 11, 1996, p. 42; also pp. 55-56. See: William A. SCHABAS, "L'affaire Mugesera", (1996) 7 *Revue universelle des droits de l'homme* 193.

<sup>61</sup> *Ibid.*, p. 82.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Léon Mugesera et al. v. Minister of Citizenship and Immigration* (Case nos. M96-10465, M96-10466), Immigration and Refugee Board (Appeal Division) of Canada Decision of November 6, 1998. See: William A. SCHABAS, "Mugesera v. Canada," (1999) 93 *A.J.I.L.* (forthcoming).

into force<sup>64</sup>. States may well argue that extradition is unthinkable given the miserable condition of Rwandan justice. Canadian authorities seem to fear that Mugesera will petition the United Nations Committee Against Torture in order to challenge expulsion or extradition to Rwanda. But donor States such as Canada and Belgium have been asked - and have pledged - to contribute generously to make sure that the system functions. Thus, the failures of the Rwandan system are to some extent their own responsibility. At the same time, Rwanda must realize that if it hopes to judge individuals such as Leon Mugesera, it must ensure that the judicial system operates better.

### **Conclusion**

The Rwandan experience in dealing with prosecution for genocide will form a new chapter in the emerging experience on the subject of impunity. Rwanda has rejected more conciliatory approaches, such as amnesty or truth commissions, and seems determined, at least at present, to attempt to try the more than 100,000 suspects currently in custody. Its existing judicial system is at present making serious and impressive efforts, although much remains to be done. The fact that thousands have now availed themselves of the confession program shows the promise of such an approach. Its further success is hindered not by a flawed concept but by infrastructural shortcomings. It should be kept in mind that even post-war Germany was never able to prosecute successfully more than 7,000 war criminals, and that Rwanda is not far from that total at present. Given the resources available, the record in prosecuting genocide and in fighting impunity is commendable. Important lessons and valuable experience will surely be acquired in the course of the process. If this ultimately influences the traditional judicial system, with all of its bureaucratic shortcomings and poor adaptation to the African reality, so much the better.

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<sup>64</sup> For an example, see: *Federal Republic of Germany v. Rauca*, (1983) 145 D.L.R. (3d) 638, 4 C.C.C. (3d) 385, 4 C.R.R. 42, 34 C.R. (3d) 97 (Ont. C.A.).