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### Cross-examining the past

*Transitional justice, mass atrocity trials and history in Africa*

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#### 4. Cross-examining the past. Rwanda: An Untold Tropical Nazism

Witness statements are the building blocks upon which the prosecution directly bases its case. The testimony of witnesses at trial is the principal form of evidence that the Prosecutor places at the disposal of the Trial Chambers.<sup>973</sup>

You have asked me if there is such a thing as objective truth. That is a huge, almost philosophical, question that I dare not attempt to answer. But in practice, in the judiciary, it is the responsibility of the judge to listen to the testimonies of the witnesses. Each presents his or her version of the truth. Our task is to get as close to it as possible.

- Erik Møse, Judge<sup>974</sup>

##### 4.1 Introduction

Days before the genocide ended in Rwanda, the popular simplistic version of the events as an outbreak of an “ancient tribal conflict” that had largely dominated western media reporting<sup>975</sup> was subtly substituted with a much more complex narrative, one that was framed analogous to the Nazi-extermination of Jews in Europe. Social anthropologist Alex de Waal, a doyen academic on Africa, wrote that “preparations for mass killing began in 1990, when the regime of the late President Juvénal Habyarimana first faced the simultaneous threats of rebellion by the Tutsi-dominated Rwandan Patriotic Front (RPF) and the transition to multi-party rule. Starting in 1991, members of the now-notorious Interahamwe militia were mobilised from every community in the country.”<sup>976</sup> Although not entirely new,<sup>977</sup> De Waal’s framing, analysis and narrative of Rwanda’s genocide, as a pre-planned conspired criminal enterprise by a “genocidal state,”<sup>978</sup> gained much currency in the Anglophone world through the first voluminous reports by African Rights,<sup>979</sup> an NGO he co-directed with Rakiya Omaar, a Somali lawyer and trained historian who had documented the atrocities real-time for a period of six to seven weeks.<sup>980</sup> Their report, *Death, Despair and Defiance*, which was based on the raw testimonies of hundreds of survivors, for the first time provided a grand-narrative of the genocide as a state crime, told in an historical analogy to the “linear track of escalating dehumanization of

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<sup>973</sup> UNSC, *Report 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 Rwanda citizens Responsible for Genocide and Other such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994* (S/2000/927; 2 October 2000), §134.

<sup>974</sup> Arnestad, *Telling Truths in Arusha*, from 08:20 mins.

<sup>975</sup> For instance: William E. Schmidt, ‘Terror Convulses Rwandan Capital As Tribes Battle’, *The New York Times*, 9 April 1994; ‘Tribes Battle for Rwandan Capital’, *The New York Times*, 16 April 1994; James McCabe, ‘Rwanda’s bloody conflict is rooted in long history of tribal inequality’, *The Irish Times*, 7 May 1994; Reena Shah Stamets, ‘Anarchy In Africa’, *St. Petersburg Times (Florida)*, 17 April 1994.

<sup>976</sup> Alex De Waal, ‘Rwanda genocide took four years to plan’, *The Times*, 18 June 1994. Earlier on, De Waal had debunked the tribal conflict narrative in interviews, including: Martin Bright, Rwanda: Blurred Roots of Conflict; The current slaughter is political, not tribal, and those opposed to the regime include both Hutus and Tutsis’, *The Guardian*, 9 May 1994.

<sup>977</sup> Luc Reydam, ‘NGO justice. African Rights as Pseudo Prosecutor of the Rwandan Genocide’, *Human Rights Quarterly*, Vol. 38, No. 3 (August 2016), pp. 547-588: 568. HRW also published a report on the genocide, in which its author, Alison Des Forges, similarly claimed “The massacres were planned for months in advance.” HRW/Africa, *Genocide in Rwanda. April-May 1994*, Vol. 6, No. 4 (May 1994), pp. 1; Alison Des Forges had similarly testified before the USA: HRW/Africa, *Human Rights in Rwanda. Statement of Alison Des Forges. Human Rights Watch/Africa. Before the House Foreign Affairs Subc. on Africa, Wednesday, May 4, 1994*. Also see: Alison des Forges, ‘The Method In Rwanda’s Madness: Politics Not Tribalism, Is The Root Of The Bloodletting’, *Washington Post*, 17 April 1994.

<sup>978</sup> See: Alex De Waal, ‘Genocide in Rwanda’, *Anthropology Today*, Vol. 10, No. 3 (June 1994), pp. 1-2; Alex De Waal, ‘The genocidal state: Hutu extremism and the origins of the “final solution” in Rwanda’, *Times Literary Supplement*, No. 4761 (July 1994), pp. 3-4; Alex De Waal, ‘Ethnicity and Genocide in Rwanda’, *Times Literary Supplement*, No. 4764 (22 July 1994), p. 15.

<sup>979</sup> Most notably: African Rights, *Rwanda. Who is Killing; Who is Dying; What is to be Done. A Discussion Paper* (African Rights: London, May 1994); African Rights, *Rwanda. Death, despair and defiance* (London; 1994); African Rights, *Death, Despair and Defiance* (London; 2<sup>nd</sup> revised edn. 1995).

<sup>980</sup> De Waal, ‘Ethnicity and Genocide in Rwanda’, p. 15; AR, *Death, Despair and Defiance*, p. xvii.

Jews” during the Holocaust.<sup>981</sup> At the same time, the “yellow-book” as it soon became to be known for its yellow cover, for the first time meticulously identified and biographed the main alleged masterminds and executioners of the genocide – more than 200 in the first edition (September 1994) of the report and more than 600 in the second edition (August 1995)<sup>982</sup> - many of whom ended up being prosecuted by the UN’s tribunal and jurisdictions in Europe.<sup>983</sup> On different levels, the report’s narrative of a “pathology of genocide” and “preparation for the apocalypse”, the names of “killers and their accomplices” and detailed testimony from recent crime scenes has had a massive impact. In the first place, it was the first report that published testimonies from survivors and witnesses so immediately after the events.<sup>984</sup> Second, it allegedly became a guide book to Rwanda for the overall non-French speaking UNICTR investigators, prosecutors and other staff. Besides serving as pseudo-prosecutor’s manual, the book was heavily consulted and referenced by the early Anglophone literary, academic and human rights community that shaped and trickled into early historiography on the Rwandan genocide.<sup>985</sup>

In the field of mass atrocities, it is very common that NGOs, who as activist quasi investigative journalists bring to the attention of world leaders and the public at large immediate human rights situations, are the first to interview and document testimonies on the ground.<sup>986</sup> Human rights reports often become the first drafts of history, even more so when written by historians.<sup>987</sup> This was not only the case for African Rights’ Rakiya Omaar and Alex De Waal who crafted the first sketches of a narrative,<sup>988</sup> but later also for Human Rights Watch’s Alison Des Forges, who published the second standard report on the genocide, *Leave None to Tell the Story*.<sup>989</sup> Researched before and after the genocide, Des Forges’ report carried a similar linear explanation of the genocide, although also highlighting the role of the RPF. Both reports not only influenced popular thinking on Rwanda, historiography and a genocide scholarship, but also the manner in which prosecutors at the UNICTR and elsewhere framed the narrative of the crime of genocide that was committed in Rwanda.

<sup>981</sup> Alex De Waal, ‘Writing Human Rights and Getting it Wrong’, *Boston Review*, 6 June 2016.

<sup>982</sup> AR, *Death, Despair and Defiance*, pp. 100-176. The chapter “the killers and their accomplices” is structured by: the president’s family; the interim government; politicians and ideologues with an extremist agenda; military officers; professional Interahamwe; and principal killers in the prefectures.

<sup>983</sup> In The Netherlands alone, I was able to track at least seven cases against Rwandans in which African Rights was the referencing source.

<sup>984</sup> Days after the start of the genocide, Omaar had travelled to Rwanda with an escort from the rebel RPF and interviewed over 200 survivors. She took notes longhand and almost verbatim, sending to De Waal in London, who typed them up. De Waal, ‘Writing Human Rights’.

<sup>985</sup> Reydams, ‘NGO justice’, pp. 547-588. Prunier, Gourevitch and Des Forges.

<sup>986</sup> International criminal tribunals and courts often start their investigations on the basis of such reports, as recently transpired again at the ICC during the testimony of an investigator. ICC, TCVIII, *Situation: Republic of Mali. In the case of The Prosecutor v. Ahmad Al Faqi Al Mahdi: Transcript* (ICC-01/12-01/15; 22 August 2016), p. 101.

<sup>987</sup> At least two members of a consortium of human rights NGOs that conducted an investigation in Rwanda prior to the genocide were trained historians (Alison Des Forges and William Schabas) and their report commences with a chapter “Historical Background.” Fédération Internationale des Droits de l’Homme (FIDH), Africa Watch, Union Inter africaine des Droits de l’Homme et des Peuples (UIDH) & Centre International des Droits de la Personne et du Développement Democratique (CIDPDD), *Report of the International Commission of Investigation on Human Rights Violations in Rwanda since October 1, 1990 (January 7–21, 1993) Final Report* (March 1993), pp. 5-7.

<sup>988</sup> Their report starts with the following observation: “History lives in Rwanda. Contemporary political and ethnic identities have been greatly influenced by interrelations of history. As elsewhere, history is interpreted differently by the different parties to various conflicts. Unfortunately, a great deal of the highly erroneous writing that is used to underwrite these histories is still regarded as “scholarship” and therefore quantified in a wholly unwarranted way. In particular, the meanings of the ethnic labels “Hutu” and “Tutsi” are vigorously disputed [...] It is therefore necessary to investigate, as carefully as possible, the history of political ethnicity in Rwanda. What follows is only a beginning, but it does identify many of the most crucial facts, claims, myths and disputes.” AR, *Death, Despair and Defiance*, pp. 1-2.

<sup>989</sup> Des Forges writes: “Rwandans take history seriously. Hutu who killed Tutsi did so for many reasons, but beneath the individual motivations lay a common fear rooted in firmly held but mistaken ideas of the Rwandan past. Organizers of the genocide, who had themselves grown up with these distortions of history, skillfully exploited misconceptions about who the Tutsi were, where they had come from, and what they had done in the past. From these elements, they fuelled the fear and hatred that made genocide imaginable. Abroad, the policy-makers who decided what to do or not do about the genocide and the journalists who reported on it often worked from ideas that were wrong and out-dated. To understand how some Rwandans could carry out a genocide and how the rest of the world could turn away from it, we must begin with history.” Des Forges, *Leave None*, p. 31.

However, twenty years of criminal investigations, proceedings and judgements against 75 key suspects at the UNICTR did not substantiate such a narrative. Most likely, the genocide, which was a crime committed through the state machinery, was animated by some planning but it was arguably not conspired for four, three, two or a year in advance. In fact, no judge at the UNICTR was convinced that any of the persons tried had conspired to commit genocide before 7 April 1994. Their individual judgements, as we will see below, sometimes attempt to provide a nuanced reading on major historical claims, but the tribunal – since it is not its purpose – never brought everything together to endeavour to paint an all-encompassing picture of the genocide. Only since very recently, scholarship, in English, free from the Holocaust template and based on a mosaic of evidence gathered over the past twenty years, including much UNICTR material, provides us with rich and detailed understanding of the dynamic process that led genocide to become a policy but only from 12 April 1994.<sup>990</sup> Overall and beyond any legal, historical and academic dispute, it is a fact that genocide was committed against the Tutsi population. However, the leading narrative of a tropical Nazism as coined by human rights organisations, operationalised by prosecutors and embedded in academia, in its immediate wake has not become a judicial truth, backed by irrefutable empirical evidence. Alex De Waal, in the summer of 2016, surprisingly, acknowledged this. His, and thereby Omaar's, explanation of the genocide had become dominant in an academic and popular discourse, and he does not regret writing it “for Rwanda in 1994,” but other stories, particularly those of the fiercely fought war and violence by the RPF forces that chased out the genocidal interim regime, were corked. Moreover, the RPF government had turned this particular genocide story – which in the official version is traced back to Belgian colonial rule - into orthodoxy, even law, and used it for justify its lethal military operations against Rwandan Hutus in Zaire from 1996, its cling unto power and persecution of nonconformists. The compelling, but partial and incomplete, human rights narrative he had helped to craft, he says, had even become a license for despotism.<sup>991</sup> Thus, twenty two years after the genocide and twenty six years after the start of the civil war, various narratives that are held to be true about the genocide and the context in which it was perpetrated persist among ‘ordinary’ Rwandans in- and outside Rwanda, the Rwandan government, Rwandese opposition, the international community, governments with close relations to Rwanda, NGOs, Rwandan and non-Rwandan academics, Rwandan and non-Rwandan ‘Rwanda-experts’, Rwandan and non-Rwandan jurists and Rwandan and non-Rwandan students of Rwanda. Suffice to say, when reading the passages below, this study does not attempt to write yet another Rwanda-story, nor deny that the crime of genocide was committed against Rwandan Tutsis, but it seeks to unravel how and why the dominant version that was informed by a Holocaust template of how genocide happens, coined by historians and adopted by the post-genocide authorities

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<sup>990</sup> André Guichaoua, *From War to Genocide. Criminal Politics in Rwanda, 1990-1994* (Madison: University of Wisconsin Press, 2015). This abridged English translation of the book, which includes a foreword by Scott Straus and new chapters, only became available after most of this chapter was already written. It is for that reason that in the text below, both the English and French versions are referenced. André Guichaoua, *Rwanda. De la Guerre au Genocide. Les Politiques Criminelles au Rwanda (1990-1994)* (La Découverte: Paris, 2010).

<sup>991</sup> De Waal, 'Writing Human Rights'.

in Rwanda, was litigated and not proven beyond any reasonable doubt by a court that was expected to be capable of unearthing the truth.

## The Mille Collines

As has become clear in the short introduction above, Rwanda, on all altitudes, is a multifarious state. Before delving into the even more intricate matters of history, politics and mass violence, the first paragraphs below serve as introduction into some key facts on geography, population and administration.

Green slopes, rubicund earth and azure lakes typify the colour card of Rwanda's landscape. Positioned in the Central African Great Rift Valley, a mountainous relief shapes the 26.338 square kilometres of land, known as the *Mille Collines*.<sup>992</sup> Mount Karisimbi in the volcanic northwest forms the roof of the country at 4.507 meters, while the southwest lowlands mark the ground floor, still at 900 meters above sea level. At these altitudes, numerous rivers meander through grassy uplands, small rainforests, lowlands and savannahs, connecting twenty-three lakes. These diverse ecosystems host a rich natural flora and fauna, flourishing in a mild tropical climate, despite being only two degrees south of the equator. Good climatic circumstances explain the prevalence of agriculture and livestock in the country.<sup>993</sup> Rwanda's contemporary borders are among the scarce ones on the African continent that are not so much the reminders of Europe's unilateral scramble for and partition of Africa in the late 19<sup>th</sup> century. Whereas elsewhere the stroke of a pencil sketched the angulated shapes of African countries on the atlas, back at the Congo-conference in Berlin in 1885,<sup>994</sup> the frontiers of Rwanda are somewhat consistent with the ones European explorers located when they first set foot there. Essentially, Rwanda was not a European conception like many modern-day African states.<sup>995</sup> But that is not the sole peculiarity.

An antique Kingdom ruled by complexly centralised dynasties,<sup>996</sup> Ruanda<sup>997</sup> only became part of 'German East Africa' (Deutsch-Ostafrika) in 1890, united with [B] Urundi and Tanganyika, until forces from the Belgian Congo seized it in 1916.<sup>998</sup> Three years later, at Versailles, the Belgians were allocated control over Ruanda-Urundi, which became a *mandate territory* under the freshly

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<sup>992</sup> European Commission & Republic of Rwanda, *Environmental profile of Rwanda* (Kigali, July 2006), p. 17.

<sup>993</sup> See for a more general description of Rwanda's geographical positioning in the Great Lakes Region: Jean-Pierre Chrétien, *The Great Lakes of Africa: Two Thousand years of History*, translated by Scott Straus (New York: Zone Books, 2003), pp. 22-26.

<sup>994</sup> The Berlin Conference of 1884-85, also known as the Congo Conference (*Kongokonferenz*) or West Africa Conference (*Westafrika-Konferenz*) regulated European colonisation and trade in Africa. The conference ushered in a period of heightened colonial activity by European powers, which eliminated or overrode most existing forms of African autonomy and self-governance

<sup>995</sup> Straus, *The Order of Genocide*, p. 207.

<sup>996</sup> David Newbury, 'Precolonial Burundi and Rwanda: Local Loyalties, Regional Royalties', *The International Journal of African Historical Studies*, Vol. 34, No. 2 (2001), pp. 255-314.

<sup>997</sup> The European spelling "Ruanda" was adopted in the Trusteeship Agreement. In Kinyarwanda, however, soon the spelling "Rwanda" was used and under the influence of local nationalism became prevalent throughout the Territory and was adopted as the country's name after independence in 1962.

<sup>998</sup> *L'Organisation Politique du Rwanda au début de l'Occupation Belge (1916). Notes rédigées par le R.P. Classe, des Pères Blancs, Mission de KABGAYI, à la demande de l'Administration Belge* (28 August 1916).

established League of Nations in 1924.<sup>999</sup> Both central African countries regained their independence in July 1962, with Burundi preserving its monarchy and Rwanda becoming a republic.<sup>1000</sup> Kigali was made Rwanda's capital and is at the heart of the landlocked country. Currently, the country has four neighbours: Uganda in the north; Tanzania in the east; Burundi in the south; and the Democratic Republic of the Congo (DRC) in the west. Lake Kivu borders most of the rugged western shores and beaches. Rwanda has always been one of the most densely populated countries in the world. Its population is classically and roughly divided into three social groups,<sup>1001</sup> which, since European dominion, were ambiguously labelled respectively as racial, ethnic and national.<sup>1002</sup> Reportedly, the majority of *Banyarwanda* ("those who come from Rwanda") is commonly believed to be [Ba] Hutu (85%), followed by [Ba] Tutsi (14%) and [Ba] Twa (1%),<sup>1003</sup> but no certified data exists since 1994.<sup>1004</sup> Most Rwandans are fluent in the lyrical language Kinyarwanda, followed by the two other *lingas Franca* English and French, while Kiswahili and Kirundi are much heard tongues as well.<sup>1005</sup> Half of the populace, which reaches almost 12.5 million (in 2015), is Roman Catholic, followed by Protestants and other Christians (45%) and a smaller group of Muslims (1,8%). Roughly 60 % of the strongly urbanised (19%) population is younger than 25 years old, with a median age of 19, while life expectancy at birth is 59.<sup>1006</sup> From 1962 to December 2005, Rwanda was hierarchically administrated into prefectures (provinces), sub-prefectures, communes (municipalities), sectors, cells, and, at the lowest level, *nyumbakumi* (groupings of ten households).<sup>1007</sup> Since January 2006, as part of a decentralisation policy, the government altered place names<sup>1008</sup> at all administrative levels and put in place a reorganised administrative structure, consisting of five provinces: Kigali City (capitol), the

<sup>999</sup> 'United States and Belgian Rights: Treaty with Belgium Concerning Her Mandate over the Territory Ruandi-Urundi', reprinted in: Charles I. Bevans, *Treaties and Other International Agreements, of the United States of America, 1776-1949. Volume 5: Afghanistan-Burma* (Washington: Department of State, 1970), pp. 523-531. The conventions were signed in April 1923 and entered into force on 18 November 1924. See for a discussion: Alison Liebhafsky Des Forges, *Defeat is the only bad news. Rwanda under Musinga, 1896-1931* (Madison: University of Wisconsin Press, 2011), p. 158; Louis, Wm. Roger. *Ruanda-Urundi, 1884-1919* (Oxford: Clarendon Press, 1963).

<sup>1000</sup> UNGA, *Question of the Future of Ruanda-Urundi* [1962] (A/RES/1743 (XVI); 23 February 1962); UNGA, *The Future of Ruanda-Urundi* [1962] (A/RES/1746 (XVI); 27 June 1962); UNGA, *Admission of the Kingdom of Burundi to Membership in the United Nations* [1962] (A/RES/1749 (XVII); 18 September 1962); and UNGA, *Admission of the Republic of Rwanda to Membership in the United Nations* [1962] (A/RES/1748 (XVII) (18 September 1962).

<sup>1001</sup> Also, there are twenty-odd clans known in Rwanda, which are found everywhere mixed one with the other, a situation that is the product of an historical evolution. See: Jan Vansina, *Antecedents to Modern Rwanda. The Nyiginya Kingdom* (Madison: University of Wisconsin Press, 2004), p. 33.

<sup>1002</sup> In singular form Mahutu, Matutsi and Matwa. Commonly these are simply referred to as Hutu, Tutsi and Twa, like in the rest of this thesis. For historical works in the Hutu-Tutsi identifiers: Catherine Newbury, *Cohesion of Oppression. Clientship and Ethnicity in Rwanda, 1860-1960* (New York: Columbia University Press, 1988); and Vansina, *Antecedents to Modern Rwanda*, pp. 36-38. See for a useful discussion on the 'contested categories' of Hutu, Tutsi and Twa: J.J. Carney, *Rwanda Before the Genocide. Catholic Politics and Ethnic Discourse in the Late Colonial Era* (Oxford: Oxford University Press, 2014), pp. 11-15.

<sup>1003</sup> Alison Des Forges writes, that in the 1930s the Belgians asked each Rwandan to declare his group identity. Then, "Some 15 percent of the population declared themselves Tutsi, approximately 84 percent said they were Hutu, and the remaining 1 percent said they were Twa. But the numbers were flexible, she adds: "said to represent 17,5 percent of the populations in 1952, Tutsi were counted as only 8,4 percent of the total in 1991. See: Des Forges, *Leave None*, p. 37 & 40. Other numbers exist. In 1960 the numbers were set at Tutsi (16,59 %), Hutu (82,74%) and Twa (0,67 %), see: United Nations Trusteeship Council, *Visiting Mission to Trust Territories in East Africa, 1960. Report on Ruanda-Urundi* (§T/1538; 2 June 1960), §65. Rougher estimates circulate after the genocide, with Hutu making up between 84-90 % and Tutsi between 10-14 % of the population, see: Scott Straus, 'The Historiography of the Rwandan Genocide', in: Dan Stone (ed.), *The Historiography of Genocide* (Basingstoke & New York: Palgrave MacMillan, 2008), p. 519.

<sup>1004</sup> Since 1994, there is no formal or public ethnic registration in Rwanda. See for insights and debate: Paul Kagame, 'Preface', in: Phil Clark and Zachary D. Kaufman (eds.), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and beyond* (London: Hurst, 2008), pp. xxi-xxvi; René Lemarchand, 'The Politics of Memory in Post-Genocide Rwanda', in: Phil Clark and Zachary D. Kaufman (eds.), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and beyond* (London: Hurst, 2008), pp. 65-76; and Stef Vandenginste, 'Governing ethnicity after genocide: ethnic amnesia in Rwanda versus ethnic power-sharing in Burundi', *Journal of Eastern African Studies*, Vol. 8, No. 2 (2014), pp. 263-277. Even more, one could claim that different social categories erupted after the genocide. Arguably, the English-speaking Ugandan immigrants – some with Rwandan Tutsi or Hutu backgrounds – make up a new group. But again, one could argue as well that they would constitute a different class.

<sup>1005</sup> English was introduced as an official language in 2008: Chris McGreal, 'Rwanda to switch from French to English in Schools', *The Guardian*, 14 October 2008 (www-text: <http://www.theguardian.com/world/2008/oct/14/rwanda-france>, visited: 13 August 2015).

<sup>1006</sup> Central Intelligence Agency (CIA), 'Rwanda', *The World Factbook* (www-text: <https://www.cia.gov/library/publications/the-world-factbook/geos/rw.html>, visited: 10 September 2014). The percentages are, however, believed not to have changed significantly.

<sup>1007</sup> Bert Ingelaere, 'The Ruler's Drum and the People's Shout. Accountability and Representation on Rwanda's Hills', in: Scott Straus & Lars Waldorf (eds.), *Remaking Rwanda. State Building and Human Rights After Mass Atrocity* (Madison: Wisconsin Press, 2011), pp. 67-78: 68-71.

<sup>1008</sup> From villages to provinces, to "protect survivors from remembering where their relatives died." See: Susan Thomson, 'Re-education for Reconciliation. Participant Observations on Ingando', in: Straus, *Remaking Rwanda*, p. 333.

Eastern-, Southern, Western- and Northern Provinces. The provinces are then divided into districts and municipalities. On the political level, the Republic of Rwanda (*Republika y'u Rwanda*) is a multiparty democracy,<sup>1009</sup> headed by President Paul Kagame (since 22 April 2000).<sup>1010</sup> His Rwandan Patriotic Front (RPF; or FPR in French) is the governing party since 1994.<sup>1011</sup>

## 4.2 Matters of history: Uprising and containment

The African population of Ruanda is not of one single physical type: it includes Tutsi Hamites (or ethioids) Hutu Bantus (or negroids) and Twa pygmies. The Twa, who no longer represent more than a small minority (0.67 per cent of the population), are related to the pygmies of the Belgian Congo and have probably been in the country from time immemorial. The Hutu came later, but nothing is known of their origin. They now form the great majority of the population (82.74 per cent of the population of Ruanda). Lastly, the Tutsi (16.59 per cent of the population of Ruanda) are related to the Hima, who are the ruling caste in all the kingdoms between the lakes. They probably came originally from Ethiopia. They undoubtedly migrated to Ruanda some time before the fifteenth century. The Tutsi were nomadic cattle-breeders, who gradually occupied the country and Subjugated the indigenous inhabitants, establishing various small kingdoms in the east of what is now Ruanda, and extending those kingdoms towards the west.”<sup>1012</sup>

Some people have asked whether this is a social or racial conflict. We think that that is idle speculation. In reality and in the minds of men it is both. It can, however, be narrowed down for it primarily a question of a political monopoly by one race, the Mututusi, and, in view of the social situation as a whole, it has become an economic and social monopoly, in view, also, of the de facto selection in education, this political, economic and social monopoly has also become a cultural monopoly, to the great despair of the Bahutu, who see themselves condemned forever to the role of subordinate manual workers, and this, worse still, after achieving an independence which they will have unwittingly helped to obtain. [...] The difficulties which might arise from the Hamitic monopoly over the other more numerous races which have lived in the State for a longer time, must be eliminated. [...] People are not unaware of the support the indirect administration gives to the Mututusi monopoly. Therefore, in order to keep a close check on this racial monopoly, we strongly oppose, for the time being at least, the discontinuance of the practice of entering Muhutu, Mututsi, or Mutwa on official or personal identity cards. Its discontinuance would make it even easier to practice selection, by concealing it and making it impossible to establish the true situation statistically. Moreover, it has never been agreed that the Muhutu is ashamed of his name; what he objects to is the privileged position of a favoured monopoly which threatens to reduce the majority of the population to a position of systematic inferiority and to an undeserved sub existence.

- Manifesto of the Bahutu<sup>1013</sup>

<sup>1009</sup> Although critics of the regime decry the democratic space and the “authoritarian” Rwandan Patriotic Front (RPF). Most notably: Filip Reyntjens, *Political Governance in Post Genocide Rwanda* (New York: Cambridge University Press, 2013); Straus, *Remaking Rwanda*.

<sup>1010</sup> Rwanda became a republic after independence. Since then, there have been five presidents: Grégoire Kayibanda (1962-1973); Juvénal Habyarimana (1973-1994); Pascal Sindikubwabo (1994); Pasteur Bizimungu (1994-2000); and Paul Kagame (2000 -). Presidential elections are slated for 2017 and as of 2015 there is a discussion on changing the constitution in order to facilitate a third term for Kagame: ‘Rwanda MPs step up efforts to grant Kagame third term, *The East African*, 25 July 2015.

<sup>1011</sup> The Rwandan Patriotic Front (RPF) is also known as FPR (from French: Front Patriotique Rwandais) or RPF-Inkotanyi. It was established in 1987 as a successor of the Rwandese Alliance for National Unity (RANU), which was made up out of Rwandans (mostly Tutsi-exiles and their offspring) in the Diaspora, particularly in Uganda. Its military wing was known as the Rwandan Patriotic Army (RPA). Colin. M. Waugh, *Paul Kagame and Rwanda. Power, Genocide and the Rwandan Patriotic Front* (Jefferson & London: McFarland & Company, Inc., Publishers, 2004), pp. 36 -43. Also see the RPF’s website: <http://rpfinkotanyi.org/en/>, visited: 2 September 2014.

<sup>1012</sup> UNTC, *Report on Ruanda-Urundi*, §65.

<sup>1013</sup> United Nations Trusteeship Council (UNTC), *Report of the United Nations Visiting Mission to Trust Territories in East Africa, 1957, on Ruandi-Urundi (T/1346): Annex I: “Manifesto of the Bahutu”*. Note on the Social Aspect of the Indigenous Racial Problem in Ruanda (UN-doc: T/1402; New York, 1958), pp. 39-42.

History matters in Rwanda, as any other place that has experienced mass atrocities and identity-based violence.<sup>1014</sup> In the young, seemingly divided nation, it is a lifeline. People keep a tight grip on it, twist it and throw it out again. Owning the past, or at controlling its narrative, is a survival strategy in the present. Those who pen down the narrative of history, carve a corridor into the future. Owning the discourse on the past is also a strategy of political survival. Without doubt, Rwanda's past has been - and still is - significantly disputed; not only inside Rwanda, but also in the Diaspora and among foreign students of the republic. For the sake of space, the historical synopsis delivered below will be brief, accentuating only key ingredients that are central to the diverse narratives that deal with the 1994 genocide. Like elsewhere in Sub-Sahara Africa, little is known about the pre-colonial times.<sup>1015</sup> Reconstruction may thus be puzzling. But it is not unmanageable.<sup>1016</sup> Archaeology, oral histories and myths, at least, lift the lit to some extent and some consensus has been reached. In its most simplified account, *bonafide* scholars of history acknowledge that before colonisation Rwanda had advanced into one of the most sophisticated and powerful monarchies in the Great Lakes Region. Through their military forte and finely advanced feudal system, Tutsi kings (*Mwami*) had succeeded to enlarge their territory and establish a centralised monarchy. Towards the end of the 19<sup>th</sup> century, the empire was firmly established in the south central part of the country and it had shown itself to be expansionist, centralised, hierarchical and militaristic.<sup>1017</sup> The last sovereign monarch, Kigeri IV Rwabugiri (1860-1895), had in particular manifested centralised power, through large-scale institutional reforms.<sup>1018</sup> From the lowest official, the *chef de colline*, all the way up to the royal court, through *chefs* and *sous chefs*, he built a strong hierarchy, particularly through a patron-client system between cattle herding Tutsi, farming Hutu and hunting Twa called *Ubugake*.<sup>1019</sup>

### ***The red thread: class, race, ethnicity and political identity***

A cornerstone as well as red thread in Rwanda's history – particularly for understanding the 1994 genocide - is the relationship between Hutu and Tutsi.<sup>1020</sup> Myriad diverging theories and explanations exist on these categories' meanings, genesis and real and perceived differences.<sup>1021</sup> Anachronistically – looking back knowing that genocide occurred in 1994 – the history of Hutu-Tutsi relations has often been described and comprehended as a continuous skirmish, often involving or descending into discriminatory violence. In his brilliant 'lecture on Rwanda', Ryszard Kapuscinski summarised the relations as a “dark passage of unceasing pogroms and massacres, of mutual extermination, forced

<sup>1014</sup> Sarah Warschauer Freedman, Harvey M. Weinstein, K. L. Murray and Timothy Longman, 'Teaching History in Post-Genocide Rwanda', in: *Straus, Remaking Rwanda*, pp. 297-315: 297; Catherine Newbury and David Newbury, 'Bringing the Peasant Back in: Agrarian Themes in the Construction and Corrosion of Statist Historiography in Rwanda', *American Historical Review*, Vol. 105, No. 3 (2000), pp. 832-877.

<sup>1015</sup> Although, some standard works exist, including: Alexis Kagame, *Les Milices du Rwanda précolonial* (Brussels, 1962); Alexis Kagame, *Un abrégé de l'ethno-histoire du Rwanda I* (Butare, 1972); Alexis Kagame, *Un abrégé de l'histoire du Rwanda II* (Butare, 1975); J. Rumiya, *Le Rwanda sous le régime d mandat Belge* (Paris 1992); J.-N. Nkururimfura, *Le gros bétail et la société rwanda Evolution historique des XIIe-XIVe siècles a 1958* (Paris 1994).

<sup>1016</sup> See for instance: Chrétien, *The Great Lakes of Africa: Two Thousand years of History*, translated by Scott Straus (New York: Zone Books, 2003).

<sup>1017</sup> David Newbury, 'Precolonial Burundi and Rwanda: Local Loyalties, Regional Royalties', *The International Journal of African Historical Studies*, Vol. 34, No. 2 (2001), pp. 255-314; Jan Vansina, *Antecedents the Modern Rwanda. The Nyiginya Kingdom* (Madison: University of Wisconsin Press, 2004); Straus, 'The Historiography of the Rwandan Genocide', p. 519; Alison Liebhaufsky Des Forges, *Defeat is the only bad news. Rwanda under Musinga, 1896-1931* (Madison: University of Wisconsin Press, 2011).

<sup>1018</sup> Des Forges, *Defeat is the only bad news*, pp. xxiii-xxxvii.

<sup>1019</sup> Newbury, *Cohesion of Oppression*, pp. 38-39.

<sup>1020</sup> As a matter of fact, the Twa have always been and still are a group on the periphery.

<sup>1021</sup> Catharine Newbury 'Ethnicity and the Politics of History in Rwanda', *Africa Today*, Vol. 45, No. 1 (January-March 1998), pp. 7-24

migrations, furious hatred.”<sup>1022</sup> From the deterministic point of view, looking back with the wisdom of the present, his assessment makes sense. It is the story about Rwanda that is told by many. Yet, it is too unsophisticated. But also, it is not persuasive. Hutu, Tutsi and Twa labels existed already for centuries, although nobody can precisely isolate the date of genesis and its etymology. As ‘ethnic’ groups, they are invented, imagined and mythologised communities.<sup>1023</sup> And their meaning has been morphing over time, drifting on political currents and exposed and magnified in times of political transition or imminent crisis. Like a chameleon, the immediate context dictates the colour of group identity and its place in the socio-political geography. Also, the three groups were not exclusive; clan, region and other social identities, including class, also mattered.<sup>1024</sup> Hutu and Tutsi, furthermore, were most certainly not tribes, nor ‘races’ as many outside observers have wanted to believe.<sup>1025</sup> The markers of belonging to either Hutu or Tutsi were – or arguably are again – rather economic (agriculturalists versus herders) or related to status (Tutsi as elite) and power (Tutsi royalists). A prevailing and popularly narrated myth is that in order to be labelled Tutsi one ought to own at least ten cows, the most valuable and sacred belonging in traditional culture. Similarly, the identity units were neither static, nor set in stone. Variations existed and moving up and down the ladder was possible, including through marriage. That was the situation before external intermingling. With the arrival of Europeans,<sup>1026</sup> the existing social stratification was viewed, interpreted and operationalized from a new framework, the racist offspring of the European Enlightenment and its philosophers.<sup>1027</sup>

Obsessed with ethnography and inspired by ethnography and exotism, missionaries and colonial administrators perceived the social strata from a racial pyramid perspective.<sup>1028</sup> For long, the guiding idea was that Africa, “was no historical part of the world” and that “in Negro life the characteristic point is the fact that consciousness has not yet attained to the realization of any substantial objective existence — as for example, God, or Law — in which the interest of man’s volition is involved and in which he realizes his own being.”<sup>1029</sup> Like elsewhere in Africa and the Great Lakes Region, the ‘white man’s burden’ was to bring culture and shape identities and so they ‘ethniced’ entire societies, often slashing through age-old existing groups and artificially defining dichotomies.<sup>1030</sup> Armoured with the Hamitic hypothesis,<sup>1031</sup> they believed the pastoralist Nilotic races, peoples who had descended from the north, via North Africa and the Middle East, to rule over the

<sup>1022</sup> Ryszard Kapuscinski, *The Shadow of the Sun. My African Life* (London: Penguin Books, 2002), p. 179.

<sup>1023</sup> Lemarchand, *The Dynamics of Violence*, pp. 49-57.

<sup>1024</sup> Straus, ‘The Historiography of the Rwandan Genocide’, pp. 517-542: 519.

<sup>1025</sup> It was particularly the case during the genocide, in which media and foreign political entities characterised the war and the genocide as a “tribal”.

<sup>1026</sup> Only since 1894 had discoverers, mainly Germans, started to cross Rwanda. In that year, Mwami Yuyi Misinminga put his land under German protectorate. The first catholic mission was established in 1900 and the German residence was only erected in 1907.

<sup>1027</sup> See for instance: Emmanuel Kant, *Über die verschiedenen Rassen der Menschen* (1775).

<sup>1028</sup> Charles Robert Darwin, *On The Origins of Species By Means of Natural Selection or the Preservation of Favoured Races in the Struggle for Life* (London: John Murray, 1859).

<sup>1029</sup> As progressed in Hegel’s lectures between 1830-31: Georg Wilhelm Friedrich Hegel, *The Philosophy of History. With Prefaces by Charles Hegel and the Translator, J. Sibree, M.A.* (Kitchener: Batoche Books, 2001), pp. 110-111; 117.

<sup>1030</sup> Compare: David van Reybrouck, *Congo. An Epic History of a People* (New York: Harper Collins, 2014).

<sup>1031</sup> “It states that everything of value ever found in Africa was brought there by the Hamites, allegedly a branch of the Caucasian race.” Edith R. Sanders, ‘The Hamitic Hypothesis; Its Origin and Functions in Time Perspective’, *Journal of African History*, Vol. x, No. 4 (1969), pp. 521-532.

Bantu populations of interior Africa.<sup>1032</sup> Based on this combination of the biblical narrative of the ‘curse of Ham’ and scientific racialism of the late 19<sup>th</sup> century, the Tutsi were believed to represent the Hamitic civiliser over Hutu Bantu Africans.<sup>1033</sup> Key to this observation was the question of how else would it have been possible that in Rwanda a complex, well-organised and centralised state existed, sharing many features of the modern European states? At the turn of the 19<sup>th</sup> century, so believed many, it must have been ‘some kind of white people’ who built it, as blacks were deemed incapable of civilisation. Simple at its core, the answer to this question was to claim that Hamites were “Caucasians under a black skin”; different than Negroes, those who civilized the Negroes and were in turn corrupted by the Negroes.<sup>1034</sup> These Hamites included ancient Egyptians, Nubians and Ethiopians, who had for centuries migrated down south.

In early colonial times, the bigoted Hamitic hypothesis served as a practical, political and ideological prism for colonial representatives through which to comprehend and map the freshly divided African continent. In Rwanda, European newcomers described the Tutsi as “brothers of the Nubians”, having a “Caucasian type” or as “Negroids [...] which possesses the strongest Hamitic indices.”<sup>1035</sup> Despite its negligible administrative influences, the Germans had already favoured Tutsi, yet motivated by regional pacification and security as part of an indirect rule system.<sup>1036</sup> The newcomer, Belgium, was more influential. Leon Classe, a prominent White Father missionary and Catholic Vicar Apostolic in Rwanda between 1922 and 1945, was a sound devotee to Europe pseudo-scientific racial thinking and his ideas were constructive to the architecture of colonial policies and social engineering in Rwanda. In his mind, Tutsi were born rulers: that was the secret of their mastery of the country.<sup>1037</sup> According to him,

The greatest disservice which the Government could do to itself and to the state would be to eliminate the Tutsi caste. A revolution of that nature would lead the entire state directly into anarchy and to European-hating Communism. Far from furthering progress, it would nullify the Government’s action by depriving it of auxiliaries who are, by birth, capable of understanding and following it [...] Generally speaking, we have no chiefs who are better, more intelligent, more active, more capable of appreciating progress and more fully accepted by the people than the Tutsi. It is therefore primarily and essentially with their aid that the Government will succeed in developing Ruanda from all points of view.<sup>1038</sup>

### ***The façade of ‘indirect rule’ and Tutsi vassals***

<sup>1032</sup> “Apart from relatively late Semitic influence [...] the civilisations of Africa are the civilizations of the Hamites, its history the record of these peoples and of their interaction with the two other African stocks, the Negro and the Bushman, whether this influence was exerted by highly civilized Egyptians or by such wider pastoralists as are represented at the present day by the Beja and Somali [...] The incoming Hamites were pastoral ‘Europeans’ – arriving wave after wave – better armed as well as quicker witted than the dark agricultural Negroes”. C.G. Seligman, *Races of Africa* (London: Thornton Butterworth, Ltd., Home University Library, 1930), p. 96.

<sup>1033</sup> J. J. Carney, ‘The Danger of Description. The Ethnic Labelling of the Poor in Colonial Rwanda’, *Journal of Religion and Society*, Supplement Series, 10 (2014), pp. 229-241: 231.

<sup>1034</sup> Mamdani, *When Victims Become Killers*, p. 82.

<sup>1035</sup> Carney, ‘The Danger of Description’, p. 231.

<sup>1036</sup> The first German Resident wrote: “Our political and colonial interests require that we should support the King and uphold the supremacy of the Tutsi and the corresponding extreme dependence of the great mass of the population.” *UNTC, Report on Ruanda-Urundi*, p. 79.

<sup>1037</sup> Leon Classe, 21 September 1927. Cited in: Filip Reyntjens, *Danse Macabre. Rwanda en Burundi, tussen hoop en haat* (Translation of *L’Afrique des Grandes Lacs en crise. Rwanda, Burundi: 1988-1994*; Antwerp 1996), p. 19.

<sup>1038</sup> Cited in: UNTC, *Report on Ruanda-Urundi*, §90-91.

On that European pseudo-scientific racialist proposition, the modern colonial Rwandan state was extendedly constructed, between 1926 and 1931.<sup>1039</sup> At the height of the transition into a *de facto* colony, Mwami Yuhi V Musinga, who wished not to convert to Christianity and was known to be clinging on to tradition, was purged and substituted by his son Mutara III Rudahigwa, a King by the grace of the Belgians.<sup>1040</sup> Most existing structures remained nonetheless, but the Belgians were on top of political control, through an arrangement of camouflaged direct rule system they labelled ‘indirect rule’.<sup>1041</sup> The undercurrent ideology was ‘racially’ prejudiced; all administrative posts were delegated to the ‘superior’ Tutsi. Accordingly, they were positioned at prominent spots within the Catholic Church as well as in schools.<sup>1042</sup> Moreover, many Tutsi were exempted from the dreaded *corvée*, a system of forced labour, which practically subjected the Hutu population into a second-class people. Thus, besides racist ideology and racialisation, social discrimination and segregation too widened the Hutu-Tutsi dichotomy. At the climax of the European interference, these new divisions were ethnicised, institutionalised, stabilised and essentialised through quasi-scientific racial measurements and the introduction, in the 1930s, of personal identity cards. Notoriously, these *Livrets d’indétité* or *Eenzelvigheidsboekjes* marked ‘tribe’, ‘race’ and later ‘ethnicity’: Mututsi, Muhutu or Mutwa.<sup>1043</sup> This Apartheid-like constellation and exclusion of the majority was ready to crack. After a decade, change loomed, particularly in the quivering wake of the Second World War and the spirits of decolonisation and self-determination in the ‘non-western’ hemispheres. Cognisant of this, the Belgians shifted allegiances and by the mid-1950s those few educated Hutu saw their opportunity for social emancipation and had calculated their democratic overweight. A tragic event,<sup>1044</sup> *jacquerie*,<sup>1045</sup> or Hutu social revolution<sup>1046</sup> in November 1959 turned the table - reversing the racialist order – and paved the way to Hutu-majoritarianism, discrimination against Tutsi and post-colonial violence.

### ***A double decolonisation***

Decisive to the understanding of the political discourse and genocide dialectics in the 1990s are the period of decolonisation and the first decade of independence and nation building. In Rwanda, it was a double process. Not only were the foreign Belgians ousted, but the Hutu masses simultaneously ‘emancipated’ themselves from ‘foreign’ Tutsi control. Self-rule for the trust territories was on the horizon after the Second World War. In response to this changing climate and the rise of liberation movements in many colonies, Belgium allowed for an opening of public and political space, even

<sup>1039</sup> The Resident-General recalled that “In setting up the first administrative cadres they turned to the Tutsi aristocracy and with its aid began to carry out the urgent tasks, such as the establishment of the first colonial administration, the intensification and improvement of agriculture, the introduction of public health services and the opening of the first schools. In accordance with this policy, the influence and authority of Tutsi chiefs were extended over the north-western region of Ruanda during the earlier years of the administration.” See: UNTC, *Report on Ruanda-Urundi*, §79.

<sup>1040</sup> René Lemarchand, *Rwanda and Burundi* (London: Praeger Publishers, 1970), pp. 69-71.

<sup>1041</sup> Verlinden, *Hutu en Tutsi. Eeuwen strijd* (Leuven: Davidsfonds, 1995), p. 42.

<sup>1042</sup> The enrolment, for example, by ethnic origin of the Astrida College was as follows: 1932: 45 Tutsi and 9 Hutu’s; 1945: 46 Tutsi and 3 Hutu; and 1954: 63 Tutsi and 6 Hutu. Numbers from: Gérard Prunier, *The Rwanda Crisis. History of a Genocide* (Hurst & Company: London, 1995), p. 33.

<sup>1043</sup> Straus, *Making and Unmaking*, p. 227. Straus, like others, refers to ethnicity. That was only the case at a later stage, where cards depicted the label ‘ethnie’. The first identity cards referred to tribe and race: Peuple – Race (in French) and Volkstam – Ras (in Flemish).

<sup>1044</sup> UNTC, *Report on Ruanda-Urundi*, §59.

<sup>1045</sup> Lemarchand, *Rwanda and Burundi*, pp. 114-115.

<sup>1046</sup> Straus, *Making and Unmaking*, p. 277.

luring Hutu to articulate their grievances outside of Africa. By the end of the 1950s, colonial administrators accused Tutsi of “egotism, and lack of appreciation of an inevitable evolution towards democracy.”<sup>1047</sup> In the period leading up to independence, increasingly educated and aspiring Hutu counter-elite had risen. They were seeking to alter the racially codified distribution of power and privilege and were eventually backed by the Belgian authorities and clergy.<sup>1048</sup> On the other side of the spectrum remained the Tutsi, now downplaying the importance of race, hoping to remain in power after a swift transfer of power from Belgium to governing elite.<sup>1049</sup> But the ‘voices of the oppressed’ were loudly heard. Hutu political activists recognised, infused and operationalised the colonial identity labels and embraced a racial discourse, calling for democratic emancipatory liberation from “Hamitic colonialism.”<sup>1050</sup> Drawn up by nine Hutu intellectuals, the Manifest of the Bahutu (or Bahutu Manifesto) became the clearest manifestation of that resentment and its signatories formed the "Mouvement Social Muhutu" in 1957, which later became the "Parti du mouvement pour l'emancipation des Hutus," or PARMEHUTU.<sup>1051</sup> Led by former journalist Grégoire Kayibanda, the party’s aim was to “end the Tutsi hegemony and the feudal regime.”<sup>1052</sup>

Racialized nationalism and anti-colonialism were the main ideological drivers on the eve of independence, particularly between 1957 and independence in 1962.<sup>1053</sup> Sharpened tongues within the Hutu political movement, articulated their plight in racial and ethnic terms. Not only did they wish sovereignty from Belgium, but also from deep-rooted Hamitic colonialism. It contoured what political scientist Scott Straus calls Rwanda’s founding narrative, which holds Hutu’s to be the “core political community, Hutu freedom and development to be the core political project, and Tutsi power to be a threat to the core community and the political project.”<sup>1054</sup> This vision guided the ‘revolution’ and became the anchor of the Rwanda’s political mind-state all the way up to 1994 and arguably continues as a negative – but legitimising - pointer for the current regime. Playing the genocide card and framed in the fashionable language of ‘reconciliation’, highlighting victimhood and keeping alive the fear of Hutu revenge or recurrence of violence soundly justifies a political dominance of Tutsi.<sup>1055</sup> November 1959 is a crucial month in understanding modern-day Rwanda, the context of the genocide, the history of the first two republics and the first outbreaks of mass violence. Richly detailed reports exist,<sup>1056</sup> but space considering, Straus’ brief summary of key events illustrates well enough what happened in that month: “in July 1959 the Tutsi king died unexpectedly after receiving an antibiotic shot from a Belgian doctor. His death crystallized the fears of many Tutsis, hardened their political positions, and

<sup>1047</sup> UNTC, *Report on Ruanda-Urundi*, §97.

<sup>1048</sup> Straus, *Making and Unmaking*, p. 278.

<sup>1049</sup> *Idem*.

<sup>1050</sup> United Nations Trusteeship Council (UNTC), *Report of the United Nations Visiting Mission to Trust Territories in East Africa, 1957, on Ruandi-Urundi (T/1346): Annex I: “Manifesto of the Bahutu”*. Note on the Social Aspect of the Indigenous Racial Problem in Ruanda (UN-doc: T/1402; New York, 1958), pp. 39-42.

<sup>1051</sup> Straus, *Making and Unmaking*, pp. 279-280.

<sup>1052</sup> UNTC, *Report on Ruanda-Urundi*, §167.

<sup>1053</sup> Carney, *Rwanda Before the Genocide*, pp. 150-155.

<sup>1054</sup> Straus, *Making and Unmaking*, p. 280.

<sup>1055</sup> The current narrative is one of reconciliation, which, despite the outlawing of ethnic markers is based on the premise that different groups do exist: See for this type of argument: Reyntjens, *Political Governance*, pp. 187-211.

<sup>1056</sup> Most prominently: UNTC, *Report on Ruanda-Urundi*. There was also a Belgian Commission of Inquiry, which presented a report in January 1960 to the Government. Unfortunately, the author did not obtain a copy.

ultimately increased Tutsi elite alienation from the Belgians. In November of the same year, Tutsi party youth attacked a leading Hutu politician, in turn leading to a counterattack against Tutsi elites by Hutu crowds, further counterattacks by Tutsis against Hutu political figures, and yet more violence against Tutsi families. Ultimately, the Belgians intervened to stop the violence and, in its aftermath, radically restructured the administration. Whereas before the November 1959 events, every chief was Tutsi and all but ten sub chiefs were Tutsi, afterward the Belgians allotted half the chiefdoms and more than half of the sub-chiefdoms to Hutus. [...] In 1960, communal elections were held. The main Tutsi-led party boycotted, and the main Hutu-led party, PARMEHUTU, won an overwhelming majority of 74 percent.<sup>1057</sup> The leader of the party, Grégoire Kayibanda, a former journalist who was one of the authors of the Manifesto, became president in 1961, the same year that the Belgians and leading Hutu political figures announced the formation of a republic and the end of the monarchy.<sup>1058</sup> In July 1962, Rwanda achieved formal independence.”<sup>1059</sup>

### ***Ethnic paranoia: Kayibanda’s social revolution***

Transitioning from Ruanda to Rwanda, from colony to sovereign nation and from monarchy to republic had far-going social effects. “The events of 1959-1960 had left behind, in opposing ethnic and political groups, a residue of bitterness and fear,” reported the UN in 1961.<sup>1060</sup> There was bloodshed. Inter-ethnic violence flared up at several instances from November 1959.<sup>1061</sup> Next to thousands of huts that were set on fire, there were numerous killings, countless intimidations, myriad harassments, large lootings and many other ‘disturbances’. Consequently, or out of fear for new violence, a mass of Tutsi fled their homes and left for sanctuaries either in Rwanda itself or in neighbouring Burundi, Zaire and Uganda.<sup>1062</sup> From March 1961, some of these refugees, who had received training in China, began to attack Rwanda.<sup>1063</sup> Calling themselves *Inyenzi*,<sup>1064</sup> small bands of Tutsi exiles sought to restore the monarchy through a counter-revolution using guerrilla tactics. Reportedly, they carried out repeated attacks, targeting Hutu elite and Europeans, some ten times up to 1966.<sup>1065</sup> In most cases, these raids triggered violent reactions towards Tutsi living in Rwanda. A perhaps real opportunity to realise their goals, occurred only once, at the end of 1963. From Burundi, on 21 December, the *Inyenzi* forces managed to move up to twenty kilometres from Kigali. But their march to the capital was stopped by Rwandese troops under Belgian command. Only two days later, mass retaliation by civil defence units against Tutsi civilians started in Kikongoro prefecture, leaving

<sup>1057</sup> This number should be corrected to 77,7 per cent. See: UNGA, *Agenda item 49: Question of the future of Ruanda-Urundi. Addendum: Documents A/4994 and ADD.1. Report of the United Nations Commission for Rwanda-Urundi* (A/4994; New York, 29 November 1961), §371.

<sup>1058</sup> David Halberstam, ‘Rwanda and Burundi Become Independent Countries’, *The New York Times* (1 July 1962), p. 18.

<sup>1059</sup> Straus, *Making and Unmaking*, p. 282.

<sup>1060</sup> UNGA, *Agenda item 49: Question of the future of Ruanda-Urundi. Addendum: Documents A/4994 and ADD.1. Report of the United Nations Commission for Rwanda-Urundi* (A/4994; New York, 29 November 1961), §, §250.

<sup>1061</sup> ‘Terrorist Tribe Worries Rwanda’, *The New York Times* (1 July 1962), p. 18.

<sup>1062</sup> In Rwanda and Burundi alone were estimated to have reached over 70000 in 1961. UNGA, *Agenda item 49: Question of the future of Ruanda-Urundi. Addendum: Documents A/4994 and ADD.1. Report of the United Nations Commission for Rwanda-Urundi* (A/4994; New York, 29 November 1961), §418; Lemarchand, *Rwanda and Burundi*, p. 162-163.

<sup>1063</sup> ‘Terrorist Tribe Worries Rwanda’, p. 18.

<sup>1064</sup> Created in 1960 by the King’s advisor François Rukeba, this guerrilla movement was dubbed the *Inyenzi*, because, as cockroaches, they attacked by night and were considered to be uncrushable. Warren Weinstein, ‘Military Continuities in the Rwanda State’, in: Ali Al Amin Mazrui (ed), *The Warrior Tradition in Modern Africa* (The Hague and Leiden: E.J. Brill Publishers, 1978), pp. 49-68: 62; Lemarchand, *Rwanda and Burundi*, p. 198.

<sup>1065</sup> Des Forges, *Leave None*, p. 26; Lemarchand, *Rwanda and Burundi*, p. 218; Weinstein, ‘Military Continuities in the Rwanda State’, pp. 63-64.

5.000 dead.<sup>1066</sup> That death toll of Tutsi rose to an estimated 10.000 to 14.000 after the killings had spread to other locales.<sup>1067</sup> After these massacres, the *Inyenzi* launched no other major attacks against the new Hutu regime and small-scale raids had ceased by 1967.<sup>1068</sup> At the regional level, in post-independence Zaire, anti-Tutsi – in line with a general resentment against Banyarwanda (‘Rwandans’) - sentiments were displayed. During the ‘Kanyarwanda war’ between 1963 and 1966, large-scale massacres by Congolese were reported against Tutsi as well as Hutu.<sup>1069</sup>

Already thousands of Tutsi had been killed and between 130.000 and 300.000 were reportedly forced to flee in the first years of Rwanda’s ‘first Republic’.<sup>1070</sup> Contrary to the insurgents’ objectives, the new regime only grew stronger as its ‘terrorist’ attacks made it survive its internal and regional dissensions and nurtured social cohesion among the Hutu populace.<sup>1071</sup> In the end, the ‘foreign Hamitic Monarchy’ was toppled, the colonialists had left, the majority had materialised the Social Revolution, the resistance towards it had been quashed and a new nationalism had risen. These were the ingredients of the new regime’s ideology. The Hutu democratic masses had defeated their oppressive Tutsi elites. History’s course had been turned 180 degrees and the social balance was reset. Hutu-nationalism replaced Tutsi-feudalism, but the colonial ethnic identity cards were maintained and soon ethnic quotas were introduced, marginalising Tutsi from public life.<sup>1072</sup> A master of political rhetoric and memory manipulation, Kayibanda, while facing *Inyenzi* insurgencies, had crafted a narrative that would resurface in the late 1980s and was represented in the logic of the ‘Hutu Power’ movement in the 1990s: Tutsi had provoked violence against themselves, because some were not accepting the realities of the revolution. At a certain time, Kayibanda even called Tutsi “genociders” and if they did not desist they would face the “the precipitous end of the Tutsi race.”<sup>1073</sup> In his political logic, that had earned him the presidency and legitimised his power in the first place, Tutsi remained a threat to the cause of the Hutu revolution and emancipation from feudal slavery, even despite the fact that by the end of the 1960s they posed no longer a realistic danger to the new-born Republic.<sup>1074</sup> But Kayibanda’s post-independence paranoia stretched beyond the image of returning monarchists. He also feared democratic opposition and after just three years in power, he had turned Rwanda into a *de facto* one-party state, led by his MDR-Parmehutu. His eventual downfall however, was not organised by the exiled Tutsi he feared. Rather it came from the inside.<sup>1075</sup> Like in other post-colonial African states, issues of land control, personal rivalries and regionalism were the real threats to the power. For Kayibanda, who hailed from south-central Gitarama prefecture, it was not different.

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<sup>1066</sup> Elspeth Huxley, ‘The Rise and Fall Of the Watutsi’, *The New York Times*, 23 February 1964.

<sup>1067</sup> René Lemarchand, *Rwanda and Burundi*, pp. 222-225.

<sup>1068</sup> Weinstein, ‘Military Continuities in the Rwanda State’, p. 65.

<sup>1069</sup> Lemarchand, *The Dynamics of Violence*, p. 13.

<sup>1070</sup> C.L. Sulzberger, ‘Foreign Affairs’, *The New York Times*, 6 April 1964; André Guichaoua, ‘Vers Dexu Générations de Réfugiés Rwandais? La Première Génération: Les Réfugiés Tutsi, Trente Ans Après’, in: André Guichaoua (ed.), *Les crises politiques au Burundi et au Rwanda (1993/1994)* (Karthala: Paris, 1995), pp. 339-348.

<sup>1071</sup> Lemarchand, *Rwanda and Burundi*, p. 227.

<sup>1072</sup> Lee Ann Fujii, *Killing Neighbors. Webs of Violence in Rwanda* (Ithaca & London: Cornell University Press, 2009), p. 71. Magnerella, *Justice in Africa*, 14-15.

<sup>1073</sup> Straus, *Making and Unmaking*, p. 286.

<sup>1074</sup> Kyrsten Sinem, *Who Must Die in Rwanda’s Genocide?: The State of Exception Realized* (Lenham: Lexington Books, 2015), p. 65-97.

<sup>1075</sup> Sinem, *Who Must Die in Rwanda’s Genocide?*, p. 75.

Regional events were the trigger. Reignited racial tensions and violence against Tutsi intellectuals returned in Rwanda in early 1973,<sup>1076</sup> as a reaction to the genocide against Hutu in Burundi a year before.<sup>1077</sup> Amidst the crisis, which again produced a large amount of Tutsi refugees, Juvénal Habyarimana, a Hutu from the north (Gisenyi), staged a military coup in the dry season of 1973, heralding the birth of the ‘second republic’.<sup>1078</sup>

### ***Umaganda! Habyarimana’s ‘moral revolution’***

Scattered across the neighbouring yard of his former presidential palace in Kigali, parts of a shot-down airplane are the only reminders of the second and longest sitting president of Rwanda.<sup>1079</sup> On 5 July 1973, General Habyarimana, the most senior official of the army and former Defence Minister, had come to power in a seemingly bloodless coup – although some fifty political supporters of Kayibanda were executed or died in prison.<sup>1080</sup> On the promise to establish order in the wake of anti-Tutsi violence and national unity between Hutu from the north and Hutu from the south, he was quick to establish a single-party state under the National Revolutionary Movement for Development (MRND).<sup>1081</sup> Every Rwandan, by birth and irrespective of ethnicity, religion or region, automatically became a member.<sup>1082</sup> Also, he shifted the epicentre of his power from the central south to the northeast. Ideologically, the Second Republic claimed to complete the “national” revolution of 1959 through a “moral revolution.”<sup>1083</sup> To this effect, Habyarimana, in his “responsible democracy” showed himself to be two-headed Janus. On the one hand he preached unity, reconciliation, peace and even Tutsi integration, while at the other he endorsed the seeds and fruits of the social Revolution and clung on to the fundamental idea of Hutu majority rule.<sup>1084</sup> Identity markers, however, again, proved to be elastic. Where during the Revolution and under Kayibanda’s rule the Hutu political elites perceived Tutsi as a foreign race (Hamitic Ethiopids), Habyarimana arched them into an indigenous category: an ethnic group. This shift opened up opportunities for Tutsi to participate in the political and educational spheres, yet only befitting their minority status and strictly demarcated by state through quotas.<sup>1085</sup> It was not a strict quota. Tutsi were still restricted from the highest levels of the public sector and the army,<sup>1086</sup> whereas in other sectors – commerce, NGOs and development projects they were present beyond the proportion of 9% allotted to them. Discrimination against Tutsi

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<sup>1076</sup> Tutsi were violently purged from schools and university. Several hundred Tutsi were killed. Carney, *Rwanda Before the Genocide*, pp. 184-193.

<sup>1077</sup> Between May and August 1972 and estimated 200,000 Hutu were killed. The killings sparked a refugee trek into Rwanda, adding to old fears of Tutsi insurgency and violence. See for studies on Burundi: Jean Pierre Chrétien & Jean-François Dupaquier, *Burundi 1972: au bord des génocides* (Paris: Karthala, 2007); and René Lemarchand, *Burundi: Ethnic Conflict and Genocide* (New York: Cambridge University Press, 1994).

<sup>1078</sup> ‘Military Coup in Rwanda Follows Tribal Dissension’, *The New York Times* (6 July 1973), p. 3.

<sup>1079</sup> The presidential palace, located in Kanombe, Kigali, has been turned into a museum. The physical remains of the plane that crashed and killed Habyarimana are preserved there and displayed.

<sup>1080</sup> Charles Mohr, ‘Rwanda Coup Traced to Area Rivalry and Poverty’, *The New York Times* (7 July 1973), p. 4.

<sup>1081</sup> Des Forges, *Leave None*, pp. 40-41.

<sup>1082</sup> Guichaoua, *Guerre au Genocide*, p. 41.

<sup>1083</sup> Mamdani, *When Victims Become Killers*, p. 138; Filip Reyntjens, ‘Démocratisation et conflits ethniques au Rwanda et au Burundi’, in: P. Wymeersch (ed.), *Liber Amicorum Marcel d’Herfelfelt. Essais anthropologiques* (Brussels: Institut Africain, 1993), pp. 209-227.

<sup>1084</sup> Strauss, *Making and Unmaking*, p. 287.

<sup>1085</sup> Mamdani, *When Victims Become Killers*, p. 138. From that time on identity cards would list people’s *ethnie* (Ubwoko), rather than ‘tribe’ or ‘race’.

<sup>1086</sup> According to Strauss, “officially, Tutsi’s were welcomed in the MRND and were considered citizens but without a place in the political sphere. By the 1980s, the proportion of Tutsis in secondary schools, in government positions, in salaried employment and in key sectors such as banking and insurance remained superior to their official population share. Even in the Army, there was a Tutsi colonel, two Tutsi lieutenant colonels, and other Tutsi officers. Before the crisis of the 1990s, there were token Tutsi ministers and one Tutsi prefect, even if there were no Tutsi burgomasters, who were the key local officials at the local level. Strauss, *Making and Unmaking Nations*, p. 291; Prunier, *The Rwanda Crisis*, pp. 74-76.

prevailed, but most Hutu from the south were as much discriminated against in access to schools and universities.<sup>1087</sup> On the general scheme of things, from the first years of the Second Republic, regionalism became more important than ethnicity.<sup>1088</sup> By the end of the 1980s, ethnic tensions were reported to be at its lowest since colonial times.<sup>1089</sup> At the factual levels of power, though, the top of the state machinery - or the Akazu (little house) – was exclusively Hutu and relatives and close allies of Habyarimana and all stemmed from the north.<sup>1090</sup>

Rwanda has been one of the most aided countries in the world.<sup>1091</sup> It is not a trend set in motion by the post-genocide regime. It originates from the Habyarimana times.<sup>1092</sup> In contrast to Kayibanda, Habyarimana was not living in the tunnel vision of racial revolutionarism only. He also embraced an ideology of post-colonial development. As a self-styled ‘father of the nation’, his post-revolutionary policies soon focused on national state building, education, economic growth, infrastructure and international cooperation. Playing the development game smartly, Habyarimana lured in a vast army of foreign development NGOs, comforting them with liberal policies not seen in other African countries, while at the same time shielding them off from the political and human rights arena.<sup>1093</sup> As part of what became some kind of a-political development assistance, large amounts of aid money were poured into Rwanda. Foreign currency became the magic oil of Rwanda’s economic engine, but it was attained by discourse of national ‘self-help’. In accomplishing development, Habyarimana’s post-colonial dictatorship relied on national mobilisation, participation and discipline. He perceived inactivity as a social evil.<sup>1094</sup> In his vision, Rwandans ought to take personal responsibility and to take the "revolution into one's own hands - everyone is responsible."<sup>1095</sup> “First the population must get down to work [...] Thus we shall devote each Saturday to tilling the soil with hoes in our hands,” he told a journalist from *Le Monde* in 1974.<sup>1096</sup> It quickly materialised. Embodied by the introduction and institutionalisation in 1974 of a state-led forced labour programme - *Umuganda* (communal work) – public works projects were marshalled and materialised.<sup>1097</sup> Every Saturday, one adult male per family had to participate in community labour on projects chosen by the state: campaigns to construct primary schools, offices for the communal administration and its personnel, roads, markets, or anti-erosion structures.<sup>1098</sup> Through this policy of authoritarian development, which was kept in place through hierarchal social control, particularly agricultural

<sup>1087</sup> Peter Uvin, *Aiding Violence. The Development Enterprise in Rwanda* (West Hartford: Kumarian Press, 1998), p. 35.

<sup>1088</sup> Filip Reyntjens, *L'Afrique des Grands Lacs. Rwanda, Burundi: 1988-1994* (Paris: Éditions Karthala, 1994), pp. 33-34.

<sup>1089</sup> Guichaoua, *Guerre au Genocide*, p. 44.

<sup>1090</sup> See for a schematic overview of the Habyarimana extended family: Guichaoua, Rwanda. *Guerre au Genocide*, pp. 102-104. They were closely related to the family of Felicien Kabuga: See: ‘Familles Habyarimana et Kabuga (document interne de TPIR).’ (www-document: [http://rwandadelaguerreaugenocide.univ-paris1.fr/wp-content/uploads/2010/01/Annexe\\_11.pdf](http://rwandadelaguerreaugenocide.univ-paris1.fr/wp-content/uploads/2010/01/Annexe_11.pdf), visited: 20 August, 2015).

<sup>1091</sup> Compare: Patricia Crisafulli & Andrea Redmond, *Rwanda, Inc. How a Devastated Nation Became an Economic Model for the Developing World* (New York: Palgrave Macmillan, 2012).

<sup>1092</sup> Michael T. Kaufman, ‘In Mountainous Rwanda, Foreign Aid is Crucial Import’, *The New York Times* (27 December 1976), p. 4.

<sup>1093</sup> Uvin, *Aiding Violence*, p. 176.

<sup>1094</sup> Mamdani, *When Victims Become Killers*, p. 146.

<sup>1095</sup> Straus, *Making and Unmaking*, p. 288.

<sup>1096</sup> Cited in: Mamdani, *When Victims Become Killers*, p. 146.

<sup>1097</sup> There still is a mandatory community service day from 8:00am to 11:00am, on the last Saturday of each month called “umunsi w’umuganda,” meaning “contribution made by the community which is designed to be a day of contribution and building the country by citizens themselves.”

<sup>1098</sup> Uvin, *Aiding Violence*, p. 131.

production (coffee, tea and crops) had risen dramatically, even defying famines up to the point that by the mid-1980s the population had even grown to over 8 million.<sup>1099</sup>

### ***Transitioning into state of emergency***

After two decades of economic elevation, donor-darling Rwanda spiralled into a profound economic and financial crisis from the mid-1980s. First, food production stagnated and imports could not make up for it, triggering local famines in the late 1980s. Second, coffee and tea production fared well but the world market prices declined so much that export receipts dropped dramatically and took down the purchasing power of most rural households. Third, as the other few export industries folded, the government resorted to increased borrowing and rapidly increased its foreign debts. Aggregated by civil war since October 1990 - which further strained agricultural production, displaced farmers, rendered public finances and human resources and created a need for emergency food and housing - the economy buckled to its knees.<sup>1100</sup> The donor community then forced Rwanda into a structural adjustment programme,<sup>1101</sup> which again was a radical change. On top of the economic crisis grew separate social and political crises. Bundled together they would form a bomb, ready to explode. Tensions had been building up across the country: banditry and public insubordination rose, resentment between local and urban elites increased while corruption and favouritism became notoriously common.<sup>1102</sup> This political discontent directed at least two other crises: the insurgency and war started by the Rwandan Patriotic Front (FPR) and international pressure for democratisation, free elections and reform. Together, these compressions exposed and destabilised the supremacy and privileges of the regime's dignitary inner circles, the Akazu, around President Habyarimana and his wife Agathe Kanziga.<sup>1103</sup> Faced with internal political party opposition and external political military opposition, their position was tumbling and radical elements among them embarked, as part of panicked crisis management, on a series of decisions, actions and strategies to retain power, including the murder of Tutsi civilians.<sup>1104</sup>

### ***Diaspora, insurgency and guerrilla***

A chief component of the accumulating calamities was the resurfacing eruption of an old problem that had been breeding in Rwanda's neighbouring countries for two decades: over half a million Tutsi refugees<sup>1105</sup> who had fled during three earlier waves of violence (1959-61, 1963-4 and 1973).<sup>1106</sup> Over the years, they had grown into a community of nationless *Banyarwanda*. Within the Great Lakes

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<sup>1099</sup> Cited in: Mamdani, *When Victims Become Killers*, p. 145.

<sup>1100</sup> Uvin, *Aiding Violence*, pp. 53-57.

<sup>1101</sup> World Bank, *Report and Recommendation of the President of the International Development Association to the Executive Directors on a Proposed Credit of SDR 76.5 Million to the Rwandese Republic for a first Structural Adjustment Program* (P5544; 29 May 1991).

<sup>1102</sup> Straus, *Unmaking*, 292; Melvern, *A People betrayed*, pp. 39-49.

<sup>1103</sup> Guichaoua, *From War to Genocide*, pp. 49-52

<sup>1104</sup> *Ibidem*, pp. 332-333.

<sup>1105</sup> There is absolutely no consensus on the real number as official statistics are unavailable or tainted, with estimates going up into the million. See the discussion in: Mamdani, *When Victims Become Killers*, 317-8, note 2. A somehow conservative, but median estimate comes from: Catherine Watson, *Exile from Rwanda: Background to an Invasion* (US Committee for Refugees, 1991).

<sup>1106</sup> These were the largest waves of refugees fleeing Rwanda.

Region they had meanwhile made up an “ethnic” group in itself, often uprooted, discriminated against and persecuted outside of Rwanda.<sup>1107</sup> They were Kinyarwanda-speaking Rwandans without a national home. In the course of years, intelligentsia among the exiles had developed a political diaspora - including some high-level Hutu dissidents – next to the much larger cultural diaspora of Banyarwanda, which also includes the non-refugees such as residents and migrants.<sup>1108</sup> From the earlier 1980s onwards, Habyarimana’s ultimate fiasco was his mishandling of the question of these Rwandans living outside Rwanda, their desire for repatriation and their true possible homecoming. The key failure was that he did nothing and when he did act, it was only half-heartedly or already too late. His categorical Malthusian policy was based on a meek pretext: ‘there was no more space in overpopulated Rwanda.’<sup>1109</sup> Referring back to the 1960 *Inyenzi* raids, in public statements he uttered, “Tutsis could come back to Rwanda, but not by *violence*” and he rather encouraged many to assimilate into their host countries.<sup>1110</sup> Some had integrated into societies elsewhere, of course, but other exiles, principally those in Uganda, had organised in political associations such as the Rwandese Refugee Welfare Foundation. Set up in 1979, the Rwandese Alliance for National Unity (RANU) was their offspring, a clique that was openly discussing the question of return of exiles to Rwanda.<sup>1111</sup> Return became a necessary discourse from the late 1980s, mainly stirred-up by political winds from Kampala against the Rwandans.<sup>1112</sup> Although many of the refugees, including Fred Rwigyema and Paul Kagame, had joined Yoweri Museveni’s victorious National Resistance Army (NRA) and had worked their way up to minister of defence and acting chief of intelligence respectively,<sup>1113</sup> they saw themselves compelled to pick between forced naturalisation in Uganda or take up arms and go back to Rwanda. Meanwhile, presided over by a Hutu and joined by other Hutu opponents of Habyarimana<sup>1114</sup> but predominantly a Tutsi organisation, RANU had rechristened into the Rwandan Patriotic Front (RPF)<sup>1115</sup> in 1987 and Kagame was on his way for military training in the USA.<sup>1116</sup>

Rwanda’s violent state of emergency was heralded by an armed rebel invasion from Uganda.<sup>1117</sup> In the afternoon of 28 September 1990, Habyarimana was in New York, at the UN General Assembly. After elaborately lamenting Iraq’s “illegal occupation and aggression” in Kuwait

<sup>1107</sup> Both Hutu and Tutsi – or related peoples like the Banyamulenge - have been targets in bordering countries. The problem remains up to the present day: Lemarchand, *The Dynamics of Violence*, pp. 12-29; Réne Lemarchand, ‘The Politics of Memory in the Great Lakes Region, *NIOD Lecture in Holocaust and Genocide Studies 2013* (Amsterdam: NIOD Institute for War-, Holocaust- and Genocide Studies, 2013).

<sup>1108</sup> Mandani, *When Victims Become Killers*, pp. 159-166.

<sup>1109</sup> Philip Verwimp, ‘Development Ideology, the Peasantry and Genocide: Rwanda represented in Habyarimana’s Peaches, Working Paper 13. Genocide Studies Program, Yale University (1999), p. 6.

<sup>1110</sup> Straus, *Making and Unmaking*, p. 290.

<sup>1111</sup> Mandani, *When Victims Become Killers*, p. 166.

<sup>1112</sup> Waugh, *Paul Kagame and Rwanda*, pp. 39-41.

<sup>1113</sup> They had assisted Museveni in the guerrillas he led against the regime of President Milton Obote (July 1985-December 1980) and Tito Okello (July 1985 - January 1986).

<sup>1114</sup> Other prominent Hutu’s in the RPF were: Pasteur Bizimungu, the first post-genocide President of Rwanda and married to Kayibanda’s daughter, Colonel Alexis Kanyarengwe, who participated in the 1973 coup that allowed Habyarimana to power and. Theoneste Lizinde, former head of security.

<sup>1115</sup> Its mission statement was “the liberation of the Rwandan people from ignorance, poverty and dictatorship to achieve his own development” and it advocated a “multi-ethnic democracy” and opposed the “corrupt and tribalist regime” of Habyarimana. Its eight-point charter highlight the ideological background: the restoration of national unity; building a true democracy; the establishment of an economic system based on national resources; the fight against corruption, mismanagement of public affairs and misappropriation of public funds; safeguarding the security of persons and their property; the final settlement of the causes of the refugee problem; social welfare of the masses; the reorientation of foreign policy of Rwanda. See: Assemblée Nationale, *Rapport D’Information*, pp. 121-123.

<sup>1116</sup> Waugh, *Paul Kagame and Rwanda*, p. 42.

<sup>1117</sup> Uganda’s President, Yoweri Museveni, would recount how he had always supported the RPF: ‘Museveni: How I supported RPF in Rwanda’s 1994 liberation war’, *The Observer*, 18 January 2015.

and the “inter-ethnic fratricidal war in Liberia,” he only hastily touched upon the problem that would change the course of his regime only a few days later:

No less important than the problems I have already mentioned is that of my compatriots living outside Rwanda. As I have repeatedly said, the question of Rwandese refugees is primarily the responsibility of the Government and the people of Rwanda. However, in the light of its well-known problems, including those due to the small size of its territory and its population, Rwanda cannot by itself resolve this thorny and painful problem. We renew our appeal to the international community to find a solution along three lines: voluntary repatriation, naturalisation in the host country, also voluntary, and freedom of residence.<sup>1118</sup>

Habyarimana had stayed in New York for some days. On 1 October, he attended a UNICEF conference and banquet on children’s issues in the Third World, ironically together with Ugandan President Museveni. There he received the news that some hundred men, led by Museveni’s recently sacked Deputy Defence Minister Rwigyema, coming in from Uganda, attacked his country.<sup>1119</sup> Benefitting from the act of surprise and a weak reaction by the Rwandan Armed Forces (FAR), the first RPA<sup>1120</sup> insurgents managed to push all the way through to Gabiro, 90 kilometres from Kigali.<sup>1121</sup> Soon joined by other Rwandans and dubbing themselves *Inkotanyi* (“those who complete” in Kinyarwanda), the RPF band had bet on a quick victory, erroneously relying on massive support of the population. But already in the second day, Rwigyema and two of his top lieutenants were killed. Soon backed by a French intervention force (*Opération Noroît*), the FAR pursued the RPF back into Akagera National Park. In the north western Virunga forests, the RPF, now led by Paul Kagame who had quickly returned from his trainings in the USA on 14 October, regrouped and recruited new fighters from the region. From thereon, the RPF embarked on guerrilla warfare.<sup>1122</sup> The scramble for Rwanda had started and plunged the country into a low-intensity war, low- and large-scale abuses and, at its height, mass annihilation. Despite the presence of Ugandan and Zairian elements in the RPF, by all means, it was a Rwandan war. Rwandans were fighting Rwandans. It would fundamentally change all those who took part in it: the RPF went to war as an army of liberation<sup>1123</sup> and came out of it as an army of occupation while the Habyarimana regime entered the war pledged to a policy of reconciliation and out of it pledged to uphold Hutu Power.<sup>1124</sup>

### 4.3 Revitalising Hutu narratives

The first casualty of war is truth. Fighter’s statements, public rumours, half-truths, lies and political propaganda substitute it and start to take a life on their own. All parties to a conflict bend it in such a

<sup>1118</sup> UNGA, *Forty-fifth Session: Provisional Verbatim record of the Thirteenth Meeting* (A/45/PV.13; New York, 28 September 1990), p. 16.

<sup>1119</sup> See for a detailed account of war-related events in October 1994: *Reyntjens, L’Afrique des Grands Lacs*, pp. 89-103.

<sup>1120</sup> The military branch of the RPF was named RPA (Rwandan Patriotic Army) but in fact the term was hardly used.

<sup>1121</sup> Assemblée Nationale, *Rapport D’Information*, pp. 122-143.

<sup>1122</sup> Gérard Prunier, *The Rwanda crisis. History of a genocide* (London 1995), pp. 93-108; André Guichaoua, *Les antécédents politiques de la crise rwandaise de 1994, Rapport d’expertise rédigé à la demande du Tribunal pénal international des Nations Unies sur le Rwanda, Arusha* (April 1997); Assemblée Nationale, *Rapport D’Information*, pp. 122-143.

<sup>1123</sup> In fact, the RPF continued to cultivate its image as an army of liberators. Republic of Rwanda, ‘History’ ([www-text: http://www.gov.rw/home/history/](http://www.gov.rw/home/history/)), last visit 14 September 2016).

<sup>1124</sup> Mamdani, *When Victims Become Killers*, p. 185.

way that is most beneficial to their cause: winning. A reality is that winning – but also losing<sup>1125</sup> - often requires sacrifices: civilians. So was the case in the hills of Rwanda. Habyarimana and his entourage pulled an old trick from the box. Like Kayibanda, when faced with attacks from *Inyenzi* in the 1960s, he found in the RPF attacks an opportunity to rally Rwandans against an ‘infiltrating enemy’ and consolidate them behind his MRND. It could possibly reconstitute the crumbling national (Hutu) cohesion and his power base. In so doing, he chose to sacrifice the Tutsi.<sup>1126</sup> His deception was an RPF attack in Kigali, on 4 October 1990. In what appears to have been a staged event,<sup>1127</sup> the attack gave him the pretext to massively jail *ibytso* (accomplices), Tutsi<sup>1128</sup> dissident Hutu as well as foreigners, all accused of somehow supporting the rebels.<sup>1129</sup> Most detainees were brutalised in deplorable prison conditions.<sup>1130</sup> On at least 17 occasions in various communes, between October 1990 and January 1993, an estimated 2.000 Tutsi were massacred.<sup>1131</sup> On 8 October 1990, soldiers from the Rwandan Armed Forces (FAR) murdered at least 65 Hima in Mutara (Savannah in North-east Byumba).<sup>1132</sup> The second killing spree took place in Kibilira commune (Gisenyi) ten days after the staged attack. In 48 hours, at the instigation of local authorities, ‘civil defence’ groups killed 348 people and burnt more than 550 houses. Nineteen people were killed in the neighbouring commune.<sup>1133</sup> Pogroms continued throughout 1991 and 1992 into 1993 in various communes in north-western Rwanda. Between January and March 1991, an estimated 300 to 1.000 Bagogwe Tutsi were massacred in Gisenyi and Ruhengeri, following a major RPF offensive in the area at the end of January.<sup>1134</sup> A year later, in March 1992, Bugesera (south-central Rwanda) was the scene of bloodbaths. Reportedly, following radio broadcasts that ‘warned’ of an imminent plot by Tutsi to kill Hutu leaders, civilian Hutu killed a reported 277 Tutsi.<sup>1135</sup> On the side of the RPF – which had hindered a human rights probe in 1993 – abuses were reported as well, including killing of civilians, executions, abductions, pillage and forced displacement.<sup>1136</sup>

### ***‘Do not let yourselves be invaded’***

Like a drumbeat, stories of imminent danger travelled across the hills in Rwanda. Many of the outbursts of violence against civilians since the start of the war followed a same kind of pattern, even traceable farther back in history:<sup>1137</sup> rumours emerge that Tutsi have killed or are planning to kill

<sup>1125</sup> See for this argument: De Swaan, *The Killing Compartments*, p. 112. De Swaan argues, in the case of Rwanda, that the Hutu regime became powerless to expel the RPF. Instead of facing defeat, they embarked on annihilating, to the last soul, their enemies as a grand victory in the face of history. De Swaan calls this specific mode of mass annihilation: a *losers' triumph*, a delirium of annihilation at the time of imminent military defeat.

<sup>1126</sup> A radical break was that the authorities also included Hutu (those opposing Habyarimana's) among the ‘accomplices’. *Des Forges, Leave None*, p. 50.

<sup>1127</sup> Guichaoua, *From War to Genocide*, p. 34.

<sup>1128</sup> 90 % of those arrested were reported to be Tutsi: André Guichaoua, Rwanda. *De la Guerre au Genocide. Les Politiques Criminelles au Rwanda* (1990-1994) (Paris 2010), p. 77.

<sup>1129</sup> *Des Forges, Leave None*, pp. 48-49; Assemblée Nationale, *Rapport D'Information*, pp. 82-84.

<sup>1130</sup> See for more details: Straus, *The Order of Genocide*, 192-195; Guichaoua, *De la Guerre au Genocide*, p. 79.

<sup>1131</sup> Out of 17 incidents of serious violence in the 1990-93 period, 14 took place in Gisenyi or Ruhengeri. *Des Forges, Leave None*, pp. 87. Also see the map of principal massacres in: *Reyntjens, L'Afrique des Grands Lacs*, p. 186.

<sup>1132</sup> Philip Verwimp, ‘The 1990-92 Massacres in Rwanda: A Case of Spatial and Social Engineering?’, *Journal of Agrarian Change*, Vol. 11, No. 3 (July 2011), pp. 396-419: 402; Prunier, *History of a Genocide*, p. 102.

<sup>1133</sup> A handful of massacres would follow in the same locality. FIDH et al., *Report of the International Commission of Investigation*, p. 13; Straus, *Making*, 293.

<sup>1134</sup> FIDH et al., *Report of the International Commission of Investigation*, pp. 17-23.

<sup>1135</sup> *Ibidem*, pp. 25-27.

<sup>1136</sup> *Des Forges, Leave None*, p. 701.

<sup>1137</sup> Also see the table on ‘historical patterns of violence’, in: Straus, *The Order of Genocide*, p. 198.

Hutu; ideologues and the rural elite animate meetings at massacre sites; burgomasters mobilise their *conseillers*; death squads (residents, sometime accompanied by soldiers and increasingly *Interahamwe*) are dispatched to hunt, pillage and kill; authorities react slow, weak and unconcerned; culprits are arrested but the majority of cases is quickly dropped.<sup>1138</sup> Driven by mechanics of uncertainty and insecurity, the violence by ‘civil defence’ groups appeared as self-defence, retaliation, deterrent and ethnic rebalancing. In the process, civilian Tutsi became an integral part of the perceived rebel threat. All Tutsi soon “stood in for the actions of few.”<sup>1139</sup> This became vehemently apparent in the political language surrounding the violence. It was filled with historical analogies and references, pitting Hutu against Tutsi.<sup>1140</sup> The term *Inyenzi* immediately resurfaced (now meaning cockroach equated with the RPF) prior to a massacre, reinforcing the fear of raids by Tutsi exiles in the 1960s.<sup>1141</sup> It was a discourse that trickled down from the central government all the way into the communes and cells. Habyarimana had already linked the RPF to ‘the Monarchy’, saying that “rather than giving up a single inch of our territory in response to a *fait accompli* from these deserters of a foreign army, the Rwandan people – all of us – [...] we will fight to the last man before allowing our country to be destroyed and the return of a feudal, elitist and royalist regime.”<sup>1142</sup> Reports circulate, that in the lead-up to massacres, certain ‘ideologues’ animated sentiments against Tutsi, embarking on the ‘anti-royalist’ and ‘threat-to-the-revolution’ discourse. Prior the massacre in Bugesera, for example, journalist and editor of *Kangura* newspaper Hassan Ngeze, was reported to have travelled through the prefecture to “distribute anti-Tutsi tracts.”<sup>1143</sup> Better known to students and scholars of Rwanda - as it is the only one that is preserved in its entirety-<sup>1144</sup> is a November 1992 speech by Léon Mugesera. The political scientist (PhD) and freshly elected vice-chairman of the MRND in Gisenyi prefecture told a crowd of MRND ‘militants’ in Kabaya commune:<sup>1145</sup>

[...] that you should not let yourselves be invaded [...] for our peace, there is no way to have it but to defend ourselves [...] I tell you that the Gospel has changed in our movement: if someone strikes you on one cheek, you hit them twice on one cheek and they collapse on the ground and will never be able to recover! [...] Something else which may be called "not allowing ourselves to be invaded" in the country, you know people they call "Inyenzis" (cockroaches), no longer call them "Inkotanyi" (tough fighters), as they are actually "Inyenzis". These people called Inyenzis are now on their way to attack us. [...] Are we really waiting till they come to exterminate us? [...] we must do something ourselves to exterminate this rabble. I tell you in all truth, as it says in the Gospel, "When you allow a serpent biting you to remain attached to you with your agreement, you are the one who will suffer [...] they

<sup>1138</sup> Philip Verwimp, ‘The 1990–92 Massacres in Rwanda: A Case of Spatial and Social Engineering?’, *Journal of Agrarian Change*, Vol. 11, No. 3 (July 2011), pp. 396–419: 411; FIDH et al., *Report of the International Commission of Investigation*, p.11.

<sup>1139</sup> Straus, *The Order of Genocide*, pp. 198-199.

<sup>1140</sup> Newbury ‘Ethnicity and the Politics of History in Rwanda’, pp. 7-24.

<sup>1141</sup> FIDH et al., *Report of the International Commission of Investigation*, p.12.

<sup>1142</sup> Cited in: Straus, *Making and Unmaking*, p. 294.

<sup>1143</sup> FIDH et al., *Report of the International Commission of Investigation*, p. 26.

<sup>1144</sup> Mr. Mugesera was on trial on Rwanda, on charges of genocide related to his famous speech. In 2012, he was extradited from Canada, where had sought refuge in 1993 and had been living ever since. To date, the most reliable information stems from a long court case against him in Canada, its judgement includes the best quality translated transcript from the oral speech he made on 22 November 1992 of which only an audio cassette recording was made. See: J. A.. Décaré, J.A. Létourneau & J.a. pelletier, *Between: The Minister of Citizenship and Immigration and Léon Mugesera, Gemma Uwamariya, Irénée Rutema, Yves Rusi, Carmen Nono, Mireille Urumuri and Marie-Grace Hoho: Judgement* (Case Nos. A-316-01 / A317-01: Ontario, 8 September 2003), §15-17. Also see: *Des Forges, Leave None*, p. 84.

<sup>1145</sup> He announced to discuss four topics: “kicks by the dying MDR”; “we should not allow ourselves to be invaded, whether here where we are or inside the country”; “the way we should act so as to protect ourselves against traitors and those who would like to harm us.” He omitted the fourth point. Décaré, Létourneau & Pelletier, *Judgement*, §15-17.

only want to exterminate us: they have no other aim. [...] They attacked the homes and killed people. [...] we must defend ourselves. [...] we must wake up! [...] "Unite!" [...] As they intend to cut our necks, let them bring (money) so [[we can defend ourselves by cutting their necks]]! Remember that the basis of our Movement is the cell, that the basis of our Movement is the sector and the Commune. [...] If anyone penetrates a cell, watch him and crush him: if he is an accomplice do not let him get away! Yes, he must no longer get away! [...] the most essential is that we should not allow ourselves to be invaded, lest the very persons who are collapsing take away some of you. Do not be afraid, know that anyone whose neck you do not cut is the one who will cut your neck. [...] Another important point is that we must all rise, we must rise as one man [...] if anyone touches one of ours, and he must find nowhere to go. Recently, I told someone who came to brag to me that he belonged to the P.L. - I told him "The mistake we made in 1959, when I was still a child, is to let you leave". I asked him if he had not heard of the story of the Falashas, who returned home to Israel from Ethiopia? He replied that he knew nothing about it! I told him "So don't you know how to listen or read? I am telling you that your home is in Ethiopia, that we will send you by the Nyabarongo so you can get there quickly [...]"<sup>1146</sup>

In the speech - so abridged some human rights *enquêteurs*, observers, academics and legal practitioners later - Mugesera spelled out the typical pro-Habyarimana and anti-RPF propaganda.<sup>1147</sup> Also it would be a prime ingredient of the dominant narrative on the 1994 genocide and interpreted as an indicator of national planning. His commanding refrain was: "do not let yourself be invaded."<sup>1148</sup> Others, including the UN tribunal that would adjudicate the matter, argued that in his speech he "called for the extermination of the Tutsi and the assassination of Hutu opposed to the President."<sup>1149</sup> Acutely alarming in his speech was the apparent insinuation - through an analogy of the encounter he had with a political opponent from the Liberal Party whom he held to be Tutsi - to the idea that Tutsi came from Ethiopia and that after they had been killed, they should be thrown into the tributaries of the Nile, so that they should return to where they are supposed to have come from. In his improvised political *animation*, he pitches in other historical allusions, like the equation of the RPF with *Inyenzi*. Mixed with his petition to "not be afraid", "unite", "rise", "defend ourselves" and above all "not be invaded", he urges reprisal, unity and self-defence.<sup>1150</sup> The fact that a month after his speech, parts of which were reportedly broadcasted on radio and printed in a newspaper, new massacres occurred, has led many to believe that there was a causal relation between the speech and the killings as assailants were reportedly citing phrases from the speech to legitimise their actions.<sup>1151</sup>

At the time, even the Rwandan judiciary, led by a Minister from the opposition *Parti Libéral* (PL), found that Mugesera made an inflammatory speech that could set citizens against each other and even trigger "disturbances in the Republic's territory" and called for his arrest three days later because he had "damaged the security of the state."<sup>1152</sup> From the speech, on the one hand, emerges, directly and

<sup>1146</sup> Calibrated from the full text: Décary, Létourneau & Pelletier, *Judgement*, §15-17.

<sup>1147</sup> Mugesera was convicted by a Rwandan court for incitement to commit genocide for his 1992 speech. Ivan R. Mugisha, 'Rwandan court sentences former don to life for genocide' *The East African*, 16 April 2016.

<sup>1148</sup> *Des Forges, Leave None*, pp. 48-49; Straus, *The Order of Genocide*, pp. 195-197.

<sup>1149</sup> UNICTR, *Akayesu Judgement*, §100.

<sup>1150</sup> Straus, *Making and Unmaking*, p. 197.

<sup>1151</sup> FIDH et al., *Report of the International Commission of Investigation*.

<sup>1152</sup> Létourneau, & Pelletier, *Judgement*, §227-236.

indirectly, a call on his MRND audience to take the law into its own hands and defend Rwanda from ‘infiltrations’ and ‘attacks’ by forces controlled from the outside (RPF). A Rwandan court, in 2016, convicted him of incitement to commit genocide and persecution.<sup>1153</sup> On the other hand, he also identifies and warns for the dangers from the inside. He starts his talk with lamenting the MDR party, but also balks at the PL and PSD.<sup>1154</sup> These political opponents, which had become part of a coalition government and started talks with the RPF (see below) and whom he easily also equates with *Inyenzi*, had been ‘invading’ the MRND, posed a threat to Hutu unity but most importantly to President Habyarimana.

### ***Multiparty-ism, political calamity and radicalism***

Mugesera’s oration reveals a political mind state of calamity, confusion and imaginably also anxieties. Full authority was slithering out of the hands of Habyarimana’s MRND like a roller ball and its protagonists faced an existential political watershed, already stemming from a tidal change set in motion in mid-1990.<sup>1155</sup> Several months ahead of the RPF attack in October 1990, Habyarimana had bowed to post-Cold War international and national calls for reform to (re) inaugurate multiparty-ism.<sup>1156</sup> Even his model-state for African development – which was built on apolitical aid - had to face the newly furnished moral conditions by Western donor states, including from its staunchest supporter France. Democracy, liberalisation and human rights became the tropes of the post-communist political order and development industry.<sup>1157</sup> This chorus was joined throughout Africa by internal calls for opening up political space, including in Rwanda. Habyarimana, who was sensitive to the idea that he could not halt a democratic transition, tried to administer the reform process by himself in order to show the people he was a reborn democrat.<sup>1158</sup> Conscious that democracy would ultimately mean the demise of his 17-year old authoritarian legacy, he desired to go slow and appoint his henchmen in key commissions that would lead the democratic turn.<sup>1159</sup> But the tide was turning more quickly. With the RPF pressuring the regime from the outside and the massive arrests just after the start of the war, in-house antagonists demanded more rapid transformation.<sup>1160</sup> Habyarimana caved in and only eleven months later, the regime legalised, through the constitution, political parties other than the MRND.<sup>1161</sup> A dozen parties emerged.<sup>1162</sup> Amongst the most important opposition groups were the Democratic Republican Movement (Mouvement Démocratique Républicain, MDR), Social Democratic Party

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<sup>1153</sup> Rodrigue Rwirahira, ‘Leon Mugesera gets life term for Genocide crimes’, *The New Times*, 16 April 2016.

<sup>1154</sup> “The first point I would like to submit to you, therefore, is this important point I would like to draw to your attention. As MDR, PL, FPR and the famous party known as PSD and even the PDC are very busy nowadays, you should know what they are doing, and they are busy trying to injure the President of the Republic, namely, the President of our movement, but they will not succeed. They are working against us, the militants: you should know the reason why all this is happening: in fact, when someone is going to die, it is because he is already ill!”

<sup>1155</sup> Guichaoua, *From War to Genocide*, pp. 39-61.

<sup>1156</sup> On 1 July 1990 he announced he would work towards a new constitution that included democratic reforms. Reyntjens, *L’Afrique des Grands Lacs*, pp. 90-91.

<sup>1157</sup> Fujii, *Killing Neighbors*, pp. 46-47.

<sup>1158</sup> *Ibidem*, p. 47.

<sup>1159</sup> Guichaoua, *From War to Genocide*, pp. 41-42.

<sup>1160</sup> Des Forges, *Leave None*, p. 51.

<sup>1161</sup> “Political parties fulfilling the legal conditions shall concur to the expression of suffrage. They shall be formed and shall exercise their activities freely provided that they respect democratic principles and not infringe upon republican form of government, national territorial integrity, and the security of the State.” *Constitution for the Republic of Rwanda* (30 May 1991), art. 7.

<sup>1162</sup> Prunier, *The Rwanda Crisis*, 121-127; Guichaoua, *Guerre au Genocide*, pp. 94-96.

(Parti Social Démocrate, PSD), Liberal Party (Parti Libéral, PL) and the Democratic Christian Party (Parti Démocrate Chrétien, PDC).<sup>1163</sup> Whereas the centre-right, urban-based PL attracted business people and well-to-do Tutsi, the strongest opposition came from a party that celebrated the accomplishments of the Hutu revolution: the MDR.<sup>1164</sup> Basically a reincarnation of Kayibanda's MDR-PARMEHUTU,<sup>1165</sup> the new party – with a strong base in central and south Rwanda - publicly presented itself as a non-ethnic 'Rwandan' party fighting against the corrupt northern Gisenyi mafia,<sup>1166</sup> while at the core remained faithful to the triumphs of the 1959 Revolution.<sup>1167</sup>

With the outbreak of the tit-for-tat armed engagement with the RPF, Habyarimana's logic had become to remobilise the Hutu people from the countryside and consolidate the opposition against the common enemy embodied by the RPF.<sup>1168</sup> Framing the insurgency as a racial and ethnic war and using its well-organised 'retaliatory' massacres against Tutsi, the regime hoped to characterise any further moves toward democratisation as a "slide toward anarchy" and refocus on the real enemy.<sup>1169</sup> On the other hand, the regime was using the war and its accompanied state of emergency as a pretext to silence the freshly arisen opposition - through mass arrests and political assassinations of Hutu *moderates* – those who did not subscribe to the hard-line. Massacres were performed to instil fear into civilians (*paysants*) and signal they should not allow themselves to become victims (i.e. 'members' "to be invaded" in Mugesera's language) of a new political order ran by so-called 'accomplices.' The strategy had worked for a while, with the MDR nominally aligning itself to the MRND's stance towards the insurgency. But soon, the moderates saw through the regime's tactics in thwarting reforms. Now working together as a common front against the regime, the opposition organised mass street parades in January 1992 that forced Habyarimana to agree to a new cabinet under a MDR Prime Minister in April, a month after the start of the Bugesera massacres. As part of larger agenda on reforms of the coalition,<sup>1170</sup> official peace talks with the RPF would deepen the political crisis.

Yet, as the negotiations for the coalition government had been going on, a group of 51 Hutu, allegedly close to the Akazu, established a new party, the Coalition for the Defence of the Republic (Impuzamugambi Ziharanira Repubulika; Coalition pour la Défense de la République, CDR). It was not included in the coalition government. Its manifesto, alongside a membership application form, was published in a special issue of *Kangura*; the extremist glossy newspaper ran by one of the CDR's founding members Hassan Ngeze, which in 1990 had published the infamous Hutu Ten Commandments.<sup>1171</sup> Under the motto of "unity and solidarity," the party's statute spoke of the "need

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<sup>1163</sup> Des Forges, *Leave None*, p. 51.

<sup>1164</sup> Prunier, *The Rwanda Crisis*, pp. 124-125; Straus, *Making and Unmaking*, p. 297.

<sup>1165</sup> In March 1991, its protagonists published "an appeal for the recreation of the Mouvement Démocratique Républicain n(MDR)". See: Prunier, *The Rwanda Crisis*, p. 122.

<sup>1166</sup> Fujii, *Killing Neighbors*, p. 48.

<sup>1167</sup> Straus, *Making and Unmaking*, p. 298.

<sup>1168</sup> Guichaoua, *From War to Genocide*, p. 40.

<sup>1169</sup> Fujii, *Killing Neighbors*, pp. 49; 51; Prunier, *The Rwanda Crisis*, p. 144.

<sup>1170</sup> Out of seven objectives, "negotiating peace", "assuring national security" and "settling the refugee problem" related to the civil war. Reyntjens, *L'Afrique des Grands Lacs*, p. 111.

<sup>1171</sup> 'Coalition pour la Défense de la République: Manifeste-Programme Politique., *Kangura. Spécial: Manifestes et Statuts* (no date; 1992), p. 10.

to preserve the gains of the 1959 Social Revolution” and the concern “to reinforce the unity of the popular masses.”<sup>1172</sup> Positioned on the far right side of the MRND – and sometimes dubbed the “Akazu-MRND” the CDR became the regime’s radical proxy.<sup>1173</sup> Although they were officially separated and openly criticising each other, the CDR existed “to state positions favoured by the MRND but too radical for them to support openly.”<sup>1174</sup> Thus, with its conservative ideology and racist lexicon, the protagonists of the emerging Hutu Power movement built its own political institutions: a political party, a radio station (*RTL*), a newspaper (*Kangura*) and a youth militia (*Impuzamugambi*). At the same time, it sought to expand through control over the existing state institutions of power: the media of the ruling party and its armed groups, including the Army, the Presidential Guard and the MRND’s youth movement (*Interahamwe*).<sup>1175</sup>

### ***Defining the enemy***

All these political struggles and changes did not occur in a vacuum. The country was still engaged in a contained low-scale war. Despite a Zairian brokered cease-fire in 1991,<sup>1176</sup> low-intensity military operations had continued but neither the RPF nor the FAR was gaining real advantages.<sup>1177</sup> So far, the main consequence of the sporadic raids and fighting was a massive displacement of populations, particularly Hutu farmers fleeing RPF-controlled areas. More distracting and disturbing than the conventional war between the two armies was the political violence and state-controlled massacres of civilians.<sup>1178</sup> The demarcation lines between the authorities and its enemies became clearer and clearer. By the end of 1991 – over a year after the start of the war and a handful of pogroms – a ten-member military commission, appointed by Habyarimana and led by Colonel Théoneste Bagosora,<sup>1179</sup> defined its enemy and its partisans:<sup>1180</sup>

1. The primary enemy are the extremist Tutsi within the country and abroad who are nostalgic for power and who have NEVER acknowledged and STILL DO NOT acknowledge the realities of the Social Revolution of 1959, and who wish to regain power in RWANDA by all possible means, including the use of weapons.

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<sup>1172</sup> See: ‘Coalition pour la Defense de la République’, p. 3-7; UNICTR, *Nahimana, Barayagwiza & Ngeze Judgement*, §83.

<sup>1173</sup> Guichaoua, *From War to Genocide*, p. 352.

<sup>1174</sup> *Des Forges, Leave None*, p. 53.

<sup>1175</sup> Mandani, *When Victims Become Killers*, p. 209.

<sup>1176</sup> *The N’sele Ceasefire Agreement Between The Government Of The Rwandese Republic And The Rwandese Patriotic Front, As Amended At Gbadolite, 16 September 1991, And At Arusha, 12 July 1992*.

<sup>1177</sup> See map of RPF positions between 1990-1993: Reyntjens, *L’Afrique des Grands Lacs*, p. 92.

<sup>1178</sup> Prunier, *The Rwanda Crisis*, p. 136.

<sup>1179</sup> Guichaoua, *From War to Genocide*, pp. 37-40.

<sup>1180</sup> On 4 December 1991, President Habyarimana set up a military commission with the mandate “to further study and respond to the question: What must be done in order to defeat the enemy militarily, in the media, and politically”. Théoneste Bagosora chaired the commission, which sat until about 20 December 1991. The report was originally given limited distribution. However, on 21 September 1992, the Rwandan chief of staff, Déogratias Nsabimana, sent a letter to all OPS Sector Commanders units, enclosing excerpts of the report (it is only the second part of a six-part report, which has never been fully produced at the ICTR). The commanders were asked to “circulate this document widely, highlighting in particular the chapters concerning the definition, identification and recruiting grounds of the enemy”. UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Judgement*, §227; Thierry Cruvellier, ‘Brainless Genocide’, in: Gargot, Christophe, Sylvie Lineperg & Thierry Cruvellier (eds), *Arusha to Arusha* (DVD/Book: Paris 2011), pp. 58-74: 61.

## 2. Enemy supporters are all who lend support to the primary enemy. [...]”<sup>1181</sup>

According to the Rwandan military experts at the time, the enemy and its supporters were essentially recruited among Tutsi refugees, the National Resistance Army (in Uganda), the Tutsi from inside, the disgruntled Hutu of the regime in place, the unemployed from inside and outside Rwanda, foreigners married to Tutsi women, the Nilo-Hamitic peoples from the region and criminals on the run.<sup>1182</sup> Not to be confused with the enemy or its supporters, added the commission, were “political opponents who desire power or peaceful and democratic change in the current political regime in Rwanda.”<sup>1183</sup> After the genocide in 1994, the commission was often compared, even by UN investigators and prosecutors,<sup>1184</sup> to the Nazi’s 1942 Wannsee Conference and its report taken into account as a document that shows not only genocidal intent but also prior planning.<sup>1185</sup> For some observers, talking about “Tropical Nazism”, it fitted perfectly in the analogy to the Holocaust and the persecution of European Jews from the 1930s onwards.<sup>1186</sup> Undoubtedly, and as will transpire in detail below, the document became a central issue in debates on the alleged planning and the conspiracy to carry out genocide.<sup>1187</sup> The text was drafted in 1991 by a commission of ten prominent military men<sup>1188</sup> on the request of Habyarimana and sought to answer the question “how to vanquish the enemy in the military, media and political domains.”<sup>1189</sup> In questioning if the so-called “enemy report” was drawn up with an intent that resonates the language of the genocide convention, one recent understanding of the report is that it represents, at minimum, that the military elites in the 1990s perceived the RPF attacks through the discursive and political lens of the 1959 Social Revolution. Its discourse uncovers a historical logic that Tutsi (RPF) in the present wants the same as the Tutsi (unwinnable *Inyenzi*) from the past. And to that effect, Straus claims, thirty years later the new war was still perceived and pitted as one “between those who would take away Hutu freedom and those who would protect it.”<sup>1190</sup>

<sup>1181</sup> Cited as translated in: UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Judgement*, §202; Straus makes the following, more direct, translation: “The principal enemy is the Tutsi on the inside or outside [who is] extremist and nostalgic for power, who NEVER recognized and STILL DOES NOT recognize the realities of the Social Revolution of 1959 and who wants to reconquer power in Rwanda by any means, including arms. 2. The partisan of the ENI is any person who helps the principal ENI.” Straus, *Making and Unmaking*, p. 296. Excerpts of the documents itself, produced by the ICTR and published by André Guichaoua, are available online: ‘Extraits du rapport *Définition et Identification de l’ENI [Ennemi]*, document attaché à la lettre de Nsabimana a Liste A 21 septembre 1992’ (www-text: [http://rwandadelaguerreaugenocide.univ-paris1.fr/wp-content/uploads/2010/01/Annexe\\_7.pdf](http://rwandadelaguerreaugenocide.univ-paris1.fr/wp-content/uploads/2010/01/Annexe_7.pdf) visited: 26 August 2015).

<sup>1182</sup> ‘Extraits du rapport *Définition et Identification de l’ENI [Ennemi]*, document attaché à la lettre de Nsabimana a Liste A 21 septembre 1992’ (www-text: [http://rwandadelaguerreaugenocide.univ-paris1.fr/wp-content/uploads/2010/01/Annexe\\_7.pdf](http://rwandadelaguerreaugenocide.univ-paris1.fr/wp-content/uploads/2010/01/Annexe_7.pdf) visited: 26 August 2015), p. 2.

<sup>1183</sup> It goes on saying: “The ENEMY, or their accomplices, be they Rwandan or foreign nationals within the country or abroad, can be identified in particular by any of the following acts: Taking up arms and attacking RWANDA; Purchasing arms for enemy soldiers; Contributing money to support the ENEMY; Providing any form of material support to the ENEMY; Spreading propaganda favourable to the ENEMY; Recruiting for the ENEMY; Contaminating public opinion by spreading false rumours and information; Spying for the ENEMY; Divulging military secrets to the ENEMY; Acting as a liaison officer or runner for the ENEMY; Organising or performing acts of terrorism and sabotage in support of ENEMY activities; Organising or inciting revolts, strikes or any form of disorder to support ENEMY activities; Refusing to fight the ENEMY; Refusing to comply with war requisitions.” UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Judgement*, §202.

<sup>1184</sup> Cruvellier, *Court of Remorse*, p. 141.

<sup>1185</sup> ICTR, *Akayesu: Trial Judgement*, §123-124.

<sup>1186</sup> Jean-Pierre Chrétien, ‘Enjeux: Un “Nazisme Tropical” au Rwanda? Image ou Logique d’un Génocide’, *Vingtième Siècle. Revue d’histoire*, No. 48 (October-December 1995), pp. 131-142.

<sup>1187</sup> Des Forges, *Leave None*, pp. 59-64

<sup>1188</sup> Colonel Théoneste Bagosora (ICTR accused), Colonel Déogratias Nsabimana, Colonel Marcel Gatsinzi, Colonel Pontien Hakizimana, Colonel Félicien Muberuka, Colonel Anatole Nsengiyumva (ICTR accused), Major Juvénal Bahufite, Major Augustin Cyiza, Major Aloys Ntabakuze (ICTR accused) and Major Pierre Karangwa. Guichaoua, *From War to Genocide*, pp. 37-40.

<sup>1189</sup> *Lettre de Déogratias Nsabimana, Colonel BEM, Chef EM AR [chef de l’état-major de l’armée], Lettre, à Liste A, 21 septembre 1992* (www-text: [http://rwandadelaguerreaugenocide.univ-paris1.fr/wp-content/uploads/2010/01/Annexe\\_7.pdf](http://rwandadelaguerreaugenocide.univ-paris1.fr/wp-content/uploads/2010/01/Annexe_7.pdf) visited: 26 August 2015).

<sup>1190</sup> Straus, *Making and Unmaking*, p. 296.

For one of the members of the military commission, however, that interpretation (that the Tutsi as a whole group were the enemy) was held by the ruling party (MRND), but it was not the “spirit of the commission”, which, according to him, took a more practical stance and sought just to represent a “sociological reality.”<sup>1191</sup> Augustin Cyiza was one of the two moderates on the commission that attained high positions in the post-genocide government.<sup>1192</sup> It appears that the authors’ wording in the secret report is less crucial to understanding its meaning than is the timing and context in which the extract of the report was widely distributed by the army nine months later; at a time that the controversial Arusha peace agreements were being negotiated and the Hutu *Pawa* (Power) was mobilising against possibly sharing power with the RPF.

### *Arusha: the political ‘settlement’*

As sketched above, the political context had drastically changed in early 1992. Amidst an excavating crisis three major political forces had emerged at the national level: (1) a coalition of mainstream *Hutu moderates* (liberal democrats), with some support in the army; (2) conservative, opportunistic and racist *Hutu hardliners* from the MRND, CDR, the Akazu and their allies in the military, media and militias; and (3) well-organised and uncompromising *Tutsi rebels* of the RPF.<sup>1193</sup> Now also faced with opposition parties in its own coalition government – although maintaining key portfolios such as defence, interior and civil service - Habyarimana and his MRND saw power evaporate as water in the open sun. A chief concern became the coalition’s wish to negotiate with the unified, disciplined but uncompromising RPF, which had swelled in ranks but maintained a hard line position that it could only stop its rebellion through a negotiated settlement that would give them out of proportion participation.<sup>1194</sup> Early talks hosted by Laurent Desire Mobutu Sese Seko and Yoweri Museveni in Zaire shipwrecked and succeeding cease-fire promises were nonchalantly broken.<sup>1195</sup> But the situation had changed. Throughout the war period, the FAR’s was incompetent in extricating the rebels from their northern strongholds and at times even needing French support to stop their swelling force - despite its own growth from 5.000 to 30.000 poorly trained and badly disciplined troops.<sup>1196</sup> This military weakness combined with international efforts to pressure for a political settlement led to the

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<sup>1191</sup> Thierry Cruvellier, ‘Par-delà le glaive et la balance’, in: Thierry Cruvellier et al., *Augustin Cyiza: Un homme libre au Rwanda* (Paris: Karthala, 2004), pp. 7-13.

<sup>1192</sup> Colonel Gatsinzi was Minister of Defence between 2002 and 2010 and Major Cyiza was a former Vice-president of the Rwandan Supreme Court and human rights advocate of considerable standing. See: ICTR, *Bogosora Trial Judgement*, §205, footnote 236.

<sup>1193</sup> Straus, *The Order of Genocide*, p. 42.

<sup>1194</sup> The RPF rejected invitations to participate in the multi-party system, partly because Habyarimana was to continue real power but also because it could not win significant power through elections without forming a coalition. Even if the Tutsi’s returned to Rwanda, they would constitute no more than 14 percent of Rwanda’s total population. USA Secretary of State [drafted by Rick Ehrenreich], ‘A. Essay: Rwanda: Threading a Needle’, *INR/AA’S AFRICAN TRENDS - 9/18/92 (NO. 19)*, Declassified cable (www-text: <http://nsarchive.gwu.edu/NSAEBB/NSAEBB458/docs/DOCUMENT%202.pdf>, visited: 26 August 2015), §33-37.

<sup>1195</sup> Bruce D. Jones, ‘The Arusha Peace Process’, in: Howard Adelman & Astri Suhrke (eds.), *The Path of a Genocide. The Rwanda Crisis from Uganda to Zaire* (New Brunswick & London: Transaction Publishers, 1999) 131-156: 132-136. Also see: *N’Sele Cease-fire Agreement between the Government of the Rwandese Republic and the Rwandese Patriotic Front*, as amended at Gbadolite on 16 September 1991 and at Arusha on 12 July 1992. Originals are annexed to: UNSC, *Letter dated 23 December 1993 from the Permanent Representative of the United Republic of Tanzania to the United Nations addressed to the Secretary-General* (S/26915; 23 December 1993).

<sup>1196</sup> Mandani, *When Victims become Killers*, p. 206. By 2003, the UN surveyed the Government forces at 23,100 plus 6,000 Gendarmerie and the RPF at 20,000. UNSC, *Report of the Secretary-General on Rwanda, requesting establishment of a United Nations Assistance Mission for Rwanda (UNAMIR) and the integration of UNOMUR into UNAMIR* (S/26488; 21 September 1993), §27.

commencement of talks between the three opposition parties (MDR, PSD and PL) and the RPF in Paris in May 1992.<sup>1197</sup>

For years, the Arusha International Conference Centre in Tanzania was the centre stage for dealing with the ‘Rwanda question.’ After the 1994 genocide, as outlined later in this chapter, an intercontinental flock of jurists set up their courtrooms there to adjudicate the man-made humanitarian catastrophe that was the climax of a peace agreement and power-sharing accord signed in the very same building in August 1993.<sup>1198</sup> Thirteen months of draining marathon negotiations – interrupted in 1993 by pogroms against Tutsi<sup>1199</sup> and bombings and assassinations by the RPF<sup>1200</sup> – between the Rwandan Government and rebels had preceded the so-called Arusha Accords. But it was a peace deal and power-sharing agreement, enforced on Habyarimana by donor countries<sup>1201</sup> and reached between the *moderates* and the RPF and fiercely rejected by the *hardliners* who had been excluded from the process as well as the outcome.<sup>1202</sup> Branded as a sell-out by the CDR and conservative figures in the MRND at the time – and retrospectively a very likely kick-starter of further polarisation and radicalisation – the RPF celebrated the accords triumphing and left the President’s party defeated.<sup>1203</sup> Comparable to modern transitional justice settlements, the Accords were comprehensive and encompassed separate agreements on the rule of law, transitional institutions, repatriation and resettlement of refugees and displaced persons and the integration of the two opposing armies.<sup>1204</sup> But the MRND returned from Arusha severely bruised, losing most of its power. Habyarimana was to remain president until elections, but his party would only hold 26, 3 percent of the ministerial portfolios in the “broad-based transitional government”<sup>1205</sup> and less than 20 percent of seats in the

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<sup>1197</sup> Mandani, *When Victims become Killers*, p. 210.

<sup>1198</sup> *Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front*, signed at Arusha on 4 August 1993; *N’Sele Cease-fire Agreement between the Government of the Rwandese Republic and the Rwandese Patriotic Front*, as amended at Gbadolite on 16 September 1991 and at Arusha on 12 July 1992; *Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Rule of Law*, signed at Arusha on 18 August 1992; *Protocols of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on power-Sharing within the Framework of a Broad-Based Transitional Government*, signed at Arusha on 30 October 1992 and 9 January 1993, respectively; *Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Repatriation of Rwandese Refugees and the Resettlement of Displaced Persons*, signed at Arusha on 9 June 1993; *Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Integration of the Armed Forces of the Two Parties*, signed at Arusha on 3 August 1993; *Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on Miscellaneous Issues and Final Provisions*, signed at Arusha on 3 August 1993. Originals are annexed to: UNGA & UNSC, *Letter dated 23 December 1993 from the Permanent Representative of the United Republic of Tanzania to the United Nations addressed to the Secretary-General* (UN docs. A/48/824 & S/26915; 23 December 1993).

<sup>1199</sup> Africa Watch reported that “More than 300 Tutsi and members of political parties opposed to Rwandan President Juvénal Habyarimana were massacred in north-western Rwanda in late January 1993 by private militia at the direction of local and central government authorities. In February and March, smaller scale attacks claimed the lives of at least thirty others. Rwandan soldiers have also attacked Tutsi and opposition party members, and, since January, have killed, beaten, detained or made to disappear hundreds of civilians. Africa Watch, ‘Beyond the Rhetoric: Continuing Human Rights Abuses in Rwanda’, *News from Africa Watch*, No. 7, Vol. 5 (June 1993), pp. 4-5.

<sup>1200</sup> Prunier, *The Rwanda Crisis*, 174-186; Guichaoua, *From War to Genocide*, pp. 67-70.

<sup>1201</sup> An ultimatum was set on 9 August for Habyarimana to sign or else donor countries and the World Bank would cease international funds. See: Des Forges, *Leave None*, p. 124.

<sup>1202</sup> Bruce D. Jones, ‘The Arusha Peace Process’, in: Howard Adelman & Astri Suhrke (eds.), *The Path of a Genocide. The Rwanda Crisis from Uganda to Zaire* (New Brunswick & London: Transaction Publishers, 1999), pp. 131-156: 147.

<sup>1203</sup> Straus, *Making and Unmaking*, p. 229.

<sup>1204</sup> Des Forges, *Leave None*, p. 124.

<sup>1205</sup> The portfolios were distributed as follows: MRND: (1) Defence; (2) Higher Education, Scientific Research and Culture; (3) Public Service; (4) Planning; and (5) Family Affairs and Promotion of the Status of Women; RPF: (1) Interior and Communal Development; (2) Transport and Communications; (3) Health; (4) Youth and Associative Development; and (5) Rehabilitation and Social Integration; MDR: (1) Prime Minister; (2) Foreign Affairs and Cooperation; (3) Primary and Secondary Education; (4) Information; PSD: (1) Finance; (2) Public Work and Energy; (3) Agriculture and Livestock Development; PL: (1) Justice; (2) Commerce, Industry and Cottage Industry; (3) Labour and Sexual Affairs; PDC: (1) Environment and Tourism. See: *Protocols of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on power-Sharing within the Framework of a Broad-Based Transitional Government*, signed at Arusha on 30 October 1992 and 9 January 1993, in: UNGA & UNSC, *Letter dated 23 December 1993 from the Permanent Representative of the United Republic of Tanzania to the United Nations addressed to the Secretary-General* (UN docs. A/48/824 & S/26915; 23 December 1993), art. 56.

“Transitional National Assembly.<sup>1206</sup> Predictably, as a matter of principle and out of resentment for their exclusion, the radicals of the CDR snubbed at each sole letter of the settlement. But there were other adversaries too, including senior officers, soldiers, burgomasters, prefects and civilians. Most were left disillusioned by the political settlement of the war they had not lost, feared losing their privileged positions and were worried about sharing scarce resources with returning refugees.<sup>1207</sup> Facing this new paper order, the MRND calculated that it could actually “avoid the negative terms of the peace deal” by benefitting from an electoral advantage and turning to the masses. Again, against the grains of the spirit of the Accords, they sought to create and play out two blocks: anti-RPF/pro-Hutu versus pro-RPF (Tutsi). By some means, Arusha hastened and reinforced the strategy of ethnic polarisation and spirited the notion and sense of Hutu Power (‘Hutu Pawa’ in local parlance).<sup>1208</sup> This new sentiment was “built on the corpse of Melchior Ndadaye.”<sup>1209</sup>

#### 4.4 Cooking for war

Cynically, the deadly faith of one of the observers to the signing of the Accords catalysed Hutu Power, warranted self-defence and escalated the Rwandan crisis. Officers in the Tutsi-led army assassinated Burundi’s first democratically elected Hutu President Ndadaye, only two months after he attended the signing ceremonies in Arusha. The murder did not only spark reciprocal mass killings between Hutu and Tutsi in Burundi and set adrift thousands of refugees who flocked into southern Rwanda. It was used by hardliners and propagandists of the CDR-controlled *Kangura* glossy and *RTL* radio to spread rumours and instil fear into Rwanda’s Hutu population, warning that the RPF was “to exterminate the popular majority in reprisal against those who engineered the Social Revolution of 1959.”<sup>1210</sup> Next to accusing the RPF for the assassination and mass killings of Hutu, they also speculated that Tutsi were not destined at all to accept the outcome of democratic processes, anywhere, including in Rwanda and by all means necessary. Simply, in the political tradition, the struggle for state-control was fought out on the basis of ethnicity and the RPF would never win numerically. Thus, panic was spread and the polarisation worked. It even trickled down to the *moderates*, who became increasingly pessimistic about a peaceful integration of the RPF into the government and armed forces. Rwandan Tutsi, on the other side, saw once again that the only way to protect themselves from defeat was to gain control of the state, if necessary by force.<sup>1211</sup> Dangerously infused by political elites (like the MDR’s Froduald Karamira), legitimised by intelligentsia (like historian Ferdinand Nahimana and political scientist Mugesera) and valorised at political rallies, songs

<sup>1206</sup> MRND: 11 seats; RPF: 11 seats; MDR: 11 seats; PSD: 11 seats; PL: 11 seats; PDC: 4 seats; and the other registered parties one (1) seat each. See: *Protocols of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on power-Sharing within the Framework of a Broad-Based Transitional Government*, signed at Arusha on 30 October 1992 and 9 January 1993, in: UNGA & UNSC, *Letter dated 23 December 1993 from the Permanent Representative of the United Republic of Tanzania to the United Nations addressed to the Secretary-General* (UN docs. A/48/824 & S/26915; 23 December 1993), art. 62.

<sup>1207</sup> Des Forges, *Leave None*, pp. 125-126.

<sup>1208</sup> Scott Straus, *Making and Unmaking. War, Leadership, and Genocide in Modern Africa* (Ithaca & London: Cornell University Press, 2015), p. 300.

<sup>1209</sup> Des Forges, *Leave None*, p. 137.

<sup>1210</sup> UNICTR, ‘Prosecutor’s Exhibit #76: CDR Party Press Release’, *Prosecutor v. Akayesu* (19 May 1998).

<sup>1211</sup> Des Forges, *Leave None*, p. 135; Straus, *Making and Unmaking*.

(Simon Bikindi) and through inflammatory media who all brought back to the arena the discourse of the social revolution (founding narrative), the post-Arusha dialectics were dangerously escalating. Although Rwanda's *regime change* through diplomacy was sponsored, applauded and endorsed by the international community and the United Nations, its Assistance Mission to the transition (UNAMIR),<sup>1212</sup> led by the famous Dutch-Canadian General Roméo Dallaire, could only 'observe' the country sliding into chaos.<sup>1213</sup>

In fact, from late 1993 onwards, the freshly negotiated transitional state that was to prepare for democracy was not functioning at all. Instead it was preparing for war. All political settlements had failed or were continuously frustrated. Demobilisation of the FAR and integration of the RPF forces never really started as well. Vis-à-vis this political and military deadlock, the Hutu-power coalition extended and professionalised its informal and extra-state institutions. Particularly youth agents of the radical's 'self-defence' militia programme which had already commenced in 1990 – neighbourhood watch patrols, the AMASASU (military), *Interahamwe* and *Impuzamugambi* – were formalised, professionalised and militarily trained, at least from late 1993 onwards.<sup>1214</sup> By the early months of 1994, there appear to have been at least several thousand armed<sup>1215</sup> pro-Hutu militias in different parts of the country,<sup>1216</sup> while the RPF was simultaneously recruiting new fighters in Zaire, rearming and threatening to break the fragile cease-fire.<sup>1217</sup> In this period of intense political distrust, state collapse and the reported circulation of death lists, the MRND leaders and the RPF (which from January had a base in Kigali) were both preparing for war and accusing the other of doing the same.<sup>1218</sup>

From 8 January 1994, after a ceremony to install a failed and incomplete transitional government nobody wanted, the crisis accelerated. The Presidential Guard and political militias that supported Habyarimana rioted and set up roadblocks to prevent opposition deputies from attending the ceremony.<sup>1219</sup> Amidst cautions of an imminent civil war and low-scale massacres by the *Interahamwe*,<sup>1220</sup> skirmishes sparked by militias increased by the day in Kigali. Two assassinations on 23 February - of anti-Hutu Power PSD leader Félicien Gatabazi and pro-Hutu CDR-president Martin Bucyana – again created a politically explosive situation, manifested by killings, mob violence, protests and intimidations in the capital<sup>1221</sup> as well as attacks against Tutsi civilians across the country.<sup>1222</sup> In the meantime, the post-Arusha political impasse sustained at least up to the first week

<sup>1212</sup> UNSC, *Resolution 872* (UN-doc S/RES/872(1993); 5 October 1993).

<sup>1213</sup> Dallaire arrived in Kigali on 21 October 1993, the day of the assassination of Burundi's president. See for the General's personal account about events that time: Roméo A. Dallaire, *Shake Hands with the Devil. The failure of humanity in Rwanda* (London: Arrow Books, 2004). For a detailed overview of primary sources on the UN's involvement in Rwanda, see: UN, *The United Nations and Rwanda. 1993-1996* (New York: UN, 1996).

<sup>1214</sup> Guichaoua, *From War to Genocide*, p. 139.

<sup>1215</sup> See for instance: HRW Arms Project, *Arming Rwanda. The Arms Trade and Rights Abuses in the Rwandan War*, Vol. 6, No. 1 (January 1994).

<sup>1216</sup> Straus, *The Order of Genocide*, p. 27.

<sup>1217</sup> Prunier, *The Rwanda Crisis*, p. 205; Des Forges, *Leave None*, p. 129.

<sup>1218</sup> Straus, *Making and Unmaking*, p. 304.

<sup>1219</sup> UNAMIR, *Outgoing Code Cable: Weekly SITREP, No 13, 04 JAN 94 -10 JAN 94* (Kigali; 11 January 1994).

<sup>1220</sup> UNAMIR, *Outgoing Code Cable: Request for Protection of Informant* (Fax no: 011-250-84273; Kigali, 11 January 1994). [this document is also known as the "genocide fax"].

<sup>1221</sup> UNAMIR, *Outgoing Code Cable: Daily Sitrep 220600B Feb to 230600B Feb 94*.

<sup>1222</sup> UNAMIR, *Outgoing Code Cable: Sitrep Nb 20, 23 Feb 94 - 28 Feb 94*.

of April 1994.<sup>1223</sup> This time, the RPF declined to agree to allow the CDR into the transitional government because it was not renouncing “racial hatred” and “violence.”<sup>1224</sup> The disastrous climax of the unending political deadlock, the looming of an inevitable resumption of war and racist discourse was heralded by the successive assassinations of Habyarimana, Prime Minister Agathe Uwilingiyimana and ten UN peacekeepers from the evening of 6 into 7 April. What followed were six days of vicious political manoeuvring, the RPF quickly advancing towards Kigali, targeted assassinations and massacres. Then a short but explosive, full-blown destructive final war was launched by political and military extremists against the perceived support base of the RPF: Tutsi civilians and their democratic supporters (moderates).<sup>1225</sup> Operating in a vacuum of confusion, a self-proclaimed interim government of 19 radical Hutu ‘liberators’ (*Abatabazi*)<sup>1226</sup> chose elimination of all political opposition followed by exterminatory violence against unarmed and unorganised civilians as a strategy to defy the unbeatable RPF, which was rapidly closing in, once and for all and to bring back power to the Hutu masses in whose name they proclaimed to be fighting. This strategy of crushing their enemy at its roots (as a “final solution”) became an effective order of genocide for three months. However, in the face of imminent military defeat, the extermination of Tutsi turned into a last triumph of losers; in its downfall, finalising the destruction of the Tutsi became the extremists’ only winnable battle and would be its sole victory in the face of history and in fulfilment of the Hutu Revolution.<sup>1227</sup> In the genocidal logic of Hutu Power, the RPF could win the war, but when it would finally do so all of its supporters (Tutsi and moderate Hutu electorate) would be dead and the Hutu masses still alive.

### *Tuzabatsembatsemba, tuzabatsembatsemba*<sup>1228</sup>

Sprawled over the steps leading up to the pulpit was the body of a teenager. Around the base of the pulpit lay the bodies of several women slain with machetes and a male corpse was slumped over the seat in the confessional. Jesus had fallen from his Cross, and lay near the body of a small girl. This churchyard in eastern Rwanda was pervaded by an overwhelming stench of rotting flesh. The deadly silence in this beautiful, hilly landscape of pink and yellow flowers was disturbed only by the song of a lone bird and the insistent buzzing of thousands of flies. This was where the Interahamwe, the murderous bands of Hutu militia, took their toll. Having first surrounded the church and the nearby classrooms, they moved in and slaughtered two or three thousand Tutsi refugees who were sheltering there. In the reading room lay a baby; its severed head had fallen onto a book entitled ‘The secret of faith’. Bodies had been piled up in a corner of the courtyard, and maybe a hundred children’s bodies lay in a classroom. The next classroom contained fifty more dead. One lifeless man, his hand chopped

<sup>1223</sup> UNSC, *Second Progress Report of the Secretary general on UNAMIR for the period from 30 December 1993 to 30 March 1994, requesting an extension of its mandate for a period of six months* (UN-doc: S/1994/360; 30 March 1994), §4-22.

<sup>1224</sup> UNAMIR, *Outgoing Code Cable: Weekly Sitrep Nb 25, 29 Mar 94 - 04 Apr 94*.

<sup>1225</sup> So far, the most detailed, dynamic and complex study on the events, decision making and escalation of violence in Rwanda from 6 April onwards appear in: Guichaoua, *From War to Genocide*, pp. 143-266.

<sup>1226</sup> Dr. Théodore Sindikubwabo, Président de République, *Arrêté présidentiel du 8 avril 1994 portant nomination de Premier ministre* (Kigali, 8 April 1994); Dr. Théodore Sindikubwabo, Président de République, *Arrêté présidentiel du 8 avril 1994 portant designation des membres du gouvernement* (Kigali, 8 April 1994).

<sup>1227</sup> Jean-Paul Kimonyo, *Rwanda: Un genocide populaire* (Paris: Karthala, 2008), p. 504.

<sup>1228</sup> The terminology used in Rwanda to describe the events has changed over time, as Philip Gourevitch outlines. During the killings, perpetrators talked about *gutsemba* (to “massacre” or “exterminate”), *gutsembatsemba* (‘to exterminate radically’) and were reported to have sung “*Tuzabatsembatsemba, tuzabatsembatsemba*” (“We all will exterminate you all”). Immediately after the killings, Rwandans spoke about *itsembabwoko* (‘to exterminate’ an ‘ethnic’ group), *itsembatsemba* (mass killing) or génocide. The latter was ‘Rwandanised’ and rephrased into *jenocide* in 2003. In 2008, the official wording changed again, now into “genocide against the Tutsi” (*jenocide yakorewe abatutsi*). Philip Gourevitch, ‘Remembering in Rwanda’, *The New Yorker*, 21 April 2014. In 2014, in an unanimously adopted resolution, the UN endorsed the latest definition pushed for by the Rwandan government: “the 1994 genocide against the Tutsi in Rwanda, during which Hutu and others who opposed the genocide were also killed”. UNSC, *Resolution 2150* (UN-doc: S/RES/2150 (2014); 16 April 2014.

off, lay outstretched across a large wooden table. A large stick had been thrust into the genitals of a middle-aged woman by the murderers. Only one woman in the church survived the massacre. She lost the power of speech.<sup>1229</sup>

Between 1990 and 1994, the down-spiralling economic, social and political crisis, a series of events and process of radical decision-making culminated in the widespread and systematic murder of thousands of Rwandans since April 1994.<sup>1230</sup> Starting on the evening of 6 April 1994, armed conflict broke out again and Rwandan political and military leaders decided on a series of actions that turned into a policy of genocidal mass violence.<sup>1231</sup> Hardliners from within the ruling party and military took over power<sup>1232</sup> in the political vacuum that was created with the – still unresolved<sup>1233</sup> – assassination of Habyarimana, his Burundian counterpart Cyprien Ntaryamira and their entourage.<sup>1234</sup> First on target were political rivals and elites, the Prime Minister, RPF supporters and UN peacekeepers.<sup>1235</sup> Simultaneous to their political assassinations, extremist Hutu declared war against the entire Tutsi civilian populace, which was allegedly associated with the Tutsi-dominated guerrilla forces of the RPF.<sup>1236</sup> Through effective state bureaucracy, compulsion and selective incentives, Hutu Power elements overpowered internal antagonism to the violence, mobilised local officials, militia and civilians and set in motion a vast extermination operation across the country.<sup>1237</sup> For nearly three months, the theme of community ‘work’ (*Umaganda*) was “cutting the tall grass,” a much-reported euphemism for killing Tutsi. Armed with machetes, farming tools and other handmade weapons, mobs of Hutu men<sup>1238</sup> roamed their neighbourhoods, the hills and the swamps, singling out, abusing and murdering Tutsi. Allegedly, “[...] for those people, the intention was to completely wipe out Tutsi from Rwanda so that -- as they said occasionally, so that their children would know what a Tutsi was

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<sup>1229</sup> Bengt van Loosdrecht and Koert Lindijer, *Back to Rwanda* (The Hague: Sdu Publishers, 1997), p. 9.

<sup>1230</sup> In May, the UN estimated that “more than 200,000 people, the majority of them civilians, including children and women, have been killed” and that the number “may be considerably higher and may exceed 500,000” but that the number [...] will probably never be determined accurately.” *Report of the United Nations High Commissioner for Human Rights on his mission to Rwanda of 11-12 May 1994* (E/CN.4/S—3/3; 19 May 1994); UNSC, *Report of the Secretary-General on the situation in Rwanda, reporting on the political mission he sent to Rwanda to move the warring parties towards a cease-fire and recommending that the expanded mandat for Unamir be authorized for an initial period of six months* (S/1994/640; 31 May 1994), §5.

<sup>1231</sup> The literature (a fluid conglomerate of official, NGO, journalistic, literary and academic writing produced in the global north) on the genocide has swelled to large proportions and there is no space to critically review these. See for an overview: Straus, ‘The Historiography of the Rwandan Genocide’, pp. 517-542.

<sup>1232</sup> UNSC, *letter from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, transmitting a note from the Minister of Foreign Affairs and Cooperation of Rwanda explaining the political situation in Rwanda since the assassination of its President on 6 April 1994* (UN-doc: S/1994/428; 13 April 1994).

<sup>1233</sup> The shooting down of the plane touched off the widespread massacre of Tutsi, the murder of Hutu opponents and the renewed war between government forces (FAR) and RPF-rebels. Historically significant, the attack has never been fully resolved and sparked three inquiries with different outcomes. Although it fell under its mandate, the ICTR never carried out a judicial investigation because nobody was charged with the attack. In 2006, a French anti-terrorist investigative judge probed the matter and concluded that the RPF bore the responsibility: Tribunal de Grande Instance de Paris, Cabinet de Jean-Louis Bruguiere, *Delivrance de Mandats d’Arret Internationaux* (97.295.2303/0; Paris, 17 November 2006). Rwanda disagreed heavily and responded with its own investigation, concluding that the missiles came from Kanombe military base of the Rwandan government forces: Republic of Rwanda, Independent Committee of Experts Charged with the Investigation into the Crash on 06/04/1994 of Falcon 50 Aeroplane, registration number 9xr-nn., *Report of the Investigation into the Causes and Circumstances of and Responsibility for the attack of 06/04/1994 against the Falcon 50 Rwandan Presidential Aeroplane, registration number 9xr-nn* (Kigali, 20 April 2009). A second French investigation also concluded that the attack was not launched from Masaka Hill, which was the RPF base at the time: Cour d’Appel de Paris Tribunal de Grande Instance de Paris, *Rapport d’Expertise. Destruction en vol de Falcon 50 Kigali (Rwanda)* (9729523030; Paris, 5 January 2012).

<sup>1234</sup> The others killed in the attack were: Bernard Ciza (Burundian Minister of Public Works); Cyriaque Simbizi (Burundian Minister of Communication); General Degratias Nsabimana (Chief of Staff Rwandan Defence Forces); Major Thaddée Bagaragaza (Chief of “maison militaire” of Habyarimana); Colonel Elie Sagatwa (Chief of Habyarimana’s Military Cabinet); Juvénal Renaho (Habyarimana’s foreign affairs advisor); Emmanuel Akingeneye (Habyarimana’s personal physician); Jacky Héraud (French pilot); Jean-Pierre Miniberry (French copilot); and Jean-Michel Perrine (flight engineer).

<sup>1235</sup> United Nations Assistance Mission in Rwanda (UNAMIR), *Daily Sitrep Period 070600B Apr to 080600B Apr 94* (Kigali, 8 April 1994).

<sup>1236</sup> See: UNICTR, *Prosecutor versus Jean Paul Akayesu: Prosecutor’s Exhibit #25. Alison Des Forges* (13 February 1997), pp. 3-4.

<sup>1237</sup> Scott Straus, ‘20 Years after the Genocide in Rwanda, where do we stand?’, *Lecture at NIOD Roads to Justice Series*, Humanity House, (2 April 2014).

<sup>1238</sup> Straus estimates a perpetrator population of around 200,000 Rwandans. Scott Straus, ‘How many perpetrators were there in the Rwandan genocide? An estimate’, *Journal of Genocide Research*, Vol. 6. No. 1 (March 2004), pp. 85–98. Also: Omar Shahabudin McDoom, ‘Who killed in Rwanda’s genocide? Micro-space, social influence and individual participation in intergroup violence’, *Journal of Peace Research*, Vol. 50, No 4 (2013), pp. 453-467.

only by consulting a history book.”<sup>1239</sup> That was perhaps why no one was spared: inter-married family, friends, neighbours, colleagues, men, women, elderly people, children and in several cases the un-born. Most probably, the killing campaign could not have been executed without the active support by powerful elements within the national, mid-level and local state apparatus, the military and militia,<sup>1240</sup> who simultaneously propagated and celebrated the slaughter at public gatherings (*animations* and political rallies) and on radio broadcasts.<sup>1241</sup> At the same time the UN force (UNAMIR) that was tasked with ‘peacekeeping’ retreated, effectively turning its back on defenceless Tutsi. In this context of complete impunity and security vacuum, the mass killings that unfolded spread like a controlled virus of cultivated genocidal fever, which in its first month was carried out at a speed that has no equivalent in the history of mass violence.

In the interim, the war on the military fronts had continued unabated since the shooting down of Habyarimana’s plane, with the RPF steadily advancing on the government forces (*FAR*) and Kigali.<sup>1242</sup> In three months, until the RPF overthrew the homicidal regime by mid-July, at least half a million Rwandans were slain.<sup>1243</sup> Tutsi civilians had been systematically and aggressively beleaguered because their assaulters identified them as Tutsi. Victims were easily selected. Either, their assaulters knew they were Tutsi, deemed they looked Tutsi, found their names on circulated death lists, were incited by superiors or peer-pressured to target certain persons, were informed and directed by radio announcements or – in most cases – corroborated their ethnic label in identity cards – which listed a person’s ethnicity - at the many roadblocks that had been erected throughout the country.<sup>1244</sup> A reported three-quarter of the Rwandan Tutsi civilian population did not outlive the killing spree. Countless others carry both the bodily and psychological scars of violent and sexual assaults, witnessing and surviving the wielding machetes or being orphaned. Scores of people fled to neighbouring countries. Beyond any legal dispute, it has been well established and recognised that Tutsi were dehumanised, persecuted, uprooted, violated and killed with the intent to destroy them, in

<sup>1239</sup> UNICTR, *Akayesu - Audio Recording of 24/05/97 - AM* (ICTR-96-04-01033; 24 February 1997), from: 03:21:40. It became a referenced statement Prosecution witness Des Forges. In full it reads: “From the statements made by certain political leaders, from the popular songs and slogans of the Interahamwe, I believe that for those people the intention was to completely wipe out Tutsi from Rwanda so that -- as they said occasionally, so that their children would know what a Tutsi was only by consulting a history book.” However, in its trial judgement of 2 September 1998, the trial chamber not only misquotes the statement, it also provides the wrong date: “In this connection, Alison Desforges, an expert witness, in her testimony before this Chamber on 25 February 1997, stated as follows: “on the basis of the statements made by certain political leaders, on the basis of songs and slogans popular among the Interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that-as they said on certain occasions - their children , later on , would not know what a Tutsi looked like, unless they referred to history books.”” UNICTR, *Akayesu Judgement*, §118.

<sup>1240</sup> *Interahamwe* (“Those Who Stand Together” or “Those Who Attack Together”: MRND youth group) and *Impuzamugambi* (“Those who have the same goal” or “Those with a single purpose”: CDR youth group).

<sup>1241</sup> Chrétien et al., *Les médias du génocide*; Scott Straus, ‘What Is the Relationship between Hate Radio and Violence? Rethinking Rwanda’s “Radio Machete”’, *Politics & Society*, Vol. 35 No. 4 (December 2007), pp. 609-637.

<sup>1242</sup> On 7 April, after the plane crash and start of massacres, the RPF launched a military offensive against the government forces and “interim government.” At the end of May, they controlled half of the country (including important parts of Kigali, such as the airport). See: UNSC, *Report of the Secretary-General on the situation in Rwanda, reporting on the political mission he sent to Rwanda to move the warring parties towards a cease-fire and recommending that the expanded mandat for Unamir be authorized for an intial period of six months* (S/1994/640; 31 May 1994), §12-14.

<sup>1243</sup> Atrocity numbers are always contested and lead to fierce debate. It is not different in Rwanda, where no exact number of casualties was ever established. The official Rwandan statistic is around 1 million, UN and other official sources typically cite 800,000 and human rights and scholarly commentators usually put the number of at least half a million or closer to 650,000 or 700,000. The exact number may never be known. Taking that into consideration, I use the most conservative estimate of at least 500,000. Only once, in 2001, was a census carried out, by the Ministry of Youth, Culture and Sports, that cites a number of 937,000 victims. The records of the census, which details names, ages, family members, causes of death and more information are part of the Gacaca Archive in Kigali.

<sup>1244</sup> Identity cards, since 1933, listed Rwandan’s *Ubwoko* (‘Ethnie’ in French): Hutu, Tutsi, Twa or Naturalisé. Older cards use the French terms ‘Peuplade’ or ‘Race’ or the Flemish words ‘Volkstam’ or ‘Ras’.

whole in part, because of their perceived ethnic – or racial - identity.<sup>1245</sup> In all clarity, the crime of genocide had been committed against the Tutsi. But the *génocidaires*, as Hutu killers became to be known, also murdered many Hutu, whom they considered to be politically ‘moderate’, ‘ibyitso’ or ‘accomplice’ to the RPF or opposed to Hutu Power and the mass assassinations. In addition, although unparalleled to the scale of the killings of Tutsi, Hutu civilians were also victimised in atrocities, summary executions and massacres committed by RPF fighters or Tutsi elements.<sup>1246</sup> A score of reprisal killings and abuses at their hands has been reported as well, claiming at least 10,000 lives.<sup>1247</sup> Both the Rwandan government forces and RPF also had casualties of the war that had continued.

When the RPF won the war and brought an end to the genocide in July 1994, the losing regime, the army, the militias and Hutu civilians fled *en masse* to Zaire. Created by an UN-sponsored French intervention,<sup>1248</sup> they had walked through the safe corridor *zone Turquoise*.<sup>1249</sup> A new humanitarian crisis unfolded in camps in Goma and Bakavu where they mixed with Tutsi who had earlier fled them.<sup>1250</sup> *Génocidaires* regrouped, slaughtered in the camps and launched guerrilla-killing missions into Rwanda.<sup>1251</sup> On its turn, the victorious RPF that had established itself as the new government in Rwanda – together with Uganda and through proxy forces - invaded Zaire in 1996, purportedly massacring numerous Hutu (ex-) militia and non-combatants and helped toppling the long-running despot Mobutu.<sup>1252</sup> After the RPF’s vassal Laurent Kabila was installed and the country renamed the Democratic Republic of the Congo (DRC) in 1998, Rwanda was again involved in a regional war in its neighbouring state and preserved miscellaneous high-level and low-level forms of proxy-military presence in that country from the end of the Second Congo War in 2003 well into 2013.<sup>1253</sup> Internally – except for the well-reported Kibeho massacre in April 1995<sup>1254</sup> and several small insurgencies - the RPF managed to maintain relative stability, peace and security. It managed to do so

<sup>1245</sup> UNICTR, *Karemera, Ngirumpatse, Nzirorera: Judicial Notice*; UNSC, *Resolution 2150* (S/RES/2150 (2014); 16 April 2014). This resolution was intended to stress the UN’s recommitment to fight against genocide during the 20th commemoration of the Rwanda genocide. It basically accepted and defined the events as “the 1994 genocide against the Tutsi in Rwanda, during which Hutu and others who opposed the genocide were also killed.”

<sup>1246</sup> See detailed report: Des Forges, *Leave None to Tell the Story*, pp. 692-735.

<sup>1247</sup> Robert Gersony, “Summary of UNHCR Presentation Before Commission of Experts: Prospects for Early Repatriation of Rwandan Refugees Currently in Burundi, Tanzania and Zaire,” annexed to: United Nations High Commissioner for Refugees (UNHCR), *Letter to Mrs. Molina-Abram* (Geneva, 11 October 1994), §5. Gerald Gahima, the former Prosecutor General of Rwanda, orders the RPA human rights abuses into five categories: (1) ordinary individual non-genocide related crimes; (2) individual or group non-official revenge or reprisal killings; (3) killings of civilians by soldiers during combat; (4) indiscriminate massacres of civilians; and (5) targeted killings of political or other figures suspected of genocide or belonging to extremist organisations responsible for the genocide. See: Gahima, *Transitional Justice in Rwanda*, p. 227. See also: HRW/Africa, *Genocide in Rwanda. April-May 1994* (New York: HRW/Africa, May 1994), pp. 7-8; AI, *Mass murder by government supporter and troops in April and May 1994* (AFR 47/11/94; London, 23 May 1994), p. 11; and Medecins Sans Frontieres (MSF), ‘The Violence of the New Rwandan Regime’, *MSF Speaks Out* (September 2013).

<sup>1248</sup> UNSC, *Resolution 929* (UN-doc: S/RES/929(1994); 22 June 1994).

<sup>1249</sup> See for a more critical view on the role of France during the genocide and *Opération Turquoise* in particular: Andrew Wallis, *Silent Accomplice. The Untold Story of France’s Role in Rwandan Genocide* (London & New York: I.B. Taurus & Co Ltd, 2006), pp. 122-146.

<sup>1250</sup> UNSC, *Report of the Secretary General on the Situation in Rwanda* (S/1994/924; 3 August 1994), §8-18.

<sup>1251</sup> HRW, *Rwanda/Zaire. Rearming with Impunity. International Support for the Perpetrators of the Rwandan Genocide* (HRW, May 1995).

<sup>1252</sup> UNGA, *Report of the joint mission charged with investigating allegations of massacres and other human rights violations occurring in eastern Zaire (now Democratic Republic of the Congo) since September 1996* (A/51/942; 2 July 1997); UNSC, *Report of the Secretary General’s Investigative Team charged with investigating serious violations of human rights and international humanitarian law in de Democratic Republic of the Congo* (S/1998/581; 29 June 1998); and Office of the UN High Commissioner for Human Rights (OHCHR), *Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003* (August 2010).

<sup>1253</sup> See the *Reports of the Group of Experts submitted through the Security Council Committee established pursuant to Resolution 1533* (www-page: <http://www.un.org/sc/committees/1533/egroup.shtml>), visited: 9 September 2014).

<sup>1254</sup> Massacres were carried out in the context of an evacuation of the refugee camp in Kibeho. Many people did not survive the hardship, the chaos and the killing. The number of casualties remains unclear, with the government citing 300 people dead, Unamir counted 1200 to 1500 while NGOs talk about more than 4000. See: UNSC, *Report of the Independent Commission of Inquiry into the events at Kibeho in April 1995* (S/1995/411; 23 May 1995); UNSC, *Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur, under paragraph 20 of resolution S-3/1 of 25 May 1994* (E/CN.4/1996/7; 28 June 1995), §101-105; Medecins Sans Frontieres (MSF), ‘The Violence of the New Rwandan Regime’, *MSF Speaks Out* (September 2013).

through its effective, militarised and authoritarian-like rule, which is founded on ethnic amnesia, developmental ideology and the political mobilisation of its genocide experience.<sup>1255</sup>

#### 4.5 Transitional justice and the reset of history: Rwanda Inc.

Reckoning with mass violence is the red thread in the transitional justice enterprise. As outlined above, between October 1990 and July 1994, Rwanda experienced insurgency, intra-state warfare, massacres, ethnic violence, political violence and genocide. In these four years, the Rwandan Armed Forces (FAR), *Interahamwe* and *Impuzamugambi* militias, civilians, Burundian refugees and the Rwandan Patriotic Front (RPF) all committed human rights violations or violated international humanitarian law. In the subsequent twenty years, Rwanda used prosecutions, truth finding, reconciliation initiatives, reintegration, re-education and reparations to transcend towards internal peace.<sup>1256</sup> Fact-finding through human rights reporting, commissioned inquiries and UN missions already commenced during the war. Since the RPF attacks in October 1990, several massacres were reported<sup>1257</sup> and after a two-week mission in January 1993, an international non-governmental commission of inquiry documented government and rebel abuses and concluded that the Rwandan state, its army and aligned militia's committed acts of genocide against Tutsis.<sup>1258</sup> Despite a fragile peace agreement<sup>1259</sup> and the presence of international troops,<sup>1260</sup> violent incidents continued to occur

<sup>1255</sup> Scott Straus labelled the system as “transformative authoritarianism.” See: Scott Straus, “20 Years after the Genocide in Rwanda, where do we stand?,” *Lecture at NIOD Roads to Justice Series*, Humanity House, (2 April 2014) on file with author. Filip Reyntjens is more critical, arguing that Rwanda’s “deeply flawed political governance is likely to destroy the achievements of decent bureaucratic governance and may lead to new large-scale violence.” See: Reyntjens, *Political Governance*, front matter. Earlier on, Reyntjens observed even that there was a striking continuity from the pre-genocide (Habyarimana) to the post-genocide (Kagame) regime. Filip Reyntjens, ‘Rwanda, Ten Years on: From Genocide to Dictatorship’, *African Affairs*, 103 (2004), pp. 177-210.

<sup>1256</sup> Besides the mechanisms further discussed in this paper, Rwanda established various post-genocide TJ initiatives: National Unity and Reconciliation Commission (NURC 1999); Ingando (solidarity camps); Abakangurambago (reconciliation volunteers); Ubusabana (community celebrations); Itorero (civic education); National Commission for the Fight Against Genocide (CNLG, 2007); Compensation and Reparation policy. See: Charles Villa-Vicencio, Paul Nantulya Tyrone Savage, *Building Nations. Transitional Justice in the African Great Lakes Region: Burundi, The DRC, Rwanda, Uganda* (Cape Town 2005), pp. 86-95.

<sup>1257</sup> AI, Amnesty International, *Rwanda. Persecution of Tutsi minority and repression of government critics 1990-1992* (AI Index. AFR 47/02/92; Amnesty International, May 1992).

<sup>1258</sup> HRW (New York), the International Federation of Human Rights (Paris), the International Center of Human Rights and Democratic Development (Montreal), and the Inter-African Union of Human Rights (Ouagadougou). Among its members were two trained historians: Alison Des Forges and William Schabas. *Rapport de la commission internationale d'enquête sur les violations des droits de l'homme au Rwanda depuis 1er Octobre 1990 (7-21 janvier 1993). Rapport Final* (March 1993) or HRW, *Report of the International Commission of Investigation on Human Rights Violations in Rwanda since October 1, 1990 (January 7-21, 1993)* (New York: HRW, 1993). At the request of the RPF, the commission planned a second trip, which never took place as the genocide unfolded. HRW, ‘Rwanda: Human Rights Developments.’ In: HRW, *World Report 1994: Events of 1993* (www-text: <http://www.hrw.org/reports/1994/WR94/Africa-06.htm>; last accessed September 20 2012); Priscilla B. Hayner, “Fifteen Truth Commissions - 1974 to 1994,” *Human Rights Quarterly*, 16 (1994), pp. 597-633: 629-632; Hayner, *Unspeakable Truths*, p. 16; and Paul Christophe Bornkamm, *Rwanda's Gacaca Courts. Between Retribution and Reparation* (New York 2012), p. 22.

<sup>1259</sup> *Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front*, signed at Arusha on 4 August 1993; *N'Sele Cease-fire Agreement between the Government of the Rwandese Republic and the Rwandese Patriotic Front*, as amended at Gbadolite on 16 September 1991 and at Arusha on 12 July 1992; *Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Rule of Law*, signed at Arusha on 18 August 1992; *Protocols of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on power-Sharing within the Framework of a Broad-Based Transitional Government*, signed at Arusha on 30 October 1992 and 9 January 1993, respectively; *Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Repatriation of Rwandese Refugees and the Resettlement of Displaced Persons*, signed at Arusha on 9 June 1993; *Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Integration of the Armed Forces of the Two Parties*, signed at Arusha on 3 August 1993; *Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on Miscellaneous Issues and Final Provisions*, signed at Arusha on 3 August 1993. Originals are annexed to: UNGA & UNSC, *Letter dated 23 December 1993 from the Permanent Representative of the United Republic of Tanzania to the United Nations addressed to the Secretary-General* (UN docs. A/48/824 & S/26915; 23 December 1993).

<sup>1260</sup> The Security Council in June 1993 established the United Nations Observer Mission Uganda-Rwanda (UNOMUR) on the Ugandan side of the border, while a 50-member Neutral Military Observer Group (NMOG I) furnished by the Organisation of African Unity was already stationed in Rwanda. In October 1993, the Security Council, established the United Nations Assistance Mission for Rwanda (UNAMIR). The force was reduced from 2,548 to 270 in April 1994, only to increase it again to up to 5,500 troops at the end of 1994. From June 1994, French-led multinational forces carried out "Operation Turquoise", which established a humanitarian protection zone in southwestern Rwanda. The operation ended in August 1994 and UNAMIR took over in the zone. Meanwhile, the Security Council gradually scaled down UNOMUR, which left Uganda in September 1994.

in the lead up to the genocide.<sup>1261</sup> Days into the massacres - on 13 April 1994 - the RPF envoy at the UN requested the Security Council to found a “war crimes tribunal and apprehend persons responsible for the atrocities,”<sup>1262</sup> but no official request was endorsed as the Rwandan regime held a rotating seat.<sup>1263</sup> After the genocide, the new transitional government filed a new request.<sup>1264</sup> A UN Commission of Experts concluded that individuals from both sides to the armed conflict had committed crimes against humanity and that acts of genocide were committed against the Tutsi group and the International Criminal Tribunal for Rwanda (UNICTR) was set up shortly after.<sup>1265</sup> It was tasked with prosecuting “persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.”<sup>1266</sup> In its lifetime, the tribunal charged 89 Rwandans and one Belgian of whom 74 were tried for substantive crimes (genocide, crimes against humanity or war crimes), while nine suspects remain at large in 2015.<sup>1267</sup> Parts of its residual work were taken over by the Mechanism for International Criminal Tribunals (UNMICT) since July 2012 and the UNICTR will gradually fully merge into the UNMICT from 2016.<sup>1268</sup>

On the national scale, the RPF as well as civilians arrested and brought in between 120,000 and 135,000 people, intending to criminally prosecute everyone involved in the genocide.<sup>1269</sup> Simultaneously, the new leadership in Rwanda, led by President Pasteur Bizimungu, a Hutu, convened an international conference to discuss its transitional justice strategy,<sup>1270</sup> resulting in the establishment of specialised chambers in the ordinary and military courts<sup>1271</sup> to try genocide and crimes against humanity committed since October 1990.<sup>1272</sup> Genocide offences were categorised<sup>1273</sup>

<sup>1261</sup> United Nations Economic and Social Council, *Report by Mr. B.W. Ndiaye, Special Rapporteur, on his mission to Rwanda from 8 to 17 April 1993* (E/CN.4/1994/7/Add.1; 11 August 1993); HRW Arms Project, *Arming Rwanda. The Arms Trade and Human Rights Abuses in the Rwandan War* (HRW Arms Project, January 1994); UNSC, *Second Progress Report of The Secretary General on the United Nations Assistance Mission for Rwanda* (S/1994/360; 30 March 1994).

<sup>1262</sup> UNSC, *Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, p. 68.

<sup>1263</sup> Moghalu, *Rwanda's Genocide*, p. 20.

<sup>1264</sup> UNSC, *Letter Dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations addressed to the president of the Security Council* (S/1994/1115, 29 September 1994), p. 4.

<sup>1265</sup> UNSC, *Preliminary Report of the Independent Commission of Experts established in accordance for Security Council Resolution 935* (1994) (S/1994/1125, 4 October 1994), p. 1-2.

<sup>1266</sup> UNSC, *ICTR Statute*. The only country voting against its establishment was Rwanda.

<sup>1267</sup> The ICTR indicted 90 persons for genocide, crimes against and war crimes, half of them were politicians (20 interim government members and 25 local politicians) Twenty-three suspects were affiliated with the military, a militarised unit (militia) or the police. There were also 5 businessmen; 6 suspects were involved in media; and 7 were affiliated to the church. In addition to these there was also one prosecutor; one medical doctor, one singer and one youth organizer indicted. Barbara Hola and Alette Smeulers, 'Rwanda and the ICTR. Facts and Figures', in: Smeulers A., Brouwer A. (Eds): *Elgar Companion to the International Criminal Tribunal for Rwanda (ICTR)* (London: Edward Elgar Publishing Ltd., 2016).

<sup>1268</sup> UNICTR, Mechanism for International Criminal Tribunals (MICT) begins work in Arusha (press release: ICTR/INFO-9-2-725.EN, 2 July 2012). The UNMICT carries out a number of essential functions of the UNICTY and UNICTR after the completion of their respective mandates. UNSC, 'Annex 1: Statute of the International Residual Mechanism for Criminal Tribunals,' Resolution 1966 (S/RES/1966, 22 December 2010). Amongst its main tasks are tracking down and prosecuting the three remaining fugitives (the other 6 fugitives are set to be tried by Rwandan courts when captured). If necessary, the Mechanism can conduct appeals, retrials and review proceedings. Alongside, it will maintain the protection of victims and witnesses, supervise sentence enforcement, assist national jurisdictions and preserve the archives. The UNMICT has one president (Theodor Meron); one prosecutor (Hassan B. Jallow); a registrar (John Hocking) and 25 judges.

<sup>1269</sup> Paul Christophe Bornkamm, *Rwanda's Gacaca Courts. Between Retribution and Reparation* (New York: Oxford University Press, 2012), p. 22.

<sup>1270</sup> The conference stressed the need of bringing perpetrators of genocide to justice, rejected any consideration of amnesty and discussed two alternative proposals of specialised tribunals: a specialised court for genocide cases or a specialised chamber in ordinary courts. Besides criminal prosecutions, the conference discussed the possibility of a truth commission, traditional courts (Gacaca) and alternative sanctions. *Recommendations of the Conference held in Kigali from November 1<sup>st</sup> to November 5<sup>th</sup>, 1995* (Kigali, December 1995), pp. 8-9 & 16-24.

<sup>1271</sup> See for a discussion: Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007), pp. 71-72.

<sup>1272</sup> Organic Law No 08/96 of 30<sup>th</sup> August 1996 on The Organization of the Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed since 1 October 1990, Official Gazette of the Republic of Rwanda, Year 35, No. 17 (1 September 1996), art. 1.

<sup>1273</sup> Category 1: a) planners, organisers, instigators, supervisors and leaders; 1b) official, military, religious or militia perpetrators and fosterers; c) notorious murderers; d) sexual offenders; Category 2: perpetrators, conspirators or accomplices of murder; Category 3: persons who assaulted others; Category 4: persons who committed offences against property. *Organic Law No 08/96 of 30<sup>th</sup> August 1996*, art. 2.

and a confession and guilty plea<sup>1274</sup> procedure was put in place. The first trials began in December 1996 and from 1997 through June 2002, 7,211 persons were reportedly tried - of whom 1,386 were acquitted.<sup>1275</sup> Reliable recorded figures on the total number of people tried do not (publicly) exist, leaving researchers with estimates. Reportedly, several hundred people were sentenced to death but no public executions have been carried out since 24 April 1998.<sup>1276</sup> Classic trials soon proved not to be sufficient in criminally prosecuting thousands of suspects in and outside the country and Rwanda established *Inkiko Gacaca*<sup>1277</sup> – or *lawn courts* in Kinyarwanda – in 2001.<sup>1278</sup> Thousands of *Inyangamugayo* – lay judges - were nominated to oversee the process of (1) truth finding; (2) speeding up trials; (3) combating impunity; (4) sparking national unity and reconciliation; and (5) demonstrating that Rwandans can resolve their own problems'.<sup>1279</sup> From 10 March 2005 until the closing of Gacaca in June 2012, 12,103<sup>1280</sup> grassroots courts throughout the whole country had reportedly tried 1,003,227 people in 1,958,634 cases.<sup>1281</sup> Although the Gacaca process has met with praise and criticism from inside and outside Rwanda,<sup>1282</sup> its community proceedings have likely microscopically documented its genocide to an unprecedented extent.<sup>1283</sup> Future archival research and study of the 60 million pages of court records may possibly shed light on the micro-dynamics of the genocide.

Besides Rwandan and supranational schemes, other models of inquiry and justice have dealt with the aftermath of the Rwandan genocide. Parliaments in Belgium, Switzerland and France installed special commissions of inquiry<sup>1284</sup> while the United Nations and the Organisation of African Unity (now African Union: AU) investigated the 1994 bloodbath on their behalf.<sup>1285</sup> In addition to these fact-establishing exercises, a range of countries opted for criminal prosecutions. Judiciaries in Belgium, the Netherlands, Canada, Switzerland, France, Finland, Germany, the United Kingdom

<sup>1274</sup> Confessions required: (a) a detailed description of all the offences, including the date, time and the scene of each act, as well as the names of victims and witnesses; (b) information with respect to accomplices, conspirators and all other information useful to the exercise of public prosecution; (c) an apology; (d) an offer to plead guilty.

<sup>1275</sup> Statistics are hard to find and to trust in these cases. Some academics and human rights activists have published numbers without citing sources. Des Forges, 'Legal Responses to Genocide in Rwanda', p. 59; William Schabas estimated 10,000 cases by 2005: William A. Schabas, 'Genocide Trials and Gacaca Courts, Journal of International Criminal Justice, No. 3 (2005), pp. 879-895; Jones, *Courts of Genocide*, p. 88; HRW, *Law and Reality. Progress in Judicial Reform in Rwanda* (New York: HRW, 2008).

<sup>1276</sup> Des Forges, 'Legal Responses to Genocide in Rwanda', pp. 60-61. The death penalty was abolished in 2007: Organic Law No 31/2007 of 25 July 2007 relating to the abolition of the death penalty, *Official Gazette of the Republic of Rwanda*, Year 46, No. special (25 July 2007).

<sup>1277</sup> Bert Ingelaere, *Peasants, Power and the Past. The Gacaca Courts and Rwanda's Transition From Below* (Doctoral dissertation; Antwerp 2012); Paul Christophe Bornkamm, *Rwanda's Gacaca Courts. Between Retribution and Reparation* (New York 2012); Phil Clark, *The Gacaca Courts and Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (Cambridge 2010).

<sup>1278</sup> 'Organic Law N° 40/2000 Of 26/01/2001 Setting up "Gacaca Jurisdictions" and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed Between October 1, 1990 and December 31, 1994', *Official Gazette of the Republic of Rwanda*, n°6 (15 March 2001). The law was thoroughly amended the process: 15 July 2001; 19 June 2004; 12 July 2006; 1 March 2007; and 1 June 2008.

<sup>1279</sup> Republic of Rwanda, National Service of Gacaca Courts (NSGC), *Summary of the Report Presented at the Closing of Gacaca Courts Activities* (Kigali, June 2012), p. 34.

<sup>1280</sup> 9,013 cell level courts; 1,545 sector level court (plus 1,803 additional benches to complement these courts; 1545 appeals courts (plus 412 additional benches). See: NSGC, *Summary Report*, 33.

<sup>1281</sup> No comprehensive report exists, except for a 'summary report': Republika YÚ Rwanda, National Service of Gacaca Courts, *Summary Report Presented at the Closing of Gacaca Activities* (Kigali, June 2012), pp. 34-39. Similar to the ordinary trials, no other source data exists or has been disclosed. Academic studies on the Gacaca court, therefore, all cite conflicting numbers in terms of courts, people tried and the number of people convicted.

<sup>1282</sup> For instance: HRW, *Rwanda. Justice Compromised. The Legacy of Rwanda's Community-Based Gacaca Courts* (New York: HRW, 2011).

<sup>1283</sup> The Gacaca archive currently consists of some 20,000 boxes, which are kept in 1,000 square meters large building at the National Police Headquarters in Kigali.

<sup>1284</sup> Joseph Voyame, Richard Friedli, Jean-Pierre Gern & Anton Keller, *La Cooperation Suisse au Rwanda. Rapport du Groupe d'Etude institue par le DFAE* (Departement Federal des Affaires Etrangeres; Bern 1996); Senat de Belgique, Commission d'Enquete parlementaire concernant les evenements au Rwanda, *Rapport fait au nom de la commission d'enquete par MM Mahoux et Verhofstaet, Senat de Belgique, session de 1997-1998* (6 December 1997); and France: Assemblée Nationale, *Rapport D'Information Par la Mission D'Information de la Commission de le Defense Nationale et des Forces Armees et de la Commission des Affaires Etrangeres, sur les operations militaires menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994* (December 1998).

<sup>1285</sup> UNSC, *Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*; OAU, *The preventable genocide*.

(UK), the United States of America (USA), Denmark, Sweden, Norway and Spain have investigated, indicted or tried dozens of Rwandans suspected of crimes committed in 1994 under the principle of *universal jurisdiction*.<sup>1286</sup> Like the UNICTR, some of these countries have sent criminal files to Arusha or *vice versa*, including transfers to a specialised chamber in Rwanda.<sup>1287</sup> The case of Léon Mugesera (see above) is perhaps the most prominent example of this, although he is among the few persons accused of genocide for a speech he made in 1992. Legal complaints against the RPF political and military leadership have been filed around the globe, including in the USA, The Netherlands, Spain and the United Kingdom, but no trial has commenced at the time of writing in 2015.<sup>1288</sup>

## Resetting time

The history of contemporary Rwanda really commenced in July 1994, on the ruins its divided and destructive forerunner had left behind. A seemingly iconoclastic leadership that reset time, essentially reinvented and ‘remade’ Rwanda,<sup>1289</sup> yet old contours, structures and traditions can easily be discerned.<sup>1290</sup> From scratch, the *nouveau regime* engineered a new nation in the Great Lakes Region, embracing a new flag, different anthem and extra language. After becoming President in 2000,<sup>1291</sup> Paul Kagame introduced *Vision 2020*, a comprehensive roadmap for reforms and sustainable economic growth.<sup>1292</sup> Ever since, Rwanda set in motion a vast, ambitious and disciplined transition,<sup>1293</sup> with the financial backing of friendly governments and philanthropic NGOs.<sup>1294</sup> Under RPF leadership, the country has economically moved forward significantly; it is characterised by some as the ‘Singapore of Africa.’<sup>1295</sup> It made much progress on many different levels. Amongst its structural projects, the administration was reformed, public corruption virtually outlawed and public health was improved. With a GDP growth rate of 9% per year it desires to become a regional economic hub, a paradise for tourists and attractive to foreign investment.<sup>1296</sup> Meanwhile, troops of

<sup>1286</sup> Most cases concerned genocide crimes, while few dealt with alleged crimes committed by the Rwandan Patriotic Front (RPF). Judge Jean Louis Bruguiere indicted nine RPF staff members, including the present Minister of Defense James Kabarebe, for having been involved in the assassination of President Habyarimana in the airplane attack on 6 April 1994. See: Tribunal de Grande Instance de Paris, *Delivrance de Mandats D’Arrets Internationaux* (Parquet 972952303/0, Cabinet 41; Paris 17 November 2006). Spanish Investigative Judge Andreu Merelles indicted 40 high ranking Rwandan officials: Juzgado Central de instruccion No. 4, Audiencia Nacional, Sumario 3/2.008 – D. Auto (7 February 2008). See also: International Federation for Human Rights (FIDH) & Redress Trust (REDRESS), *Universal Jurisdiction Trial Strategies. Focus on victims and witnesses. A report on the Conference held in Brussels, 9-11 November 2009* (November 2010).

<sup>1287</sup> Cour de Cassation (ch. des vac.), *Proc. gén., demandeur en desaisissement, en cause B T* (n° P.96.0869 F; 9 July 1996); The Court of Interlocutory decision. LJN: BB8462 (Rechtbank 's-Gravenhage, 09/750009-06 + 09/750007-07 English translation; 24 July 2007); UNICTR, ‘Tribunal Transfers Two Accused to France for Trial, Press Release (ICTR/INFO-9-2-538.EN; 20 November 2007); and UNICTR, ‘Munyarugarama Case Transferred to Rwanda’, *Press Release* (ICTR/INFO-9-2-724.EN; 28 June 2012).

<sup>1288</sup> A noticeable case was the arrest of Rwanda’s Intelligence Chief Karake Karezi in the UK in July 2015 at the request of a Spanish judge on charges of war crimes and crimes against humanity. He was released as the British judiciary found no grounds to extradite him to Spain.

<sup>1289</sup> ‘Reinventing Rwanda: A Conversation with President Paul Kagame’, *Wharton University of Pennsylvania* (Podcast, available at: <http://knowledge.wharton.upenn.edu/article/president-paul-kagame-on-rwandas-reinvention/>, visited: 14 September 2016).

<sup>1290</sup> Several studies carry deal with the ‘re-imagining’ or ‘re-making’ of Rwanda. See: Johan Pottier, *Re-Imagining Rwanda. Conflict, Survival and Disinformation in the Late Twentieth Century* (New York: Cambridge University Press, 2002); Straus, *Remaking Rwanda*; Filip Reyntjens, *Political Governance*.

<sup>1291</sup> Kagame (FPR), who was vice-President since 1994, was elected president by the Transitional National Assembly 2000, taking over power from Pasteur Bizimungu. Kagame was directly elected 2003 (95,05%) and re-elected in 2010 (93,08). See: ‘Elections in Rwanda’, *African Elections Database* ([www.africanelections.tripod.com/rw.html](http://www.africanelections.tripod.com/rw.html)), visited: 31 August 2015).

<sup>1292</sup> Republic of Rwanda, Ministry of Finance and Economic Planning (MINECOFIN), *Rwanda Vision 2020* (Kigali, July 2000).

<sup>1293</sup> Republic of Rwanda, Ministry of Finance and Economic Planning (MINECOFIN), *Economic Development and Poverty Reduction Strategy II. 2013-2018* (May 2013).

<sup>1294</sup> Although, the percentage of budget financed by foreign aid has declined between 2010-2014 from 50 to 30. See: International Monetary Fund (IMF), ‘Rwanda. Third Review under the Policy Support Instrument’, *IMF Country Report*, No. 15/104 (June 2015), p. 17.

<sup>1295</sup> Jingdong Hua, ‘Why Rwanda is set to become the next Singapore’, *The East African*, 7 June 2014.

<sup>1296</sup> World Economic Forum (WEF), *The Global Competitiveness Report 2014-2015* (Geneva: World Economic Forum, 2014), pp. 322-323.

the Rwandan Defence Forces (RDF) are among the best trained and well-disciplined on the continent and contribute significantly to several complex peacekeeping missions in Africa.<sup>1297</sup>

On the social and cultural levels, transformation came at the speed of a whirlwind. Because of the four-year war, the genocide and the loss of human life, there was a major population shift. Many people perished while other Rwandans were spread all over the region, as Internally Displaced People (IDP's) in Rwanda or as refugees in neighbouring countries. But there were many exiles in the Diaspora as well who returned to Rwanda, in the footsteps of the RPF. All these migrations after the genocide structurally transformed the social landscape of Rwanda. There were Hutu who had stayed, gradually returned from refugee camps or resettled elsewhere in the country. There were Tutsi who had survived, returned from refugee camps to their villages or resettled elsewhere when they found out Hutu had taken their houses. Many 'old case returnees' (exiles and emigrants) from Burundi, Tanzania, Uganda, Zaire and other places also settled in the country, mainly in Kigali. Although they were all Banyarwanda,<sup>1298</sup> the immigrants brought along different cultural elements to Rwanda, including for instance the English language. Amidst these reshufflings, the first thing on the regime's agenda was to eradicate the underbelly of societal animosity: the ethnic labelling of Rwandans.<sup>1299</sup> Ethnic classification was scrapped from identity cards, public registrations and the official population census. After 1994, the Hutu-Tutsi question has basically been banned from public and official life and was substituted by an ideology of 'Rwandanticity', which emphasises that Rwandans "enjoy the privilege of having one country, a common language, a common culture and long shared history which ought to lead to a common vision of our destiny."<sup>1300</sup> Divisions on ethnic and political grounds - is the common idea - spark genocide. Thus, the notions of unity and reconciliation are contemplated and discursively framed as prime constituents for deterrence of renewed conflict and mass murder.<sup>1301</sup> Ethnic and other divisions have been progressively removed from daily life through self-contained taboos, education programmes<sup>1302</sup> and criminal laws on genocide 'sectarism', divisionism and genocide denial and ideology.<sup>1303</sup> Non-African rights watchdogs and engaged scholars have

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<sup>1297</sup> Since 2004, Rwanda's participation in such operations include the transitions from: the AU Mission in Sudan to the AU-UN Hybrid Mission in Darfur; from the African-led International Support Mission in Mali (AFISMA) to the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA); and from the African-led International Support Mission to the Central African Republic (MISCA) to the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA). It also has large presence in the UN Mission in South Sudan. See: Permanent Mission of Rwanda to the United Nations, *Statement by Minister of State in Charges of Cooperation, Eugene-Richard Gasana at the UN Security Council Open Debate on United Nations Peacekeeping: Regional Partnerships and their Evolution* (New York, 28 July 2014).

<sup>1298</sup> Kinyarwanda -plural: *Abanyarwanda*, singular: *Umunyarwanda*; literally "those who come from Rwanda."

<sup>1299</sup> According to Paul Kagame, because "it is distortions and prejudices that for decades were associated with these terms for political ends". Paul Kagame, 'Preface', in: Phil Clark & Zachary D. Kaufman (eds.), *After Genocide. Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (London: Hurst and Company, 2008), pp. xxi-xxvi.

<sup>1300</sup> Stef Vandeginste, 'Governing ethnicity after genocide: ethnic amnesia versus ethnic power-sharing in Burundi', *Journal of East African Studies*, Vol. 8, No. 2 (March 2014), pp. 296-297; Republic of Rwanda, *Constitution of the Republic of Rwanda* (adopted on 26 May 2003), 'preamble'.

<sup>1301</sup> Republic of Rwanda, National Unity and Reconciliation Commission (NURC), *Report on the Evaluation of National Unity and Reconciliation* (Kigali: NURC, 23 November 2001).

<sup>1302</sup> Particularly through the National Unity and Reconciliation Commission (NURC) that was provided for in the 2003 *Constitution* (art. 178).

<sup>1303</sup> Genocide ideology is defined as "an aggregate of thoughts characterized by conduct, speeches, documents and other acts aiming at exterminating or inciting others to exterminate people basing on ethnic group, origin, nationality, region, colour, physical appearance, sex, language, religion or political opinion, committed in normal periods or during war. [...] characterized in any behavior manifested by facts aimed at dehumanising a person or a group of persons with the same characteristics in the following manner: (1) threatening, intimidating, degrading through defamatory speeches, documents or actions which aim at propounding wickedness or inciting hatred; (2) marginalising, laughing at one's misfortune, defaming, mocking, boasting, despising, degrading creating confusion aiming at negating the genocide which occurred, stirring up ill feelings, taking revenge, altering testimony or evidence for the genocide which occurred; (3) killing, planning to kill or attempting to kill someone for purposes of furthering genocide ideology. See: Republic of Rwanda, 'Law No 18/2008 of 23/07/2008 Relating to the Punishment of the Crime of Genocide Ideology', *Official Gazette of the Republic of Rwanda*, No 20 (15 October 2008), art. 2 & 3. Other laws outlawing 'divisionism' include: Republic of Rwanda, 'Law No 47/2001 of 18/12/2001 Instituting Punishment for Offences of Discrimination and Sectarism', *Official Gazette of the Republic of Rwanda*, No. 4 (15 February 2002).

particularly voiced concerns about the strategy of ‘ethnic amnesia’, asserting it is used as instrument of suppression of political opposition, civil society and media.<sup>1304</sup> In real life, Rwandans remain well aware of their ethnic lineage (or at least of their Tutsi or Hutu lineage, irrespective of what these terms mean), as it is the spine of their private, shared and collective history, which is centred around the genocide event.

It would have been unmanageable to concoct a new Rwanda so steadfast without the repentance coinage from donors that ‘did not stop the genocide’ (some critics call this the “genocide credit”).<sup>1305</sup> Moreover, the robust manifestation of the government and its clever usage of transitional justice mechanisms were key economic and social drivers. On the continent, there is no other African country as safe, orderly and clean as Rwanda. With over one million inhabitants, Kigali remains relatively quiet and amiable, the streets are well brushed and its coffee bars and restaurants are trendy. Gentrification has pushed away the poorer parts of the population to the quiet villages.<sup>1306</sup> Security, discipline and hygiene are the strategic drivers behind the RPF’s rule. Behind it, lingers the philosophy that only under those circumstances it can restyle the economy, society and culture.<sup>1307</sup> But in order to realise its vision, the government maintains steady grip on private and public space, from house stoves to parliamentary seats. Controlled muteness and conformity are its instruments; the RPF ideologues observe that pluralism may re-furnish the radical splits that paved the way to the genocide. Only if they rhyme with fundamental government-set historical, policy and social narratives are opposition parties, civil society, non-governmental organisations, media and foreign programmes tolerated. Counter-discourses are actively disdained, undermined and countered by officials, elites and non-elites around the board. Dissent, if any, is often practiced in silence, while articulate dissidents abroad are reportedly intimidated and even killed.<sup>1308</sup>

Arguably, societal control and social engineering has particularly been manifested through Rwanda’s bold transitional justice scheme. It has been claimed, for instance, that laws and criminal prosecutions have been operationalised as an important tool of social control.<sup>1309</sup> Education has been equally important. Equipping – particularly young - Rwandans with the dogma of “national unity and reconciliation” has, for instance, been centrepiece in solidarity camps (*Ingando*) and civic education

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<sup>1304</sup> HRW, *Law and Reality. Progress in Judicial Reform in Rwanda* (New York: HRW, July 2008), pp. 34-41; Article 19, *Comment on the Law Relating to the Punishment of the Crime of Genocide Ideology of Rwanda* (London, September 2009); AI, *Safer to stay silent. The chilling effect of Rwanda’s laws on “genocide ideology” and “sectarianism”* (London: Amnesty International Publications, 2010); René Lemarchand, ‘The Politics of Memory in Post-Genocide Rwanda’, in: Clark & Kaufman, *After Genocide*, pp. 65-76.

<sup>1305</sup> Reyntjens, ‘Rwanda, Ten Years on: From Genocide to Dictatorship’, p. 199. According to Reyntjens, this is also used to deflect attention from alleged RPF crimes.

<sup>1306</sup> HRW finds that this is largely a result of the practice by the Rwanda National Police of rounding up “undesirable” people - street children, street vendors, sex workers, homeless people and suspected petty criminals - and arbitrarily detaining them at unofficial detention centres. See: HRW, *“Why Not Call This a Prison?” Unlawful Detention and Ill-Treatment in Rwanda’s Gikondo Transit Center* (HRW: New York, September 2015).

<sup>1307</sup> See for an analysis of Rwanda’s economic policies and practice: Patricia Crisafulli & Andrea Redmond, *Rwanda, Inc. How a Devastated Nation Became an Economic Model for the Developing World* (New York: Palgrave Macmillan, 2012).

<sup>1308</sup> HRW, *Repression Across Borders. Attacks and Threats Against Rwandan Opponents and Critics Abroad* (New York: HRW, 28 January 2014); AI, *Rwanda: Shrouded in Secrecy. Illegal Detention and Torture by Military Intelligence* (Amnesty International: London, 2012 (AFR 47/004/2012)).

<sup>1309</sup> Reyntjens, *Political Governance*, pp. 73-79.

trainings (*Itorero*).<sup>1310</sup> Public tutelage was allegedly further channelled through the nation-wide - mixed judicial and truth seeking - enterprise of neo-traditional community courts (*Inkiko Gacaca*).<sup>1311</sup> In this intimate process of local-level inquest, charging, naming and shaming, testimony and judgement, the *good versus evil* boundary between the old and new regime and its separate value systems was well demarcated. There is no convincing conclusion, however, reached among the handful scholars - who altogether observed perhaps less than 1 per cent of all trial hearings - what the real effects of *Gacaca* has been during, as well as after, the process. Where sound and representative empirical data is lacking or conflicting – a commonality in Rwanda - sets of conflicting theories and political interpretations remain, which all suggest that it has had some kind of social effects at the time the trial took place. At least it can be argued, that it became clear who was sentenced for genocide crimes and who was not.<sup>1312</sup>

#### 4.6 Tribunalising Genocide: The UNICTR

As the atrocities in Rwanda transpired and reached its peaks, pleas for justice were already progressively articulated.<sup>1313</sup> At first, calls came from Rwanda, aired by the RPF. Claude Dusaidi, the rebel group's representative at the UN, wrote a letter to the president of the Security Council, in which he claimed, "a crime of genocide has been committed against the Rwandese people" and requested the "International Community, through you Mr. President, to immediately set up a UN war crimes tribunal, apprehend those who have committed crimes against humanity in Rwanda and bring them to justice."<sup>1314</sup> Dusaidi furthermore underlined that the international community had "stood by and only watched" and that a tribunal would be a noble service to the Rwandan people."<sup>1315</sup> Only days into the slaughters, the RPF soon fostered a sense of guilt within the UN, for not managing to either prevent or stop the genocide. Ironically however, Rwanda held a rotating seat on the Council, which was occupied by Ambassador Jean-Damascene Bizimana, who represented the extremist government in Kigali at the time. So he did not endorse an official request, but international actors began to talk of the need for justice.<sup>1316</sup> At the UN, the driving force was remorse, for its hesitant role in preventing or stopping the escalation of mass atrocity.<sup>1317</sup> Besides, Alison Des Forges and Timothy Longman allege that not establishing a tribunal like the UNICTY for crimes in Rwanda that "were so much more

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<sup>1310</sup> Suzanne Hoeksema, *Facing the Façade. Ingando Re-Education Camps and the Making of Unity and Reconciliation in Rwanda* (Master Thesis Holocaust and Genocide Studies: University of Amsterdam, January 2008); Kirrily Pells, 'Building a Rwanda "Fit for Children"', in: Straus, *Remaking Rwanda*, pp. 79-86; Susan Thomson, 'Reeducation for Reconciliation. Participant Observations on Ingando', in: Straus, *Remaking Rwanda*, pp. 331-339.

<sup>1311</sup> Max Rettig, 'The Sovu Trials: The Impact of Genocide Justice on One Community', in: Straus, *Remaking Rwanda*, pp. 194-209; Bert Ingelaere, *Peasants, Power and the Past. The Gacaca Courts and Rwanda's Transition From Below* (Doctoral dissertation: University of Antwerp, 2012).

<sup>1312</sup> Important to note is that in this respect, the vast majority of people sentenced committed property crimes during the genocide and are convicted as *génocidaires*. Ergo, persons sentenced by Gacaca for theft can too easily be seen as killers. by default.

<sup>1313</sup> For quality histories about the establishment of the tribunal, see: Moghalu, *Rwanda's Genocide*; Cruvellier, *Court of Remorse*.

<sup>1314</sup> Letter from the RPF to the President of the Security Council, New York, 13 April 1994.

<sup>1315</sup> Letter from the RPF.

<sup>1316</sup> See, *inter alia*, the highly informative narratives on the debates, politics and actions towards setting up the UNICTR: Scheffer, *All The Missing Souls*, pp. 69-80; Gerald Gahima, *Transitional Justice in Rwanda: Accountability for Atrocity* (New York: Routledge, 2013), pp. 83-88.

<sup>1317</sup> Des Forges, 'Legal Responses to Genocide in Rwanda', p. 51; Moghalu, *Rwanda's Genocide*, p. 162; Cruvellier, *Court of Remorse*, p. 167.

blatant and grievous and large in scale than those committed in the former Yugoslavia” would have led to complaints of racism, particularly from the side of Rwanda and other African countries.<sup>1318</sup>

As the world powers, in particular the USA and the UK, struggled to label the persecutions and killings of Tutsi as genocide in the early days of the massacres,<sup>1319</sup> the Security Council on 30 April 1994 recalled that the “killing of members of an ethnic group with the intention of destroying such a group in whole or in part constitutes a crime punishable under international law” and that “persons who instigate or participate in such acts are individually responsible.”<sup>1320</sup> Jose Ayala Lasso, the UN’s High Commissioner for Human Rights at the time, added to this chorus that “the authors of the atrocities must be made aware that they cannot escape personal responsibility for criminal acts they have carried out, ordered or condoned.”<sup>1321</sup> His Special Rapporteur, René Degni-Ségui from Côte d’Ivoire, went on to advocate “an ad hoc international tribunal to hear the evidence and judge the guilty parties or, alternatively, should extend the jurisdiction of the international tribunal on war crimes committed in the former Yugoslavia.”<sup>1322</sup> It then took until late July for the Ghanaian Secretary General Kofi Annan to institute a commission of three experts<sup>1323</sup> who were to collect evidence of grave violations of international humanitarian law, including “possible acts of genocide.”<sup>1324</sup> In Geneva, they opened their probe and on 15 August went on a 20-day fact-collecting mission to Rwanda, Burundi, Tanzania and Zaire. Rapidly, they were barraged with materials. States, UN organs, intergovernmental bodies, NGOs and private individuals forwarded information to the commission.<sup>1325</sup> Some rights organisations called for a court. But politics were at play as well. Both the genocidal Hutu government – by then in exile - and the RPF submitted thousands of pages of documents, letters, complaints and testimonies. From the RPF, the commission received lists of alleged principal Hutu suspects, while the exiled regime forwarded the names of people presumably murdered by the RPF, locations of 15 mass grave sites and testimony of Hutu who had escaped RPF occupied territories.<sup>1326</sup> In sum, the commission determined that individuals from both sides committed war crimes and crimes against humanity. Yet, more importantly, it said “overwhelming evidence” existed “to prove that acts of genocide against the Tutsi group were perpetrated by Hutu elements in a concerted, planned, systematic and methodological way.”<sup>1327</sup> In other words: the mass extermination of the Tutsi was deemed genocide within the meaning of the 1948 Convention. Whereas mass assassinations and summary executions at the hands of Tutsi elements were also

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<sup>1318</sup> Des Forges, ‘Legal Responses to Genocide in Rwanda’, p.52.

<sup>1319</sup> See: Samantha Power, *A Problem from Hell. America and the Age of Genocide* (New York: Basic Books, 2002), pp. 364-389; US Department of State, *Daily Press Briefing*, 10 June 1994.

<sup>1320</sup> UNSC, *Statement by the President of the Security Council* (S/PRST/1994/21; 30 April 1994).

<sup>1321</sup> United Nations Economic and Social Council, *Report of the United Nations High Commissioner for Human Rights, Mr. José Ayala Lasso, on his mission to Rwanda 11-12 May 1994* (E/CN.4/S-3/3; 19 May 1994).

<sup>1322</sup> United Nations Economic and Social Council, *Report on the situation of human rights in Rwanda submitted by Mr. R. Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission Resolution E/CN.4/S-3/1 of 25 May 1994* (E/CN.4/1995/7; 28 June 1994), §75.

<sup>1323</sup> Mr. Atsu-Koffi Amega (Togo), Ms. Habi Dieng (Guinea) and Mr. Salifou Fumba (Mali).

<sup>1324</sup> UNSC, *Report of the Secretary-General on the Establishment of the Commission of Experts pursuant to paragraph 1 of Security Council Resolution 935 (1994) of 1 July 1994* (S/1994/879; 26 July 1994).

<sup>1325</sup> UNSC, *Preliminary Report of the Independent Commission of Experts*, §14-45.

<sup>1326</sup> *Ibidem*, §14, 15 & 19-40.

<sup>1327</sup> *Ibidem*, §44 & 148.

reported, the commission did not uncover evidence that these were systematic nor committed with the intent to destroy the Hutu ethnic group as such.”<sup>1328</sup>

After the genocide the question was what to do with these crimes and their perpetrators, who were wandering around in Rwanda or elsewhere? Prisons started to swell as the authorities were arresting people on a massive scale. Officials in Kigali initially contemplated setting up local tribunals, as the set-up of an international tribunal would take too long. But soon, the administration realised that its judiciary was in total shambles and that suspects had fled to countries that were not willing to extradite or otherwise deliver them.<sup>1329</sup> Just a week before the Expert Commission released its preliminary report, the newly established transitional government in Kigali complained about the international reluctance to erect an international tribunal “to expose and punish the criminals who are still at large” and demanded the Security Council to set one up, “as soon as possible.”<sup>1330</sup> Contention grew over the question if the genocide in the Great Lakes region should be referred to the Yugoslavia tribunal in The Hague or if a separate jurisdiction should take on the Rwanda situation.<sup>1331</sup> Like the Special Rapporteur, the expert’s Commission had recommended an annex to the UNICTY’s mandate to include crimes in the African country from 6 April 1994.<sup>1332</sup> But after failing to act and stop the killings in Rwanda, the extended Yugoslav tribunal idea was soon dropped to take away the impression the Rwanda genocide was not “second-class” but was given “due consideration” by having a tribunal solely dedicated to it.<sup>1333</sup>

### **Schisms**

So a separate tribunal was on draft. Its configurations remained a boiling matter of disagreement. First, Kigali wanted the tribunal to deal with former regime crimes committed from 1 October 1990, when the RPF had invaded Rwanda until 17 July 1994, when the war ended. But New York opted for the calendar year of 1994, including the lead-up to the genocide in April. In light of the myriad of perpetrators, Rwanda also objected to the proposal of having only six judges and two trial chambers. Sharing an appeals chamber and above all a prosecutor who had to apportion his energy to the Balkans and the Great Lakes at the same time was considered unworkable. Thirdly, Rwanda favoured the tribunal having jurisdiction only over crimes of genocide, not also over ‘secondary-level’ crimes against humanity and war crimes as envisioned by the statute drafters - who had in mind possible RPF cases. Location was another issue. The government argued that Kigali was the only suitable place for Rwandans to see justice being done and learn from the past, while the UN thought a site outside Rwanda would brand the tribunal more independent. Capital punishment and imprisonment in

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<sup>1328</sup> *Ibidem*, §79-83.

<sup>1329</sup> Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (New York: Transnational Publishers, 1998), p. 66.

<sup>1330</sup> UNSC, *Letter Dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations addressed to the president of the Security Council* (S/1994/1115, 29 September 1994), p. 4.

<sup>1331</sup> Gahima, *Transitional Justice in Rwanda*, pp. 83- 84.

<sup>1332</sup> UNSC, *Preliminary Report of the Independent Commission of Experts*, §139, 142 & 152.

<sup>1333</sup> Gahima, *Transitional Justice in Rwanda*, p. 84; Morris, *The International Criminal Tribunal for Rwanda*, p. 70.

Rwanda were also a non-option for decision makers in New York. Staffing the court became the last hot potato as the sponsors of the draft statute desired to rule out any Rwandan participation, to eradicate the appearance of a tribunal of the vanquished, in the novel UN branch.<sup>1334</sup>

The Rwandan government, still convinced that an international tribunal ought to take in account the concerns of Rwandans and Rwandese realities, was the only country voting against the court, while The People's Republic of China abstained.<sup>1335</sup> Nine months after the start of the genocide, "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 1994 and 31 December 1994" was a fact.<sup>1336</sup> The UNICTR – or TPIR according to its French acronym - was to "contribute to ensuring that such violations are halted and effectively redressed" and "to contribute to the process of national reconciliation and to the restoration and maintenance of peace."<sup>1337</sup> Its birth certificate - the statute – granted the tribunal supreme competence to try the crime of genocide,<sup>1338</sup> crimes against humanity<sup>1339</sup> and war crimes.<sup>1340</sup> Six judges divided over two trial chambers were to oversee trial proceedings, while UNICTY judges in The Hague would join five appeals judges.<sup>1341</sup> Justice Richard Goldstone from South Africa, the then already Chief Prosecutor of the UNICTY, was automatically appointed as Prosecutor.<sup>1342</sup> Honoré Rakotomanana was appointed as Deputy Prosecutor in Kigali.

### *A corrupted start*

At the Tribunal, investigations were largely target-based. In this regard, investigators would ask questions regarding the activities of the particular high-level accused persons being investigated.<sup>1343</sup>

Launching the tribunal was one thing, getting it into action was another. It was to be set up from the

<sup>1334</sup> See: UNSC, *Forty-ninth Year, 3453rd Meeting, Tuesday, 8 November 1994* (S/PV.3453; 8 November 1994), pp. 13-16.

<sup>1335</sup> UNSC, *Forty-ninth Year, 3453rd Meeting*, p. 2.

<sup>1336</sup> UNSC, *Resolution 955 (1994)* (S/RES/955 (1994); 8 November 1994).

<sup>1337</sup> UNSC, *Resolution 955*.

<sup>1338</sup> "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. Punishable are the following acts: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide. UNSC, *ICTR Statute*, art. 2.

<sup>1339</sup> The following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; and (i) Other inhumane acts. *Ibidem*, art. 3.

<sup>1340</sup> Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II: (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) Collective punishments; (c) Taking of hostages; (d) Acts of terrorism; (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) Pillage; (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; (h) Threats to commit any of the foregoing acts. *Ibidem*, art. 4.

<sup>1341</sup> In its lifespan up to the writing of this chapter in August 2015, however, a total number of 53 judges have served at the ICTR. By far, the most experienced trial judge is Erik Møse, sitting in 13 cases on trial. In the Appeals Chamber Fausto Pocar adjudicated 30 cases and Theodor Meron 29 cases. The longest serving ICTR judge is the Tanzanian William Sekule, from the beginning to present.

<sup>1342</sup> UNSC, *Resolution 936* (S/RES/936; 8 July 1994); Goldstone worked as Chief Prosecutor from 1994 to 1996 and was subsequently followed Louise Arbour from Canada (1996 - 1999), Carla Del Ponte from Switzerland 1999 - 2003) and Hassan Jallow from The Gambia (2003-2015).

<sup>1343</sup> UNICTR, (OTP), *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda* (Arusha: UNICTR, 2014), §92.

ground, with no permanent address. Goldstone had made his first visit to Kigali at the end of December of 1994<sup>1344</sup> and Rakotomanana landed a month later, to form the investigative and prosecutorial unit. A team was temporarily founded at the UNICEF building but was later redeployed to UNAMIR's old headquarters at the Amahoro Hotel, next to the national stadium.<sup>1345</sup> Nonetheless, the hearings were to be held elsewhere. Eyes were on Nairobi, which had the required infrastructure, support facilities and communication systems as well as a large UN presence. But Kenya did not want to host the tribunal, allegedly because of President Arap Moi's warm ties with the Habyarimana establishment.<sup>1346</sup> Close by to Nairobi, the second best choice left was the International Arusha International Conference Centre in Tanzania, by then already a symbolic place for the derailed diplomacy towards the Rwanda question. Dusty and isolated, the pass-through town for well-off Safari-trekkers would become the UNICTR's home base for management and trials, while investigators worked mainly from the Kigali office.<sup>1347</sup> Meanwhile, the Security Council called upon states to arrest and detain Rwandans suspected of crimes under the tribunal's jurisdiction,<sup>1348</sup> even before investigators were hired, the eleven judges were appointed<sup>1349</sup> and a prison and courtrooms were built in Arusha.<sup>1350</sup> Without ready offices, the registry started its work from hotel rooms, while judges "were reading documents in the evenings occasionally [...] by candlelight because of regular power cuts."<sup>1351</sup> Making legal history at the beginning demanded a hands-on mentality; the first ever hearing on an indictment and arrest warrant was held in a hotel room. Using a typewriter from the hotel manager, with a typist who could not type and a quickly wooden-carved stamp,<sup>1352</sup> Navanethem Pillay signed and issued the first indictment against 8 suspects.<sup>1353</sup>

Justice comes slowly, particularly if generated from the stubborn UN bureaucracy.<sup>1354</sup> Finding suitable and capable staff willing to work on the short-term contracts in a country still recovering from war was a challenge. Recruitment procedures were lengthy with some posts taking up to year to be filled.<sup>1355</sup> A Registrar, Adronico Adede, was only appointed on 5 September 1995, almost a year

<sup>1344</sup> It would be the first out of a total of 11 visits to Rwanda in his 18-month tenure.

<sup>1345</sup> UNSC, *Progress Report of the Secretary-General on UNAMIR for the period 25 November 1994 to 6 February 1995, reporting on the steps taken by the Government of Rwanda towards national reconciliation* (S/1995/107; 6 February 1995), §19-20.

<sup>1346</sup> Moghalu, *Rwanda's Genocide*, p. 166.

<sup>1347</sup> UNSC, *Resolution 977 (1995)* (S/RES/977 (1995); 22 February 1995).

<sup>1348</sup> UNSC, *Resolution 978 (1995)* (S/RES/978 (1995); 27 February 1995); UNSC, *Further report of the Secretary-General pursuant to paragraph 5 of security council resolution 955 (1994)* (S/1995/533; 30 June 1995), §2. As the other international criminal courts and tribunals, the ICTR did not have its own police force and was dependent on state cooperation in the arrest and transfer of suspects and the enforcement of its sentences enforce as well as its gathering of evidence.

<sup>1349</sup> Mr. Lennart ASPEGREN (Sweden); Mr. Kevin HAUGH (Ireland); Mr. Laïty KAMA (Senegal); Mr. T. H. KHAN (Bangladesh); Mr. Wamulungwe MAINGA (Zambia); Mr. Yakov A. OSTROVSKY (Russian Federation); Ms. Navanethem PILLAY (South Africa); Mr. Edilbert RAZAFINDRALAMBO (Madagascar); Mr. William H. SEKULE (United Republic of Tanzania); Ms. Anne Marie STOLTZ (Norway); Mr. Jir'ï TOMAN (Czech Republic/Switzerland); and Mr. Lloyd G. WILLIAMS (Jamaica/Saint Kitts and Nevis). Kama and Ostrovsky were respectively elected President and Vice-President. They adopted the rules of procedure and evidence at the end on 30 June 1995, in The Hague. UNSC, *Resolution 989 (1995)* (S/RES/989 (1995); 24 April 1995).

<sup>1350</sup> UNSC, *Progress Report of the Secretary-General on the United Nations Assistance Mission for Rwanda* (S/1995/848; 7 October 1995), §21-22.

<sup>1351</sup> Erik Møse, 'Main Achievements of the ICTR', *Journal of International Criminal Justice*, 3 (2005), pp. 920-943.

<sup>1352</sup> Navanethem Pillay talks about it in the documentary: UNICTR, *Justice Today, Peace Tomorrow* (2003), at 7:29 mins.

<sup>1353</sup> UNICTR, *Le Procureur c. Clément Kayishema, Ignace Bagilishema, Charles Sikubwabo, Aloys Ndimbati, Vincent Rutaganira, Mika Muhimana, Ryandikayo et Obed Ruzindana: Acte d'accusation* (ICTR-95-1-I; 22 November 1995); International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor of the Tribunal Against Clément Kayishema, Ignace Bagilishema, Charles Sikubwabo, Aloys Ndimbati, Vincent Rutaganira, Mika Muhimana, Ryandikayo, Obed Ruzindana: Indictment: Decision on the Review of the Indictment* (ICTR-95-1-I; 28 November 1995).

<sup>1354</sup> Megan M. Westberg, 'Rwanda's Use of Transitional Justice After Genocide: The Gacaca Courts and the ICTR', *Kansas Law Review*, Vol. 59 (2011), pp. 331-367: 343.

<sup>1355</sup> Des Forges, 'Legal Responses to Genocide in Rwanda', p. 52.

after the birth to the tribunal.<sup>1356</sup> In fact, serious operational deficiencies and corruption in the daily management of the tribunal stalled the healthy conception of a vital tribunal. The entire Registry administration functioned ineffectively<sup>1357</sup> and the OTP in Kigali had administrative, leadership and operational problems.<sup>1358</sup> The insolvent investigations unit in Kigali took over ten weeks to become operational,<sup>1359</sup> while in April 1995, Richard Goldstone had reported it was already processing about 400 cases.<sup>1360</sup> But the team was seriously understaffed, with fewer than a dozen members on board by August 1995. Some western countries, in particular The Netherlands and Canada,<sup>1361</sup> literally saved the tribunal from total disaster by providing resources, equipment and police detectives and analysts.<sup>1362</sup> One year after its establishment, the OTP had 52 staff members from 15 different countries, 28 of them on secondment. It comprised 30 investigators, lawyers, intelligence analysts, advisers, a scientific director, experts in forensic medicine, statisticians, demographers, interpreters and translators and support staff.<sup>1363</sup>

Experience and qualification within the unit soon proved to be insufficient to carry out the mandate: three senior prosecutors came from academia or human rights organisations and had neither criminal trial proficiency nor experience; the legal advisors assigned to the investigation teams had no experience in criminal investigations; investigators, drawn largely from national police forces, had no know-how at all on investigating massive international crimes. Apart from that, many had never set foot on the African continent, let alone in tiny but complex Rwanda.<sup>1364</sup> Since there were no Rwandans hired except for translators, all staff in the investigations unit was totally unfamiliar with the society, culture and history of Rwanda and Kinyarwanda was incomprehensible for the either French or English speaking staff.<sup>1365</sup> Practical working conditions were hard; some dedicated staff left “having left a piece of [their] heart” or was contemplating leaving “in complete frustration.”<sup>1366</sup> Tribunal staff regularly received threats and some staff members were even assaulted. The offices

<sup>1356</sup> UNSC, *First annual report 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 covering the period from 8 November 1994 to 30 June 1996, adopted at the third plenary session of the Tribunal (A/51/399 and S/1996/778; 24 September 1996)*, §23.

<sup>1357</sup> Finance had no accounting system and could not produce allotment reports, so that neither the Registry nor UN Headquarters had budget expenditure information; lines of authority were not clearly defined; internal controls were weak in all sections; personnel in key positions did not have the required qualifications; there was no property management system; procurement actions largely deviated from UN procedures; UN rules and regulations were widely disregarded; the Kigali office did not get the administrative support needed, and construction work for the second courtroom had not even started. UNGA, *Report of the Office of Internal Oversight Services on the audit and investigation of the International Criminal Tribunal for Rwanda (A/51/789; 6 February 1997)*, §11-18.

<sup>1358</sup> Functions were hampered by lack of experienced staff as well as lack of vehicles, computers and other office equipment and supplies. Lawyer posts were vacant and, of the almost 80 investigator posts, only 30 had been filled. Prosecution strategy deficiencies were noted. The witness-related programmes had not been fully developed. UNGA, *Report of the Office of Internal Oversight Services*, §19-25.

<sup>1359</sup> UNSC, *Further report of the Secretary-General pursuant to paragraph 5 of security council resolution 955*, §4.

<sup>1360</sup> UNSC, *S/1995/297*, §18.

<sup>1361</sup> Tweede Kamer der Staten-Generaal, *Brief van de Ministers van Buitenlandse Zaken en voor Ontwikkelingssamenwerking*, 23 727 Rwanda, No. 25 (8 October 1996).

<sup>1362</sup> Frank Vermeulen, ‘Negen Miljoen voor Rwanda’, *NRC Handelsblad* (20 May 1995); ‘Nederlanders naar Rwanda’, *Het Parool* (26 September 1995); ‘Nederlandse politie brengt zaak voor Rwanda-tribunaal’, *Trouw* (24 October 1995); Hanneke de Wit, ‘Onderzoek in Rwanda traag’, *Het Parool* (2 November 1995).

<sup>1363</sup> The number of investigators had risen to 52 in July 1997, but dropped to some 30. In 2002, the investigation division had on staff 108 persons in the investigations division – compared to 288 at the ICTY. UNGA, *Report of the Office of Internal Oversight Services, on the review of the Office of the Prosecutor at the International Criminal Tribunals for Rwanda and for the former Yugoslavia (A/58/677; 7 January 2004)*, §6.

<sup>1364</sup> Also see interviews with investigators, trial lawyers and prosecutors in the documentary about the ICTR’s trial of Jean-Paul Akayesu: Nick Louvel & Michele Mitchell, *The Uncondemned* (Film at Eleven, 2016).

<sup>1365</sup> Des Forges, ‘Legal Responses to Genocide in Rwanda’, p. 53. According to his CV, one of the authors, Longman, provided trainings himself to “researchers for the International War Crimes Tribunal” while he was a research consultant to HRW between 1995 and 1996. See: Curriculum Vitae: Timothy Paul Longman (<http://www.bu.edu/polisci/files/2014/03/Longman.pdf>); UNGA, *Report of the Office of Internal Oversight Service*.

<sup>1366</sup> *Ibidem*, §38.

lacked computers, phones, faxes and even stationary, leaving some with no other option than to bring their own laptops to the field. But they also lacked vehicles, essential to visit crime scenes and witnesses. Overall, at the inception, the OTP was in disarray and – above all – had no strategy at all but rather “a leadership void,” according to an official oversight investigation.<sup>1367</sup>

As a result, self-organised investigative teams set their own plans and strategies<sup>1368</sup> and made no systematic effort to gather documentary and forensic evidence, linking alleged organisers to specific crime scenes. There were no archives or any other paper trails to follow throughout the hills, where the main source of information was oral tradition. Finding credible evidence that could be corroborated and would hold up in a court of law was a major challenge. But independent investigations were not the principle. On the contrary, investigators heavily relied on testimony of witnesses identified and delivered to them by the Rwandan government, state-controlled ‘NGOs’ (African Rights) and organisations of genocide survivors (KWIBUKA).<sup>1369</sup> Rwandan state officials, clergy, policemen or translators, were often present during the interviews. Also, the starting point would often not be a crime scene. Instead, the OTP worked from UN or human rights reports, with Goldstone’s reported list of 400 potential suspects, or would focus on Rwandans, who were captured already, then trying to find evidence on these people, rather than doing the reverse.<sup>1370</sup> Thus, from the start, the investigations were suspect based, rather than evidence based. Otherwise, the only strategy was geographical, focusing on those areas where the massacres had been worst, in the prefectures of Butare, Kibuye, Cyangugu and Kigali.<sup>1371</sup> And indeed, it was in Kibuye and the hills of Bisesero, that the first three investigators gathered the first survivor testimonies, in May 1995.<sup>1372</sup> It was not difficult to gather evidence in Rwanda. “Basically, conducting investigations was not complicated. In Rwanda, everyone knows everything, and everybody knows everybody,” one of the investigators on the first team in charge of investigating Kibuye in 1995 candidly explained to the court.<sup>1373</sup> Sometimes, in the case no witnesses could be found around the crime scenes, reports a former OTP member, professional witnesses would offer their fairly priced ‘testimonial services’ to investigators.<sup>1374</sup> All the times, from early on, there were rumours and allegations of denunciation syndicates in Rwanda, groups of opportunistic people, who allegedly organised testimony against persons who were known to be rich or own real estate or cattle.<sup>1375</sup> At no time, even during the first trial against Akayesu, were these alleged phenomena seriously addressed by the lawyers. The very judges, who had to base their findings solely upon witness testimony from people unknown to them, seemed not convinced of,

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<sup>1367</sup> UNGA, *Report of the Office of Internal Oversight Services*, §56.

<sup>1368</sup> *Idem*.

<sup>1369</sup> Des Forges, ‘Legal Responses to Genocide in Rwanda’, pp. 49-68.

<sup>1370</sup> Jones, *Courts of Genocide*, pp. 112-115.

<sup>1371</sup> Larissa Van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Leiden & Boston: Martinus Nijhoff Publishers, 2005), p. 65.

<sup>1372</sup> Cruvellier, *Court of Remorse*, p. 81.

<sup>1373</sup> *Ibidem*, p. 96.

<sup>1374</sup> André Sirois, ‘Les mauvais débuts du Tribunal international pour le Rwanda’, *Mondialisation.ca*, 13 November 2014.

<sup>1375</sup> The Rwandan director of the Centre for the Struggle against Impunity and Injustice, Joseph Matata, told the ICTR, as a defence witness for Akayesu, that those indicted by the Rwandan courts and by the ICTR are accused on the basis of orchestrated testimony from so called “denunciation syndicates” active in Rwanda. See: ‘The trial of Jean-Paul Akayesu, former mayor of Taba commune’, *Hirondelle News Agency*, 1 September 1998.

neither disturbed by, the charge, since the defence did not put it directly to the witnesses, and brushed the matter away.<sup>1376</sup> This highly problematic investigatory modus operandi by western fact-finders in an unfamiliar politically, economically and socially anxious context, although never critically researched, would sow the seeds, in part, for the troublesome process of truth-ascertainment at the tribunal. If as truly disturbing as reported, false denunciations may have very well trickled down into judiciaries beyond the UNICTR and subsequent research based on those sources.

### *The trials*

Throughout its lifespan, the Arusha-tribunal publicly charged 90 individuals for genocide, crimes against humanity and war crimes and two people for contempt of court.<sup>1377</sup> Apart from one Belgian suspect (Georges Ruggiu), all were Rwandan Hutu and only one of them was female. Most of the suspects were believed to be interwoven in the web of Hutu extremism and their names had already circulated widely during and immediately after the genocide.<sup>1378</sup> None of the suspects belonged to the RPF, Tutsi or was charged with alleged international crimes attributed to the RPF.<sup>1379</sup> Nor was anybody publicly indicted and prosecuted, despite OTP investigations into the matter,<sup>1380</sup> for the shooting down of Habyarimana's plane, an affair critical to the understanding of the unfolding of the genocide. In the end, half of those indicted with a variety of crimes committed between 6 April and mid-July 1994, comprised *Abatabazi* government members (20) and local politicians (25). Twenty-three indictments were linked to members of the military, para-military units or the police. Amongst the core group of politicians were Prime Minister Jean Kambanda, prominent MRND members,<sup>1381</sup> CDR-

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<sup>1376</sup> Akayesu's lawyer, Nicholas Tiangaye, had made the suggestion that some, if not all, of the Prosecution witnesses did so because they were colluding in a "syndicate of informers" which would denounce a particular individual for political reasons or in order to take over his property: "So, what do we do, Mr. President, ladies and gentlemen, when witnesses come to tell lies before the Chamber, what do we do?" In reply, the Chamber held it was merely a generalised and unsubstantiated suspicion and that during the trial the Defence did not put, nor even suggest, to a single prosecution witness that he or she was lying because he or she had been drawn into a syndicate of informers and instructed as to how to testify against the accused, or that the witness was lying because he or she wished to take the accused's property. UNICTR, *Akayesu Judgement*, §44-47.

<sup>1377</sup> Many more files were prepared, but did not make it to trial. They were forwarded to the General Prosecutor in Rwanda. By 8 June 2010, for instance, the ICTR prosecutor had transferred 55 files to Rwanda for investigation or prosecution. See: UNICTR, Office of The Prosecutor, *Complementarity in Action. Lessons Learned from the ICTR Prosecutor's Referral of International Criminal Cases to National Jurisdictions* (ICTR: Arusha, February 2015), p. 7, note 17.

<sup>1378</sup> See for instance and in particular the work by African Rights. Their reports detail and highlight many suspects, most of whom who were later indicted by the ICTR. See: African Rights, *Who is Killing; Who is Dying; What is to be done? A discussion paper* (African Rights: London, May 1994); and in particular their 750-paged "yellow-pages" into the genocide: AR, *Death, Despair and Defiance*. As a first elaborate study in English, the book, which listed 'culprits' and heavily cited witness testimony soon became the first guide book for the non-French speaking – mostly Dutch – ICTR investigators.

<sup>1379</sup> Investigations into allegations of RPF crimes were commenced but charges were never pressed, allegedly out of fear that Rwanda would stop its cooperation with the court. Prosecutor Del Ponte even claims that her wish to pursue these case or "Special Investigation" led the UN not to extend her mandate at the ICTR. Carla del Ponte, *Madame Prosecutor – Confrontation with humanity's worst criminals and the culture of impunity* (New York: Other Press 2009). E-book "chapter 9". When the ICTR got its own Prosecutor, the UN called "on all States, especially Rwanda, Kenya, the Democratic Republic of the Congo, and the Republic of the Congo, to intensify cooperation with and render all necessary assistance to the ICTR, including on investigations of the Rwandan Patriotic Army [author's emphasis] and efforts to bring Felicien Kabuga and all other such indictees to the ICTR and calls on this and all other at-large indictees of the ICTR to surrender to the ICTR." UNSC, *Resolution 1503 (2003)* (S/RES/1503(2003); 28 August 2003), §3. At least one dossier, the "Kabgayi case", however, was cleared by the OTP and sent to Rwanda's General Prosecutor, who brought a case against four individuals. See: UNICTR, *Letter from Hassan B. Jallow, Chief Prosecutor ICTR to Kenneth Roth, Executive Director Human Rights Watch*, ref. OTP/2009/P/084 (Arusha, 22 June 2009). The non-charging of persons alleged to be responsible for crimes attributable to the RPF has become the major criticism of the tribunal among jurists, activists and scholars. Amongst the latter was Filip Reyntjens, who had worked as consultant to the OTP and an expert witness since 1995. See: Filip Reyntjens, 'Prosecutorial Policies in the ICTR: Ensuring Impunity for the Victors' (www-text: [http://www.tpirheritagedefense.org/Conference2/Papers/Filip\\_Reyntjens\\_Prosecutorial\\_Policies\\_in\\_the\\_ICTR\\_Ensuring\\_Impunity\\_for\\_the\\_Victors.pdf](http://www.tpirheritagedefense.org/Conference2/Papers/Filip_Reyntjens_Prosecutorial_Policies_in_the_ICTR_Ensuring_Impunity_for_the_Victors.pdf), visited: 3 September 2015).

<sup>1380</sup> Investigator Michael Hourigan led the so-called 'National Team', tasked with, *inter alia*, Bagosora and identifying those responsible for the fatal rocket attack. He prepared a memo, based on testimonies from three ex-RPF informants who pointed a Kagame as the one responsible, titled 'Secret National Team Inquiry – Internal Memorandum, which was confiscated by Prosecutor Arbour. UNICTR, *The Prosecutor vs. Théoneste Bagosora et al.: Defence Exhibit 365: Affidavit of Michael Andrew Hourigan* (ICTR-98-41-T; 12 April 2007).

<sup>1381</sup> Chairman Mathieu Ndirumapfse, vice-chairman Edouard Karemera and secretary general Joseph Nzirorera.

founder Jean-Bosco Barayagwiza and interim government ministers and officials.<sup>1382</sup> Out of the twenty-five regional and local political leaders - such as prefects, *burgomasters* or councillors - 18 were convicted, three acquitted, one transferred and three remain at large. The second largest group indicted by the tribunal's prosecutors were those affiliated with armed groups,<sup>1383</sup> most of them members of the Rwandan army (FAR) and some *Interahamwe* leaders. Most notorious amongst the Military were Théoneste Bagosora, Aloys Ntabakuze (battalion commander), Anatole Nsengiyumva (lieutenant colonel) Gratien Kabiligi (brigadier-general), who were lumped together in the *Military I* case. *Military II* included Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu. Eleven others in this group received sentences ranging between 12 and 35 years. The rest of the suspects came from other walks of life. There was an historian (Dr. Ferdinand Nahimana), a newspaper editor (Hassan Ngeze), a radio presenter (Georges Ruggiu), businessmen (Felicien Kabuga most prominently<sup>1384</sup>), clergymen,<sup>1385</sup> a medical doctor (Gerard Ntakirutimana), a deputy prosecutor (Simeon Nchamihigo), a ballet director and singer (Simon Bikindi)<sup>1386</sup> and a youth organiser and former UNICTR defence investigator (Nzabirinda).

During its 20-year life span, the UNICTR conducted 52 cases regarding mass crimes, trying 74 individuals, all Hutu and one Belgian.<sup>1387</sup> From those who were publicly indicted, six men surrendered themselves voluntarily while 73 others were arrested in 24 different countries, mostly in Africa.<sup>1388</sup> Not all indicted persons were thus brought before one of the three UN Trial Chambers in Arusha. Some indictments were withdrawn,<sup>1389</sup> while others were forwarded to national courts in Rwanda and France. At the time of writing nine suspects were still out of the reach of the UNICTR's fugitive tracking department, of which three (Bizimana, Kabuga, Mpiranya) will be tried by the UNMICT if ever apprehended, while the others are destined for specialised international crimes chambers in the Rwandan courts.<sup>1390</sup> Arrested in Zambia, the first three suspects (Clément Kayishema, Jean-Paul Akayesu and Georges Rutaganda) arrived at the court in Arusha in May 1996.<sup>1391</sup> Since the reconstruction of premises was not concluded yet, they were introduced to a three-panel bench in a

<sup>1382</sup> Casimir Bizimungu (health minister); Jerome-Clement Bicamumpaka (foreign affairs minister); Justin Mugenzi (commerce minister); Prosper Mugiraneza (public services minister); Pauline Nyiramasuhuko (family and women's affairs minister); Michel Bagaragaza (government director general controlling tea industry); Callixte Kalimanzira (director of cabinet of interior ministry); Augustin Ngarabatware (planning minister); Théoneste Bagosora (cabinet director at Defence Ministry); Augustin Bizimana (defence minister, at large).

<sup>1383</sup> Fourteen of them were found guilty, three were acquitted, two were withdrawn and one was transferred. Protais Mpiranya (presidential guard commander, Kayishema Fulgence (police inspector) and Pheneas Munyarugarama (FAR colonel) remain at large.

<sup>1384</sup> Others were Alfred Musema, Gaspard Kanyarukiga, Obed Ruzindana, Protais Zigiranyirazo and Charles Ryandikayo.

<sup>1385</sup> Samuel Musabyimana, Munyeshyaka, Hormisdas Nsengimana, Elizaphan Ntakirutimana, Athanase Seromba, Emmanuel Rukundo.

<sup>1386</sup> Dubbed the troubadour of the genocide for his supposed hateful songs towards Tutsi, Bikindi was convicted for direct and public incitement to commit genocide. UNICTR, TCI, *The Prosecutor v. Simon Bikindi: Judgement* (ICTR-01-72-T; 2 December 2008), §441. For a further study, see: James E. K. Parker, *Acoustic Jurisprudence. Listening to the Trial of Simon Bikindi* (Oxford: Oxford University Press, 2015).

<sup>1387</sup> In the end, 74 suspects were brought to court, of which one, former MRND secretary-general Joseph Nzirorera, died during his trial due to a prolonged illness. In the cases of 54 individuals, appeal proceedings initiated by either the defendant, the prosecution or both parties.

<sup>1388</sup> Operation Naki. In May 1997 Bernard Muna, the new deputy prosecutor from Cameroon, took over the reins at the Kigali office. At dawn on July 18 his team of approximately thirty ICTR staff with the assistance of thirty-six Kenyan police officers launched Operation Naki (for "Nairobi-Kigali"). In one morning, seven Rwandans were arrested in Kenya on its orders, and two others were arrested in the days and weeks that followed. Six people managed to slip through the tribunal's hands in this major dragnet, but among those arrested were Jean Kambanda, head of the government during the genocide, along with one minister, two high-ranking officers of the ex-Rwandan forces, and the most famous journalist from the extremist press. See: Cruvellier, *Court of Remorse*, p. 17.

<sup>1389</sup> Bernard Ntuyahaga, who was put in trial in Belgium; Leonidas Rusatira, because of "insufficient evidence"; and Samuel Musabyimana, who died in detention. See: UNICTR, TCI, *The Prosecutor versus Bernard Ntuyahaga: Decision on The Prosecutor's Motion to Withdraw the Indictment* (ICTR-98-40-T; 18 March 1999); Tribunal de Première Instance Bruxelles, *Bernard Ntuyahaga: Judgement* (Case No 005417; Brussels, 5 July 2007); UNICTR, *The Prosecutor vs Leonidas Rusatira: Decisions on the Prosecutors Ex Parte Application for Leave to Withdraw the Indictment* (ICTR-2002-80-I; 14 August 2002); and UNICTR, 'Bishop Samuel Musabyimana dies,' *Press Release*, 24 January 2003.

<sup>1390</sup> UNSC, *Third Annual Report of the International Residual Mechanism Criminal Tribunals* (S/2015/586; 31 July 2015).

<sup>1391</sup> UNICTR, Registry, 'Statement of the Registrar of the International Criminal Tribunal for Rwanda Dr. Andronico O. Adede, *Statement* (27 May 1996).

make-shift courtroom, all pleading not guilty.<sup>1392</sup> Taba's former *burgomaster*, Akayesu, was the first to go to trial on 9 January 1997. One and a half year later, on 2 September 1998, he became the first ever to be convicted and sentenced by an international tribunal for the crime of genocide as defined in the 1948 UN Convention.<sup>1393</sup> After having established that genocide was committed in Rwanda in the Akayesu case and a dozen subsequent trials, in 2003, the UN urged the UNICTR to start working towards closure of the tribunal in 2010.<sup>1394</sup> In its so-called "completion strategy",<sup>1395</sup> the focus shifted towards trying the most senior leaders in Arusha and transferring intermediate - and lower ranking suspect to other jurisdictions. The deadline of 2010 was never met. Only in December 2012, was the last trial Judgement delivered in the Ngirabatware case and in December 2015 the ICTR definitely closed down with handing out its last appeals Judgement in in "the Butare case" against six defendants. Of the 74 persons brought before the UNICTR, 14 were acquitted.<sup>1396</sup> Most persons indicted, arrested or surrendered received a full trial, including presentation and discussion of evidence. In nine cases however, suspects pleaded guilty and no evidentiary proceedings took place.<sup>1397</sup> Altogether, the judicial process was slow, particularly in the pre-trial and the appeals phases. At the average rate of almost 7,5 years per trial (from indictment to final judgement delivery), the Rwanda tribunal was the slowest international court so far, mostly because of its delays in bringing suspects to trial and the elaborate hearing of witnesses. In terms of records, the Butare-case is notorious, absorbing 10 years of trial in first instance. Similarly, the longest entire proceedings lasted almost 13,5 years in the *Government I* case, involving Ngirumpatse, Karemera and Nzirorera.

After 20 years of work, the UNICTR convicted 52 individuals (88 per cent) for genocide, either by committing it, inciting it, being complicit to it and – to a lesser extent – conspiring to commit it.<sup>1398</sup> Often, the genocide convictions went along with a combination of crimes against humanity or war crimes. As a novelty to international criminal justice, the UNICTR tried 43 defendants for rape, as atrocity crime, or other acts of sexual violence.<sup>1399</sup>

#### 4.7 Unfolding the narrative. Akayesu: Genocide in Rwanda?<sup>1400</sup>

The evidence produced by the parties to the case was mainly testimonial. Yet, human testimony often has the shortcoming of being eminently fragile and fallible. The Chamber considered the credibility of the testimonies, all the more so as three problems were posed: firstly, the fact that most of the witnesses directly experienced the terrible events they were

<sup>1392</sup> UNICTR, 'Initial Appearance in Arusha,' *Press Release* (3 June 1996).

<sup>1393</sup> UNICTR, *Akayesu Judgement*.

<sup>1394</sup> UNSC, *Statement by the President of the Security Council* (S/PRST/2002/21; 23 July 2002).

<sup>1395</sup> UNSC, *Resolution 1503 (2003)* (S/RES/1503 (2003); 28 August 2003).

<sup>1396</sup> Emmanuel Bagambiki, Ignace Bagalishema, Jérôme Bicamumpaka, Casimir Bizimungu, Gratien Kabiligi, Jean Mpambara, Justin Mugenzi, Prosper Mugiraneza, Augustin Nindiliyimana, Hormisdas Nsengimana, André Ntagerura, François-Xavier Nzuwonemeye, Adndré Rwamabuka and Protais Zigiranyirazo.

<sup>1397</sup> Except in the case against Ruggiu, who changed his plea during his trial. See: UNICTR, TCI, *The Prosecutor v. Georges Ruggiu: Judgement and Sentence* (ICTR-97-32-I; 1 June 2000), §10.

<sup>1398</sup> There were only seven individuals, who were not convicted of genocide (four pleaded guilty to charges of crimes against humanity and three others were convicted of crimes against humanity combined with war crimes). Hola & Smeulers, 'Rwanda and the ICTR. Facts and Figures'.

<sup>1399</sup> Twelve individuals were convicted of rape as genocide and/or crime against humanity (two cases are still on appeal). The rest has been acquitted of charges containing sexual violence or the charges were dropped. ICTR, *Prosecution of Sexual Violence, Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda* (30 January 2014).

<sup>1400</sup> Chapter 3 of the judgement carries this title: UNICTR, *Akayesu Judgement*, pp. 59-66.

narrating, and that such trauma could have an impact on their testimonies; secondly, the impact of cultural and social factors on communication with the witnesses; and thirdly, the difficulties in interpreting the statements made by the witnesses, most of whom spoke in Kinyarwanda. Despite the difficulties experienced, the Chamber wishes, in this regard, to thank each witness, once again, for his/her deposition at the hearing and commends the strength and courage of survivors, who have narrated the extremely traumatic experiences they had, sometimes rekindling extremely painful emotions. Their testimonies were invaluable to the Tribunal in its search for the truth on the events that happened in Taba commune in 1994.<sup>1401</sup>

On Wednesday 2 September 1998, the name Jean-Paul Akayesu was inscribed as a milestone into the embryonic history of international criminal justice. The event was announced with much fanfare. He was branded the international community's first ever convicted *génocidaire*, based on the wording of the UN's Convention. It is dubious honour, in many respects. As a *burgomaster*, Akayesu had not killed anyone in his community, nor had he had any blood on his hands. Even more so, for almost two weeks he had opposed the genocide, only to turn 180 degrees on 19 April, allowing, even inciting at times, an estimated 2,000 Tutsi to be killed. Essential to his case – in order to determine his alleged individual responsibility – was the question if genocide had occurred in Rwanda. As there was no material evidence introduced to the trial other than post facto photographs from Taba and dead bodies in Southern Rwanda, the judges had to solely rely on testimonies from a varied group: victims, genocide suspects, villagers, Taba's new mayor,<sup>1402</sup> a former police officer, a former mayor, investigators, 5 international experts,<sup>1403</sup> the former head of the UN's peacekeeping mission Dallaire and Akayesu himself. From the memory of those 42 people,<sup>1404</sup> they managed to make that finding:

As regards the massacres which took place in Rwanda between April and July 1994, as detailed above in the chapter on the historical background to the Rwandan tragedy, the question before this chamber is whether they constitute genocide. [...] Even though the number of victims is yet to be known with accuracy, no one can reasonably refute the fact that widespread killings took place during this period throughout the country [...].<sup>1405</sup> In the opinion of the Chamber, many facts show that the intention of the perpetrators of these killings was to cause the complete disappearance of the Tutsi people. In this connection, Alison Des Forges, a specialist historian on Rwanda, who appeared as an expert witness, stated as follows: "on the basis of the statements made by certain political leaders, on the

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<sup>1401</sup> UNICTR, *Akayesu Judgement*, p. 5.

<sup>1402</sup> Ephrem Karangwa.

<sup>1403</sup> Dr. Mathias Ruzindana (linguist), Dr. Alison Des Forges (historian/human rights activist), Lindsey Hilsum (journalist and UNICEF employee), Dr. Rony Zacharia (medical doctor MSF) and Simon Cox (camera man). With respect to the three latter, the Prosecution intended to prove "the required elements of the charges against Akayesu, such as the widespread and systematic nature of the conflict. The witnesses do not directly implicate Jean Paul Akayesu." See: UNICTR, OTP, *Letter from Sara Darehshori to Mr. Tiangaye: The Prosecutor y Jean Paul Akayesu ICTR-96-4-1* (7 January 1997).

<sup>1404</sup> Prosecution witnesses: K, C, N, D, Dr. Rony Zacharia, Lindsey Hilsum (journalist), Simon Cox (journalist), W, A, Z, V, G, E, J, R, Halba Tomta (investigator), Dr. Mathias Ruzindana, Q, S, D, Alison Des Forges, U, H, JJ, OO, Christer Skarp, KK, NN, PP. Defence witnesses: DBB, DCC, DZZ, DCX, DAX, Joseph Matata, DIX, DJX, Roméo Dallaire, DFX, DAAX, DEEX, Jean-Paul Akayesu. Their testimony stretches beyond 4,000 pages of trial transcripts. See: UNICTR, *List of Witnesses who Testified in the Trial of Jean Paul Akayesu* (ICTR-96-4-T; 8 October 1998). For an overview of some of these witnesses and their testimony: "The Trial of Jean Paul Akayesu, Former Mayor of Taba Commune, *Hirondelle News Agency*, 1 September 1998.

<sup>1405</sup> Omitted text: "Dr. Zachariah, who appeared as an expert witness before this Tribunal, described the piles of bodies he saw everywhere, on the roads, on the footpaths and in rivers and, particularly, the manner in which all these people had been killed. He saw many wounded people who, according to him, were mostly Tutsi and who, apparently, had sustained wounds inflicted with machetes to the face, the neck, the ankle and also to the Achilles' tendon to prevent them from fleeing. Similarly, the testimony of Major-General Dallaire, former Commander of UNAMIR, before the Chamber indicated that, from 6 April 1994, the date of the crash that claimed the life of President Habyarimana, members of FAR and the Presidential Guard were going into houses in Kigali that had been previously identified in order to kill. Another witness, the British cameraman, Simon Cox, took photographs of bodies in various localities in Rwanda, and mentioned identity cards strewn on the ground, all of which were marked "Tutsi". Consequently, in view of these widespread killings the victims of which were mainly Tutsi, the Trial Chamber is of the opinion that the first requirement for there to be genocide has been met, to wit, killing and causing serious bodily harm to members of a group. The second requirement is that these killings and serious bodily harm be committed with the intent to destroy, in whole or in part, a particular group targeted as such."

basis of songs and slogans popular among the Interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that- as they said on certain occasions- their children, later on, should not know what a Tutsi looked like, unless they referred to history books". [...] <sup>1406</sup> In the opinion of the Chamber, this demonstrates the resolve of the perpetrators of these massacres not to spare any Tutsi. Their plan called for doing whatever was possible to prevent any Tutsi from escaping and, thus, to destroy the whole group. [...] <sup>1407</sup> Other testimonies heard, especially that of Major-General Dallaire, also show that there was an intention to wipe out the Tutsi group in its entirety, since even newborn babies were not spared. [...] <sup>1408</sup> Based on the evidence submitted to the Chamber, it is clear that the massacres which occurred in Rwanda in 1994 had a specific objective, namely the extermination of the Tutsi, who were targeted especially because of their Tutsi origin and not because they were RPF fighters. The Chamber concludes that, alongside the conflict between the RAF and the RPF, genocide was committed in Rwanda in 1994 against the Tutsi as a group. [...] <sup>1409</sup> The Chamber is of the opinion that the genocide appears to have been meticulously organized. In fact, Dr. Alison Des Forges testifying before the Chamber on 24 May 1997, talked of "centrally organized and supervised massacres [...]". <sup>1410</sup> The fact that the genocide took place while the RAF was in conflict with the RPF, can in no way be considered as an extenuating circumstance for it. This being the case, the Chamber holds that the fact that genocide was indeed committed in Rwanda in 1994 and more particularly in Taba, cannot influence it in its decisions in the present case. Its sole task is to assess the individual criminal responsibility of the accused for the crimes with which he is charged, the burden of proof being on the Prosecutor."<sup>1411</sup>

Jean-Paul Akayesu (1953), despite being a small fish, was the first to go on trial in Arusha, a case that was not just about him but even more so about answering the legal question if the overall context of his individual actions was genocide. But there was a complicated pre-history to the historic judgement of which portions are cited above. Born in Murehe sector, Taba commune, about half an hour drive southwest to Rwanda's capital Kigali, Akayesu had built a career in his locality. When he was young, the tall and slender Hutu was known as an active athlete and member of the local football team.<sup>1412</sup> In 1978 he married Suzanne Mukandinda, a nurse at the local hospital, with whom he has five

<sup>1406</sup> Omitted text: "This testimony given by Dr. DesForges was confirmed by two prosecution witnesses, who testified separately before the Tribunal that one Silas Kubwimana said during a public meeting chaired by the Accused himself that all the Tutsi had to be killed so that someday Hutu children would not know what a Tutsi looked like. Dr. Zachariah also testified that the Achilles' tendons of many wounded persons were cut to prevent them from fleeing."

<sup>1407</sup> Omitted text: "Dr. Alison DesForges stated that numerous Tutsi corpses were systematically thrown into the River Nyabarongo, a tributary of the Nile, as seen, incidentally, in several photographs shown in court throughout the trial. She explained that the intent in that gesture was "to send the Tutsi back to their origin", to make them "return to Abyssinia", in accordance with the notion that the Tutsi are a "foreign" group in Rwanda, believed to have come from the Nilotic regions."

<sup>1408</sup> Omitted text: "Many testimonies given before the Chamber concur on the fact that it was the Tutsi as members of an ethnic group who were targeted in the massacres. General Dallaire, Doctor Zachariah and, particularly, the Accused himself, unanimously stated so before the Chamber. Numerous witnesses testified before the Chamber that the systematic checking of identity cards, on which the ethnic group was mentioned, made it possible to separate the Hutu from the Tutsi, with the latter being immediately arrested and often killed, sometimes on the spot, at the roadblocks which were erected in Kigali soon after the crash of the plane of President Habyarimana, and thereafter everywhere in the country."

<sup>1409</sup> Omitted text: "The execution of this genocide was probably facilitated by the conflict, in the sense that the conflict with the RPF forces served as a pretext for the propaganda inciting genocide against the Tutsi, by branding RPF fighters and Tutsi civilians together through the notion widely disseminated, particularly by Radio Television Libre des Mille Collines (RTLM), to the effect that every Tutsi was allegedly an accomplice of the RPF soldiers or "Inkotanyi". However, the fact that the genocide occurred while the RAF were in conflict with the RPF, obviously, cannot serve as a mitigating circumstance for the genocide. Consequently, the Chamber concludes from all the foregoing that it was, indeed, genocide that was committed in Rwanda in 1994, against the Tutsi as a group."

<sup>1410</sup> Omitted text: "Some evidence supports this view that the genocide had been planned. First, the existence of lists of Tutsi to be eliminated is corroborated by many testimonies. In this respect, Dr. Zachariah mentioned the case of patients and nurses killed in a hospital because a soldier had a list including their names. The Chamber holds that the genocide was organized and planned not only by members of the RAF, but also by the political forces who were behind the "Hutu-power", that it was executed essentially by civilians including the armed militia and even ordinary citizens, and above all, that the majority of the Tutsi victims were non-combatants, including thousands of women and children."

<sup>1411</sup> UNICTR, *Akayesu Judgement*, §112-129.

<sup>1412</sup> *Ibidem*, §49-55.

children.<sup>1413</sup> Akayesu was a well-known and popular figure in the Taba, considered a man of high morals, intelligence and integrity.<sup>1414</sup> First a teacher at the *École Technique Feminine* and at a primary school in Remera-Rukoma, he was later promoted to Primary School Inspector. He was in charge of inspecting the education in the commune and acting as a head of the teachers and, when necessary, he filled in as a substitute teacher.<sup>1415</sup> Following Rwanda's transition to multiparty-ism in 1991, Akayesu became politically active and was one of the signatories to the statute and a founding member of the MDR, the MRND's main opposition party.<sup>1416</sup> Eventually, Akayesu was elected local MDR president in Taba, where a sizeable proportion of the population became members of the party. Different groups in the commune, including other MDR leaders, communal representatives and religious leaders pressured him into candidacy for *burgomaster*, the position he was elected to in April 1993. Notwithstanding his initial disinclination to take up an official post, he treated it with great responsibility and honour.<sup>1417</sup> In charge of the communal police and any gendarmes assigned to the commune, he became an advisor on matters like security.<sup>1418</sup> But he was also concerned with economics and the social well-being of the villagers. Soon, he was considered a trusted father figure or parent of the commune, to whom locals would come also for informal advice.<sup>1419</sup> During the genocide, however, an estimated 2.000 Tutsi were murdered in the commune. As the war's tide turned, on 26 June 1994, Akayesu escaped to Zaire<sup>1420</sup> and arrived in Zambia on 31 December 1994. There he was arrested by Zambian authorities, on the request of Chief Prosecutor Richard Goldstone,<sup>1421</sup> in October 1995.<sup>1422</sup> After his trial, Akayesu was sent to Mali to serve his life sentence.<sup>1423</sup>

### *Akayesu's 'conversion'*

[...] the fact that genocide was, indeed, committed in Rwanda in 1994, and more particularly in Taba, cannot influence it in its findings in the present matter. It is the Chamber's responsibility alone to assess the individual criminal responsibility of the Accused, Jean-Paul Akayesu, for the crimes alleged against him, including genocide, for which the Prosecution has to show proof. Despite the indisputable atrociousness of the crimes and the emotions

<sup>1413</sup> African Rights (AR), *Witness To Genocide: Jean Paul Akayesu. The First Prosecution by the International Tribunal in Arusha, Tanzania* (African Rights: London, September 1996), p. 4. Parts of this report, in which testimony of several prosecution witnesses are cited, were tendered as evidence into the trial: See: UNICTR, *Exhibit No. 134: Akayesu - Witness, to genocide Jean Paul Akayesu, first prosecution by the International Tribunal in Arusha Tanzania / New publication of African rights. Issue No. 4 September 1996* (18 November 1997); UNICTR, *Akayesu – Audio Recording of 12/03/98* (Rec. No. ICTR-96-04-01165; 12 March 1998).

<sup>1414</sup> UNICTR, *Akayesu Judgement*, §53.

<sup>1415</sup> UNICTR, *Interview of Mr. Jean Paul Akayesu in Zambia by ICTR, in Presence of his Lawyer*, Tape 1, Side 1 (Zambia, 10 April 1996), pp. 1-10.

<sup>1416</sup> UNICTR, *Akayesu – Audio Recording of 12/03/98* (Rec. No. ICTR-96-04-01165; 12 March 1998).

<sup>1417</sup> UNICTR, *Akayesu – Audio Recording of 12/03/98*, from: 0:25:00.

<sup>1418</sup> When appointed to the post Akayesu became “the most important local representative [] of power at the centre” and his “primary function [...] was to execute the laws adopted by the communal legislature”. Akayesu had ultimate authority over the communal police as well as the gendarmes if they were sent to his commune. His hierarchical superior was the prefect of Gitarama (witness DAXX in the trial). UNICTR, *Akayesu Judgement*, pp. 60-61.

<sup>1419</sup> *Ibidem*, §73.

<sup>1420</sup> “I left because I learned that the RPF had arrived in the administrative sector in that area and that I understood that there would be a battle that would take place in our areas, in our communes, so I decided to leave at that time.” UNICTR, *Interview of Mr. Jean Paul Akayesu in Zambia by ICTR, in Presence of his Lawyer*, Tape VI, Side B (Zambia, 11 April 1996), pp. 3-4.

<sup>1421</sup> James C. Mckinley Jr. ‘Rwanda War Crimes Tribunal Indicts 2 Men in Jail in Zambia’, *The New York Times*, 20 February 1996.

<sup>1422</sup> UNICTR, *Interview of Mr. Jean Paul Akayesu*, p. 6. Akayesu was arrested along with seventeen other genocide suspects in Lusaka, Zambia, in October 1995. Only he – alongside Clement Kayishema and Georges Rutaganda – ended up at the tribunal in Arusha since the Prosecutor did not request the transfer of the others. See: AR, *Witness To Genocide: Jean Paul Akayesu*, p. 4.

<sup>1423</sup> UNICTR, Registry, ‘Former Prime Minister and five other convicts sent to prison in Mali’, *News*, 11 December 2001.

evoked in the international community, the judges have examined the facts adduced in a most dispassionate manner, bearing in mind that the accused is presumed innocent.”<sup>1424</sup>

A key date in Akayesu’s life is Monday 18 April 1994, twelve days into the genocide.<sup>1425</sup> Before that day, hundreds of Tutsi refugees from Kigali were pouring into Taba and Akayesu had secured them at the *bureau communal*, vigilantly shielded off his community from the *Interahamwe* attacks and sought to maintain peace.<sup>1426</sup> Even the prosecutor, Pierre-Richard Prosper,<sup>1427</sup> from the USA, had to admit that Akayesu was not an *ideologue* and that witnesses indeed saw him assisting Tutsi. But, according to witnesses,<sup>1428</sup> something changed in his attitude after he attended a morning meeting on 18 April in Murambi, where the interim regime, headed by Jean Kambanda, had urged all the *Bourgmestres* and *préfets* to unite and follow the genocidal course that was set into motion.<sup>1429</sup> According to the prosecutor, Akayesu underwent a radical makeover; from 19 April onwards he exchanged his business suit for a military jacket, picked up a rifle, joined the killers’ cause, administered the genocide in Taba and cheerlead rapes and sexual abuses.<sup>1430</sup> An estimated 2,000 murders “were openly committed and so widespread that, as bourgomestre” Akayesu “must have known about them” and never “attempted to prevent the killing of Tutsi.”<sup>1431</sup> Moreover, “Akayesu made a choice,” claimed the prosecution, “he rather became a willing, indeed an enthusiastic, participant in the killings and the persecutions of the Tutsi’s.”<sup>1432</sup> According to the charges he urged villagers to murder RPF accomplices, read out names of people to be executed, conducted house-to-house searches, violently interrogated and threatened people, destroyed homesteads, participated in the killing of “three brothers”, ordered the killing of teachers and encouraged the sexual abuse of

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<sup>1424</sup> UNICTR, *Akayesu Judgement*, §192.

<sup>1425</sup> See also: AR, *Witness To Genocide: Jean Paul Akayesu*; Cruvellier, *Court of Remorse*, pp. 20-31.

<sup>1426</sup> AR, *Witness To Genocide: Jean Paul Akayesu*, p. 7.

<sup>1427</sup> Who would later become the USA’s second Ambassador At Large for War Crimes, in charge, amongst other things, of political cooperation with the ICTR. See: US Department of State, ‘Biography: Pierre-Richard Prosper. Ambassador-at-Large, Office of War Crimes Issues’, *Archive* (www-text: <http://2001-2009.state.gov/outofdate/bios/p/4417.htm>, visited: 21 October 2015).

<sup>1428</sup> UNICTR, *Interview of Mr. Jean Paul Akayesu in Zambia by ICTR, in Presence of his Lawyer*, Tape III, Side B (Zambia, 11 April 1996), p. 5.

<sup>1429</sup> UNICTR, *Akayesu – Audio Recording of 13/03/98* (Rec. No. ICTR-96-04-01171; 13 March 1998).

<sup>1430</sup> UNICTR, *The Prosecutor of The Tribunal Against Jean Paul Akayesu: Indictment* (ICTR-96-4-I; Kigali, 13 February 1996); UNICTR, *The Prosecutor of The Tribunal Against Jean Paul Akayesu: Eléments Justificatifs* (ICTR-96-4-I; Kigali, 13 February 1996); UNICTR, *The Prosecutor of The Tribunal Against Jean Paul Akayesu: Amended Indictment* (ICTR-96-4-I; Kigali, 17 June 1997). The first three counts involve genocide and crimes against humanity (extermination), the fourth contains incitement to commit genocide. Counts 5 and 6 were charged against Akayesu for crimes against humanity (murder) and violations of Article 3 common to the Geneva Conventions (murder), and count 7 and 8 involve crimes against humanity (murder) and Violations of Article 3 common to the Geneva Conventions (murder). Counts 9 and 10 contain crimes against humanity and violations of Article 3 common to the Geneva Conventions (murder). Furthermore, counts 11 and 12 were charged for crimes against humanity (torture) and violations of Article 3 common to the Geneva Conventions (cruel treatment) and finally counts 13 through 15 for crimes against humanity (rape and other inhumane acts) and violations of Article 3 common to the Geneva Conventions and of Article 4(2)(e) of additional protocol 2 (outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault).

<sup>1431</sup> UNICTR, *Akayesu Indictment*, §12.

<sup>1432</sup> UNICTR, *Akayesu – Audio Recording of 09/01/97* (ICTR-96-04-00007; 9 January 1997), from: 1:17:00.

several women.<sup>1433</sup> His lawyers Nicolas Tiangaye (Central African Republic) and Patrice Monthé (Cameroon) on the other hand, claimed Akayesu's authority was overruled by the *Interahamwe*, led by Silas Kubwimana<sup>1434</sup> and that he was effectively degraded to a bystander who lacked the means to stop the massacre. If General Dallaire, they reasoned, could not stop the genocide while he was in charge of 2,500 troops, "how, then, was Akayesu, with 10 communal policemen at his disposal, to fare any better?"<sup>1435</sup> Despite that he "tried to save some Tutsis and appeal for law and order" he "was accused of supporting RPF and [his] life was threatened."<sup>1436</sup> He further denied his alleged transformation from being the guardian of law and order and a saviour of Tutsi in his commune to being a perpetrator of Tutsi killings after 19 April 1994: "Actually, I did not change my attitude; I continued to try to work to protect people and to save them and I did. In fact, that entire day, I was not at the commune. I think you should probably go back and ask what happened when I was not present and why the situation has changed when I returned," he told investigators in 1996.<sup>1437</sup> At trial he continued to say "It is a sin to say I changed. Why did the *Interahamwe* want to kill me, or why did they kill my policeman and stab the other, if I had changed," he asked the Trial Chamber.<sup>1438</sup> On the

<sup>1433</sup> The charges read: "As bourgomestre, Jean Paul AKAYESU was responsible for maintaining law and public order in his commune. At least 2000 Tutsis were killed in Taba between April 7 and the end of June, 1994, while he was still in power. The killings in Taba were openly committed and so widespread that, as bourgomestre, Jean Paul AKAYESU must have known about them. Although he had the authority and responsibility to do so, Jean Paul AKAYESU never attempted to prevent the killing of Tutsis in the commune in any way or called for assistance from regional or national authorities to quell the violence; 12A. Between April 7 and the end of June, 1994, hundreds of civilians (hereinafter "displaced civilians") sought refuge at the bureau communal. The majority of these displaced civilians were Tutsi. While seeking refuge at the bureau communal, female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises. Displaced civilians were also murdered frequently on or near the bureau communal premises. Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings; 12B. Jean Paul AKAYESU knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Jean Paul AKAYESU facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, Jean Paul AKAYESU encouraged these activities; 13. On or about 19 April 1994, before dawn, in Gishyeshye sector, Taba commune, a group of men, one of whom was named Francois Ndimubanzi, killed a local teacher, Sylvere Karera, because he was accused of associating with the Rwandan Patriotic Front ("RPF") and plotting to kill Hutus. Even though at least one of the perpetrators was turned over to Jean Paul AKAYESU, he failed to take measures to have him arrested; 14. The morning of April 19, 1994, following the murder of Sylvere Karera, Jean Paul AKAYESU led a meeting in Gishyeshye sector at which he sanctioned the death of Sylvere Karera and urged the population to eliminate accomplices of the RPF, which was understood by those present to mean Tutsis. Over 100 people were present at the meeting. The killing of Tutsis in Taba began shortly after the meeting; 15. At the same meeting in Gishyeshye sector on April 19, 1994, Jean Paul AKAYESU named at least three prominent Tutsis -- Ephrem Karangwa, Juvénal Rukundakuvuga and Emmanuel Sempabwa -- who had to be killed because of their alleged relationships with the RPF. Later that day, Juvénal Rukundakuvuga was killed in Kanyinya. Within the next few days, Emmanuel Sempabwa was clubbed to death in front of the Taba *bureau communal*; 16. Jean Paul AKAYESU, on or about April 19, 1994, conducted house-to-house searches in Taba. During these searches, residents, including Victim V, were interrogated and beaten with rifles and sticks in the presence of Jean Paul AKAYESU. Jean Paul AKAYESU personally threatened to kill the husband and child of Victim U if she did not provide him with information about the activities of the Tutsis he was seeking; 17. On or about April 19, 1994, Jean Paul AKAYESU ordered the interrogation and beating of Victim X in an effort to learn the whereabouts of Ephrem Karangwa. During the beating, Victim X's fingers were broken as he tried to shield himself from blows with a metal stick; 18. On or about April 19, 1994, the men who, on Jean Paul AKAYESU's instructions, were searching for Ephrem Karangwa destroyed Ephrem Karangwa's house and burned down his mother's house. They then went to search the house of Ephrem Karangwa's brother-in-law in Musambira commune and found Ephrem Karangwa's three brothers there. The three brothers -- Simon Mutijima, Thaddée Uwanyiligira and Jean Chrysostome Gakuba -- tried to escape, but Jean Paul AKAYESU blew his whistle to alert local residents to the attempted escape and ordered the people to capture the brothers. After the brothers were captured, Jean Paul AKAYESU ordered and participated in the killings of the three brothers; 19. On or about April 19, 1994, Jean Paul AKAYESU took 8 detained men from the Taba *bureau communal* and ordered militia members to kill them. The militia killed them with clubs, machetes, small axes and sticks. The victims had fled from Runda commune and had been held by Jean Paul AKAYESU; 20. On or about April 19, 1994, Jean Paul AKAYESU ordered the local people and militia to kill intellectual and influential people. Five teachers from the secondary school of Taba were killed on his instructions. The victims were Theogene, Phoebe Uwizeze and her fiancé (whose name is unknown), Tharcisse Twizeyumuremye and Samuel. The local people and militia killed them with machetes and agricultural tools in front of the Taba *bureau communal*. 21. On or about April 20, 1994, Jean Paul AKAYESU and some communal police went to the house of Victim Y, a 68-year-old woman. Jean Paul AKAYESU interrogated her about the whereabouts of the wife of a university teacher. During the questioning, under Jean Paul AKAYESU's supervision, the communal police hit Victim Y with a gun and sticks. They bound her arms and legs and repeatedly kicked her in the chest. Jean Paul AKAYESU threatened to kill her if she failed to provide the information he sought. 22. Later that night, on or about April 20, 1994, Jean Paul AKAYESU picked up Victim W in Taba and interrogated her also about the whereabouts of the wife of the university teacher. When she stated she did not know, he forced her to lay on the road in front of his car and threatened to drive over her. 23. Thereafter, on or about April 20, 1994, Jean Paul AKAYESU picked up Victim Z in Taba and interrogated him. During the interrogation, men under Jean Paul AKAYESU's authority forced Victims Z and Y to beat each other and used a piece of Victim Y's dress to strangle Victim Z. See: International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor of The Tribunal Against Jean Paul Akayesu: Amended Indictment* (ICTR-96-4-I; Kigali, 17 June 1997), pp. 5-23.

<sup>1434</sup> Not much is known about this person and he was not charged himself by the ICTR and the author is not aware if he was tried ever in Rwandan courts or Gacaca. After the trial in which one of its author testified, HRW recalled he was "an honorary vice-president of the *Interahamwe* at the national level and a political rival of Akayesu," who "had left the commune some months before when Akayesu was powerful. Now he returned with the backing of the national *Interahamwe* leadership and with guns, grenades, and military uniforms to distribute to his followers." Des Forges, *Leave None*, p. 274.

<sup>1435</sup> UNICTR, *Akayesu Judgement*, §31.

<sup>1436</sup> UNICTR, 'Jean-Paul Akayesu begins testimony in his Defence', *Press Release*, 12 March 1998.

<sup>1437</sup> UNICTR, *Interview of Mr. Jean Paul AKAYESU in Zambia by ICTR*, p. 13.

<sup>1438</sup> UNICTR, 'Jean-Paul Akayesu begins testimony in his Defence'.

contrary, he claimed. At the Murambi meeting, he even asked Jean Kambanda for three gendarmes to protect his commune.<sup>1439</sup>

### ***Genocide in Taba commune***

What had happened in Taba? It was the question on the minds of the three judges who had never been to Rwanda at all. Eager to learn, they had not only observed the cross-examination of witnesses by the parties but posed questions themselves all the time. In the end, after this quasi-inquisitorial process, from the judgement emerges a grim picture of what unfolded in Taba between April and June in 1994, the time that Bourgomestre Akayesu was responsible for maintaining law, public order and the communal police. In its reasoned judgement, the trial chamber was convinced “beyond a reasonable doubt” that the following facts had occurred, mainly on 19 and 20 April. Numerous Tutsi, who sought refuge at the Taba *Bureau communal*, were frequently beaten by members of the Interahamwe. Some of them were killed, while women were sexually abused and raped. Although no witness was able to estimate the number of people killed, the court found that “it is clear from the testimony of many witnesses that a substantial number of people were killed in Taba. The number 2000 has not been contested by the Defence, and it seems to the Chamber, based on the evidence of killings and mass graves, a modest estimate of the number of people killed in Taba during this period. The testimony also uniformly establishes that virtually all of these people were Tutsi.”<sup>1440</sup> At trial, nobody had denied that these killings spread through the commune, particularly from 19 April onwards, including Akayesu himself.<sup>1441</sup> Before 18 April, Akayesu had opposed to the killings to spread into Taba, attempted to prevent violence, called on resident to chase away attackers, intervened when refugees from Kigali were being shot at by the Interahamwe, confiscated their weapons and their vehicle and asked for three gendarmes at the meeting with the Prime Minister. Then his conduct changed on 19 April.<sup>1442</sup> Yet, the judgement only talks about that Tuesday and Wednesday 20 April. Apart from helping a Hutu woman protecting her Tutsi children, Akayesu generally stopped attempting to prevent the killing of Tutsi. In fact, “there is evidence that he not only knew of and witnessed killings, but that he participated in and even ordered killings.”<sup>1443</sup> In all, “he chose the course of collaboration with violence against Tutsi rather than shielding them from it.”<sup>1444</sup>

The trial narrative then turns to the details. In the early hours of 19 April, Akayesu joined a crowd of over 100 folks, which had assembled around the lifeless body of a youthful *Interahamwe* member in Gishyeshye secteur. He took this occasion to call on his listeners to unite in order to eliminate the enemy, the RPF. From the *Interahamwe*, he had received lists with names of RPF

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<sup>1439</sup> UNICTR, *Akayesu – Audio Recording of 13/03/98* (Rec. No. ICTR-96-04-01171; 13 March 1998), from: 1:52:50.

<sup>1440</sup> UNICTR, *Akayesu Judgement*, §181.

<sup>1441</sup> UNICTR, *Akayesu – Audio Recording of 12/03/98* (Rec. No. ICTR-96-04-01165; 12 March 1998), from: 2:01:00 mins.

<sup>1442</sup> UNICTR, *Akayesu Judgement*, §187.

<sup>1443</sup> *Ibidem*, §193.

<sup>1444</sup> *Idem*.

‘accomplices’. He specifically told his listeners that Ephrem Karangwa’s<sup>1445</sup> - a Tutsi judicial police inspector - name was on one of the lists.<sup>1446</sup> Following his public address, extensive killings of Tutsi spread through the commune. On the same day, Akayesu threatened to kill a Tutsi woman (witness U), while she was being interrogated, and a Hutu man (victim V). The latter was thereafter beaten so hard with a stick and the butt of a rifle by communal policeman Mugenzi and militia member Francois, that one of his ribs was broken. Earlier that day, Akayesu and a group of men under his control were looking for Ephrem Karangwa and destroyed his house and burned that of his mother. The men, according to Karangwa’s testimony at trial, then went to search the house of his brother-in-law, in Musambira commune, and killed his three brothers. Karangwa – who had overheard Akayesu order the killing of his brothers - fled to a cathedral in another community, where Akayesu also came looking for him, but he managed to stay out of his hands and ultimately survived the genocide.<sup>1447</sup> At another time on 19 April, Akayesu took from Taba’s communal prison eight refugees (apparently Tutsi), handed them over to *Interahamwe* militiamen and ordered that they be killed. They were massacred them with machetes and small axes. Also, Akayesu ordered locals to kill ‘intellectuals’ and to look for a professor called Tharcisse. Together with his spouse, the gentleman was brought to the Bureau communal and furiously killed with a machete blow to the neck. Four other educators, from Remera School, were murdered later that day. Then, on the evening of 20 April 1994, Akayesu, two *Interahamwe* militiamen and a communal policeman interrogated, hit and beat a 69-year-old Hutu farmer suspected of knowing the hide-out of Alexia, the wife of Pierre Ntereye, a university teacher. Later on, outside a mine, Akayesu had her lie down in front of his vehicle and threatened to drive over her if she failed to give the information he sought. He casted the same threat on another woman (Victim W) that same evening. When Akayesu and his entourage interrogated two others (Z and Y), the burgomaster put his foot on the face of one of his victims (Z), causing the said victim to bleed, while the police officer and the militiaman beat the victim with the butt of their rifles. In the torture, the militiaman forced victim Z to beat victim Y with a stick.<sup>1448</sup> Sexual abuses were committed throughout the commune as well. Numerous *Interahamwe* gang-raped 25 girls and women in the cultural centre, others were raped near the bureau communal and one in a nearby forest. Some girls were forced to publicly strip naked and perform exercises, march and sit in the mud near the communal bureau.

It is a gruesome picture that emerges from those two days. Much less to virtually nothing, however, is known from the trial record about what happened in Taba afterwards other than that people from the commune have said that the raids and killings of Tutsis lasted for weeks. Survivors reported that at Akayesu’s urging, militia set up roadblocks and killed scores of people every day for

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<sup>1445</sup> Karangwa himself became the Bourgomestre of Taba in 1996. See: James McKingley Jr. ‘Ex-Mayor on Trial, a Rwanda Town Remembers, *The New York Times*, 27 September 1996.

<sup>1446</sup> Although Akayesu has explained that he did so to prove how ridiculous and implausible the list was, the ICTR found that it instead enticed the present hearers to not only kill Karangwa, but all Tutsis within the community. UNICTR, *Akayesu Judgement*, §362, 378, 384.

<sup>1447</sup> UNICTR, *Akayesu Judgement*, §220-268.

<sup>1448</sup> *Ibidem*, §682-683.

weeks. Some people, the witnesses said, were reduced to paying the militia for bullets to avoid being killed by machete.<sup>1449</sup> Then, in early May, Akayesu received a letter from the prefect to orchestrate a meeting to keep people calm and to raise self-defence. On the fourth or the fifth, an assembly was organised in the presence of parliamentarian Cyrille Ruvugama and *Interahamwe* leader Silas Kubwimana. There, the burgomaster explained to his listeners, “we had to be in charge of civil self-defence and live with our neighbours in peace. Then it was Silas’s turn. He set everything in motion. He said that when we talk about the enemy, we were talking about Tutsis and that we had to get rid of the enemy. [...] I was doing my job. I read the letter.”<sup>1450</sup>

Meanwhile, RPF troops had well-advanced and taken over larger parts of Kigali. Amidst all the violent turmoil, Akayesu fled Rwanda to Zaire, never to return home again. He only came on the UNICTR’s radar after he, as part of a larger group of Rwandans, was arrested in Lusaka, Zambia in October 1995. Investigations into his actions in 1994 commenced thereafter. A former OTP participant in the first investigative mission, recalls going to Taba with Dutch investigators to interview witnesses: “Not only did we return empty-handed since witnesses had nothing to say or did not offer reliable testimony, but one of the interviewees proved to be an excellent potential witness for the defence, providing Akayesu’s facts and actions during the period which were very favourable,” he commented.<sup>1451</sup> Sometime later though, the prosecution discovered a dozen new witnesses, this time *à charge*. Their testimony was the gist of the indictment, which was drawn up four months after his arrest.<sup>1452</sup> Akayesu himself was interviewed subsequently for two days by UNICTR investigators in April and brought to Arusha in May 1996. At his initial appearance in a crammed and hastily improvised courtroom, four days after his arrival in Tanzania, he pleaded “*non coupable*” to all counts against him.

### *At trial*

Thank you very much Mr. President. May I introduce myself I am Jean-Paul Akayesu. I was born in the commune of Taba in the Prefecture of Giterama in Rwanda. I am married and I am a father of five children. As far as my occupation is concerned, I was for a long time a teacher in various schools. And from 1990 up to 1993 I was Inspector for the Schools in our commune. After that period, I was then elected as a Bourgomestre for that commune until June, 1994. [...] It is one Commune. Taba, is the name of the commune.

- Jean-Paul Akayesu, Accused<sup>1453</sup>

Trials took off slowly in Arusha. Meanwhile in Rwanda, genocide suspects were cramping the prisons. But in its race against the UNICTR, Kigali had already managed to start genocide trials

<sup>1449</sup> McKinley, J.C. ‘Ex-Mayor on Trial, a Rwanda Town Remembers’, *The New York Times*, 27 September 1996.

<sup>1450</sup> Quoted in: Cruvellier, *Court of Remorse*, p. 23. The audio recording of the session is not available on the ICTR’s website.

<sup>1451</sup> André Sirois, ‘Les mauvais débuts du Tribunal international pour le Rwanda’, *Mondialisation.ca*, 13 November 2014 ([www-text: http://www.mondialisation.ca/les-mauvais-debuts-du-tribunal-international-pour-le-rwanda/5413802](http://www.mondialisation.ca/les-mauvais-debuts-du-tribunal-international-pour-le-rwanda/5413802), visited: 29 September 2015).

<sup>1452</sup> UNICTR, *Éléments Justificatifs* (ICTR-4-I; 13 February 1996).

<sup>1453</sup> UNICTR, *The International Criminal Tribunal for Rwanda in the matter of the trial of Jean-Paul Akayesu: Transcript* (ICTR-96-4-T; 31 October 1996), pp. 2-3.

before specialised chambers in the ordinary and military courts and was preparing to put to trial a much bigger fish than Akayesu; the ideological father and coiner of the “Hutu Power”, Froduald Karamira.<sup>1454</sup> Back in Arusha, where fair trial rights allowed Taba’s former *bourgomestre* to change his defence team several times, the trial was postponed several times.<sup>1455</sup> The UNICTR’s first trial thus opened on 9 January 1997, before trial chamber I, composed of Laity Kama (Senegal), Lennart Aspegren (Sweden) and Navanethem Pillay (South Africa). With Louise Arbour, the Canadian Chief Prosecutor absenting “because of obligations at the ICTY”, senior trial attorney Yacob Haile-Mariam presented the formal opening statements:

[...] we realise the paramount responsibility of this Tribunal is to assuage the hurt of the victims, to render fair trial to the accused and to vindicate humanity, on whose behalf we are prosecuting Jean-Paul Akayesu. At the same time, your honours, we cannot help but to recognise the solemnity of this occasion, the historic dimension of the process and the far reaching consequences of your acts today and in the coming weeks.<sup>1456</sup> Your honours, on April 19<sup>th</sup> and subsequently in the commune of Taba, 2000 Tutsi’s, men, women, and children were beaten, hacked, maimed, and killed as the result of the orders, incitement and action of mister Jean-Paul Akayesu. Your honours, mister Jean-Paul Akayesu, who is standing, who is sitting before you, has been charged with genocide, crimes against humanity and violations of article 3 of the Geneva Conventions. The evidence of the Prosecution will prove, beyond any reasonable doubt, that Jean Paul Akayesu ordered and killed, and incited people to kill and was in complicity in killing members of the Tutsi ethnic group, with the intent to destroy, in whole or in part, the Tutsi population of Rwanda. In addition, prosecution witnesses will show that the accused committed these acts as part of a widespread and systematic attack against the civilian population [...]<sup>1457</sup>

With these words, the UNICTR’s debut trial commenced. But next to highlighting the significance of the case to the cause of justice in Africa and addressing the necessary issues of law, Haile-Mariam was quick to turn to history, as a blueprint for the case theory. In a nutshell, he provided the judges with an overview of the social and political nature of Rwandan society, the road to the civil war, the armed conflict, the Arusha accords, political killings and the genocide of 1994. According to the Ethiopian Prosecutor, the armed conflict between the FAR and the RPF was a precursor for genocide: “ [...] the massacre of 1994 was not a spontaneous outburst of popular anger at the death of a beloved president, as some detractors would like us to believe, rather it appeared to be a carefully calculated, systemically planned and meticulously executed carnage.”<sup>1458</sup> To prove the accusations, Haile-Mariam foreshadowed his use of expert witnesses, international news media and NGO staff who, as eyewitnesses, were to testify to the history, society and widespread and systemic nature of the attacks against civilians. In order to prove Akayesu’s partaking in the genocide, Haile-Mariam announced that victims and survivors – who “are simple family men and women” - from Taba would “narrate the

<sup>1454</sup> Karimira was the first known suspect to be extradited to Rwanda from India. He was put to trial on 14 January and sentenced to death and month later. Tribunal de Première Instance de Kigali, Chambre Spécialisée, *Ministère Public C/ KARAMIRA: Jugement* (No.7; Kigali, 14 February 1997); Chris McGreal, ‘Survivors confront Rwandan butcher; Tutsi turned Hutu fanatic unbowed as trial starts’, *The Guardian* (16 January 1997), pp. 13.

<sup>1455</sup> UNICTR, *Akayesu Judgement*, §9-17.

<sup>1456</sup> UNICTR, *Akayesu – Audio Recording of 09/01/97* (ICTR-96-04-00007; 9 January 1997), from: 0:24:00.

<sup>1457</sup> UNICTR, *Akayesu – Audio Recording of 09/01/97*, from: 0:27:20.

<sup>1458</sup> *Ibidem*, from: 0:41:13.

saga of killings, beatings, torture, murder, by the order of Jean-Paul Akayesu.”<sup>1459</sup> He then pertinently asked, “[...] these witnesses who have given their words, are they credible?” Raising the concerns that “[t]he witnesses are persons who lived through the ordeal. Some of them survived death by dint of chance and others by heroic determination to live” he underlines that “their words are irreproachable, because they have stared death in the eye and brushed against it [...]” Then he concludes, “would their judgements be impaired by the horrors they were staring at? In our view, no [...], men and women who brushed with death do not lie! [...] we have been impressed by the absolute lack of rancour and vengeance of the victims and witnesses against mister Akayesu. In the same vain, we have equally been impressed by their determination to ask for justice. They have taken the courage, the courageous decision to tell the truth at extremely great risk to themselves and to their families, if at all there are any family members left.”<sup>1460</sup>

### ***Survivor testimony***

Akayesu had appeared in court on Thursday when the trial started with opening statements, but proceedings were adjourned for the day when three witnesses failed to arrive on time from Rwanda. Amongst those first witnesses were victims and survivors from Taba, including the prosecutor’s first witness, the commune’s former cashier and accountant. Dubbed ‘Witness K’, literally pointed out her former boss in the courtroom and said she had seen him order and oversee the killings of Tutsis in 1994.<sup>1461</sup> On 19 April, the middle-aged Tutsi woman recounted how Akayesu escorted eight men from Runda who had taken refuge in his office to a group of young *Interahamwe* carrying traditional weapons.<sup>1462</sup> The killers told them to sit down in a straight line with their arms and legs well before them and then hacked them. “Akayesu said quickly! And they were quickly killed,” she said.<sup>1463</sup> “Everybody who was there used the weapon he had had with him or her.”<sup>1464</sup> Then they hit a professor called Samuel with a machete at the throat. The woman told the judges that she escaped death because she was married to a Hutu and because she paid off the killers with money and a radio set.<sup>1465</sup> By June 1994, she testified, the killings had decreased notably but there were not many people in the streets.

On Monday 13 January, Akayesu – who tried to fire his lawyers that day – was shortly allowed to defend himself and cross-examine Witness K, who on that morning had walked into the tribunal carrying a baby.<sup>1466</sup> “Madame, my best wishes for the year 1997 first all [...] I’m very happy and very happy to see you again,” Akayesu told the ‘K’ in French before beginning his highly charged questioning.<sup>1467</sup> For over one and a half hour, Akayesu mainly questioned the woman about the role of

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<sup>1459</sup> UNICTR, *Akayesu – Audio Recording of 09/01/97*, from: 1:12:20.

<sup>1460</sup> *Ibidem*, from: 1:12:20.

<sup>1461</sup> UNICTR, *Akayesu – Audio Recording of 10/01/97- AM* (ICTR-96-04-00889; 10 January 1997), from: 00:10:00.

<sup>1462</sup> In court she identified the weapons on a slide shown to her by the prosecutor. UNICTR, *Akayesu – Audio Recording of 10/01/97*, from: 00:59:00. UNICTR, *Exhibit P33: Akayesu - Traditional knives (weapons)* (Arusha, 10 January 1997).

<sup>1463</sup> UNICTR, *Akayesu – Audio Recording of 10/01/97*, from: 01:04:00.

<sup>1464</sup> *Ibidem*, from: 01:04:00.

<sup>1465</sup> *Ibidem*, from: 1:38:00.

<sup>1466</sup> Hrvoje Hranjski, ‘Rwanda’s genocide suspect interviews witness at his trial’, *Associated Press International*, 13 January 1997.

<sup>1467</sup> UNICTR, *Akayesu – Audio Recording of 13/01/97- AM* (ICTR-96-04-00892; 13 January 1997), from: 00:06:50.

mayor in Taba, looking for her to state that the main responsibility for law and order in the town rested with the judicial police and not the *bourgomestre*. At the end of the morning, Akayesu complained about the lack of time – and paper - to prepare and write up more questions and was granted an adjournment. He continued the next morning, talking about himself in the third person: “Was Akayesu violent with his staff?”, “You did not hear it said that Akayesu was hostile to Tutsi’s?” “These people began killings on Akayesu’s orders?”<sup>1468</sup> After two hours of softly answering, Witness K, added to her testimony “that there were many people killed in the commune and that very few people who survived, in relationship to the people who survived in other communes, and this is all due to the acts of Akayesu. Thank you.”<sup>1469</sup>

That same afternoon, the second witness took the stand. This time a Hutu-farmer with the pseudonym “C” was on the witness stand. He was not among the killers, he said in a rather confusing statement marred by translation issues.<sup>1470</sup> He told the court that he was hiding a Tutsi friend in his house but that Akayesu, together with militia, had come to look for the refugee. When he refused to disclose the whereabouts of his friend Alexia, the militiaman beat him, took him to a forest, made him lie on the ground and stomped on his face until he was bleeding. Akayesu beat him as well, he said, and in court he stripped of his shirt to show scars at the left side of his back.<sup>1471</sup> In the following weeks, fourteen other witnesses from Taba recounted their painful experiences.

### ***Cross examining culture***

From the testimony, which at times was illustrated by tendered exhibits showcasing pictures of weapons, crime scenes and maps, a picture emerged on what had occurred in Taba commune. Central to that narrative were Akayesu’s makeover and the events on 19 and 20 April. But how did the attacks on people in that locality fit in the larger context of Rwanda? It was a question that became crucial at the tribunal. For the Prosecution, the answer was obvious; “the isolated attacks, or isolated crimes, that we allege Akayesu has performed or committed, by themselves alone would not constitute crimes against humanity [...] Akayesu’s acts become crimes against humanity only when they are part of the systematic and widespread attack [...]”<sup>1472</sup> Thus, the prosecutor wanted to prove that Akayesu’s actions were part of a well-conspired, organised and executed master plan to exterminate Tutsi through a campaign of widespread and systematic killing “and Akayesu’s acts was part of that global crime that we want to prove.”<sup>1473</sup> Yet, in the absence of Nazi-like archives, from which, through a documentary chain, could such a case theory be inferred, the prosecution was challenged in its presentation of a judicial account of ‘what happened’ and in what context. In doing so, they sought the assistance of handful expatriates – with specialisations in social sciences, journalism or humanitarian

<sup>1468</sup> UNICTR, *Akayesu - Audio Recording of 14/01/97 - AM* (Arusha, 14 January 1997), from: 1:38:00.

<sup>1469</sup> UNICTR, *Akayesu - Audio Recording of 14/01/97*, from: 2:02:50.

<sup>1470</sup> *Ibidem*, from: 00:45:00.

<sup>1471</sup> *Ibidem*, from: 01:14:00.

<sup>1472</sup> UNICTR, *Akayesu - Audio Recording of 16/01/97 - PM* (Arusha, 16 January 1997), from: 00:14:00.

<sup>1473</sup> UNICTR, *Akayesu - Audio Recording of 16/01/97*, from: 00:15:00.

work – to outline to the judges that genocide had indeed occurred from April onwards. In particular, a group of experts' accounts structured the framework within which the genocide was understood<sup>1474</sup> but more importantly provided the very basis for the legal determination that the crime of genocide – and crimes against humanity - was even applicable.<sup>1475</sup> Through these specialists, the tribunal's litigants, in various trials before different chambers, outlined the various elements of the crimes described in the statute: widespread and systematic violence, the targeting of a defined group, the existence of those groups and the existing intent (genocide) to destroy these social groups, in whole or in part.<sup>1476</sup>

### ***Bringing in the 'experts'***

In Akayesu's trial, the first 'experts' were expatriates who happened to be at the crime scene in 1994. First up to share his observations was Ronie Zachariah, who was the Medical and Field Coordinator for Médecins Sans Frontiers (MSF), in Butare. The Indian doctor recounted that on 13 April, when he was driving, his Tutsi driver was treated aggressively at "checkpoints" and "barricades" manned by armed soldiers and civilians with yellow scarfs and armed with machetes.<sup>1477</sup> On later days, he found many Tutsi civilians in Gitarama Hospital, visited Kibeho Church just before two to four thousand people were massacred and saw civilians being massacred in villages throughout the countryside on his way to the Burundi-border. "For me it was more the less the same picture. All the way through we could see on the horizon, sorry, on the hillside [...] where there were communities, people were being pulled out by people with machetes, and we could see piles of bodies. In fact the entire landscape was becoming spotted with corpses, with bodies, all the way from there until almost Burundi's border".<sup>1478</sup> From his car, the doctor had taken two pictures of a pile of bodies, which he showed to the court.<sup>1479</sup>

After hearing that some 40 Rwandan MSF personnel had already been killed, Zacharia evacuated his team to Burundi. On his way down, he did not see bodies on the mountain sides any longer, but now he had crossed streams and rivers in which the mutilated corpses of men, women and children floated by at an estimated rate of five bodies every minute.<sup>1480</sup> On the next day at trial, Lindsey Hilsum, a journalist, who was working on a freelance contract for UNICEF in Rwanda in 1994, came to testify. She told the court about five bodies of naked women slashed to death she had seen piled up in a flower bed behind a house guarded by two men.<sup>1481</sup> When she visited Kigali central hospital she found wounded men, women and children of all ages packed into the wards. Glancing

<sup>1474</sup> In the early days, the OTP solicited the knowledge of three *pro bono* consultants in order to blueprint indictments and strategise their prosecutions: Alison Des Forges, a USA-based, human rights activist and historian of Rwanda who; André Guichauoa, Professor of Sociology at Université des Sciences et Technologie de Lille, France; and Filip Reyntjens, Professor of African Law and Politics at the University of Antwerp, Belgium. In the early days of the tribunal, the three would meet with the OTP in various locations, even at Reyntjens' home in Antwerp, where the prosecutors would, as Reyntjens' described it, 'pick their brains' about Rwanda and the genocide. Author's Interview (telephone): Filip Reyntjens, 31 August 2012; Buss, 'Expert Witnesses and International War Crimes Trials', p. 30.

<sup>1475</sup> Buss, 'Expert Witnesses and International War Crimes Trials', p. 24.

<sup>1476</sup> The ICTR Statute, contrary to other tribunals, requires for crimes against humanity also that they be committed on 'national, political, ethnic, racial or religious grounds'. UNICTR, *Statute*, art. 3.

<sup>1477</sup> UNICTR, *Akayesu - Audio Recording of 16/01/97 - PM* (Arusha, 16 January 1997), from: 00:28:00.

<sup>1478</sup> UNICTR, *Akayesu - Audio Recording of 16/01/97*, from: 01:14:00.

<sup>1479</sup> UNICTR, *Exhibit 2: Pile of dead bodies (937) & UNICTR, Exhibit 2A: Pile of dead bodies (938)*.

<sup>1480</sup> UNICTR, *Akayesu - Audio Recording of 16/01/97*, from: 02:00:00.

<sup>1481</sup> UNICTR, *Akayesu - Audio Recording of 17/01/97 - AM* (ICTR-96-04-00913; 17 January 1997), from: 00:51:00.

down on the hospital's morgue, she saw "a big pile like a mountain of bodies outside and these were bodies with slash wounds, with heads smashed in, many of them naked, men and women."<sup>1482</sup> She estimated that the pile outside the morgue contained about five hundred bodies, with more bodies being brought in all the time by pickup trucks.<sup>1483</sup> Simon Cox, a cameraman and photographer, headed south from Uganda with an RPF escort. When he arrived in Rwanda in the third week of April, he testified, he saw massacre sites in church compounds where he found Tutsi identity cards and Tutsi civilians suffering from machete wounds in hospitals.<sup>1484</sup> During one of his trips close to the Tanzanian border, Cox filmed corpses of dead people floating by at a rate of "several a minute."<sup>1485</sup> On a subsequent journey to Rwanda, on the way to Kibuye, he saw freshly dug mass graves in churchyards and later, in the hilltops of Bisesero, he saw some 800 Tutsi civilians "in a desperate, desperate state," many apparently starving and with machete, bullet or fragment wounds, and with dead bodies strewn all over the hills.<sup>1486</sup>

After listening to the leader of the OTP's 'Zambia team', Halvard Tømta – who introduced a range of pictures on various crime scenes in Gitarama taken in June 1996<sup>1487</sup> - two other experts were called. For the three judges, who knew nothing or little about Rwandan culture, society and history but showed themselves very eager to learn, these anthropological and historical expert testimonies became highly educational and influential to their judgements. First up was Dr. Matthias Ruzindana, a Rwandan lecturer from the University of Rwanda in Butare.<sup>1488</sup> Rwandan witnesses had almost exclusively been interviewed by investigators or testified in court in their own language Kinyarwanda. At trial, the chamber had asked many questions as to the meaning of several words, syntax and modes of expression. Therefore – and because the Prosecutor charged Akayesu with incitement – the prosecution called the expert on applied linguistics to "illuminate" the meaning of particular words used in the context of the genocide.<sup>1489</sup> His testimony, delivered in impeccable English, touched upon the "extended" meanings of the words *Inkotanyi*,<sup>1490</sup> *Icyitso/Ibyitso*,<sup>1491</sup> *Inyenzi*,<sup>1492</sup> *Interahamwe*<sup>1493</sup>

<sup>1482</sup> UNICTR, *Akayesu - Audio Recording of 17/01/97 - AM* (ICTR-96-04-00913; 17 January 1997), from: 02:00:00.

<sup>1483</sup> See for a written narration of what she saw and experienced: Lindsey Hilsum, 'The Rainy Season', *Granta*, 24 October 2013.

<sup>1484</sup> UNICTR, *Akayesu - Audio Recording of 17/01/97*, from:00:44:00.

<sup>1485</sup> *Ibidem*, from:00:58:00; UNICTR, *Akayesu - Video of Massacre Scenes and Dead Bodies in River of 17/1/1997* (944).

<sup>1486</sup> UNICTR, *Akayesu - Audio Recording of 17/01/97*, from:01:42:00.

<sup>1487</sup> Tømta was a police inspector from Norway, who started working for the ICTR in August 1995. He was working on the cases against those arrested in Zambia. UNICTR, *Akayesu - Audio Recording of 30/01/97 - PM* (ICTR-96-04-00958; 30 January 1997).

<sup>1488</sup> Also see his elaborate article on Rwandan language and culture and its appreciation by the ICTR: Matthias Ruzindana, 'The Challenge of Understanding Kinyarwanda key terms used to instigate the 1994 genocide in Rwanda', in: Predrag Dojcinovic, *Propaganda, War Crimes Trials and International Law. From Speakers' Corner to War Crimes* (Abingdon: Routledge, 2012), pp. 145-170.

<sup>1489</sup> UNICTR, *Akayesu - Audio Recording of 30/01/97 - PM* (ICTR-96-04-00958; 30 January 1997), from: 00:25:00.

<sup>1490</sup> In the 19th century, Inkotanyi was the name of one of the warrior groups of Rwandese King Rwabugiri. In the war, the RPA was called Inkotanyi. It had certain extended meanings, including RPF sympathiser or supporter, or to make reference to Tutsi as ethnic group. UNICTR, *Akayesu - Audio Recording of 30/01/97*, from: 00:42:43.

<sup>1491</sup> *Icyitso*, or *Ibyitso* in the plural, means accomplice. In ancient Rwandan history, a king wanting to launch an attack on neighbouring countries would send spies to the targeted country. These spies would recruit collaborators who would be known as *Ibyitso*. In Rwanda, the term has a negative connotation and evolved, as early as 1991, to include not only collaborators, but all Tutsi. Its extended meanings included the Tutsi as group. *Ibidem*, from: 00:46:00.

<sup>1492</sup> The basic meaning is cockroach. Historically, it refers to Tutsi refugees who attacked the country in the 1960s. They would enter and leave the country under the cover of the night, only rarely to be seen in the morning. A similar comparison, between insurgent Tutsi refugees and cockroaches, was made when the RPF army carried out a number of attacks in Rwanda in 1990. It was thought that the *Inyenzi* of 1990 were the children of the *Inyenzi* of the 1960s. The term *Inyenzi* had a negative, even abusive, connotation. *Ibidem*, from: 01:12:40.

<sup>1493</sup> The term *Interahamwe* derives from two words put together to make a noun, *intera* and *hamwe*. *Intera* comes from the verb 'gutura' which can mean both to attack and to work. It was documented that in 1994, besides meaning to work or to attack, the word *gutura* could also mean to kill. *Hamwe* means together. Therefore, *Interahamwe* could mean to attack or to work together, and, depending on the context, to kill together. The *Interahamwe* were the youth movement of the MRND. During the war, the term also covered anyone who had anti-Tutsi tendencies, irrespective of their political background, and who collaborated with the MRND youth. *Ibidem*, from: 01:23:12

and the expressions used in Kinyarwanda for "rape"<sup>1494</sup> in various time and space settings, particularly in the context of the genocide. Throughout his testimony and answering to the extensive questioning by the judges, Dr. Ruzindana outlined in particular how these words were used in extremist language in various media, including *Kangura* and RTLM, and that their extended meaning became clear to many Rwandans through an oral tradition in which information travels from A to B to C: "these media had a lot of influence on people."<sup>1495</sup> Strikingly, in lecturing the court on how Rwandans use language to communicate, Ruzindana touched upon a crucial area: "you have to bear in mind [...] that most Rwandese do not write or read. They hear and report what they hear."<sup>1496</sup> Rwanda, lectured Ruzindana, "is a society ran by oral tradition [...] so therefore they do not rely on print, or on radio or television to know facts [...] A saw or heard something, which he or she said to person B, who reported to person C and so on. This is how information was channelled. Ok? In this situation the tendency is not to question the source, because very often the source isn't there. You get it from D, who got it from C, who got it from B, who got it from A. But C will not tell to D how the information had travelled. The tendency will be "I heard this, or I saw this."<sup>1497</sup>

Facts in Rwanda, Ruzindana thus explained, are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else (hearsay). When asked how Rwandan witnesses respond when asked questions, he jokingly answered that he "was not even answering the [prosecutor's] questions directly."<sup>1498</sup> He continued to state that the "Rwandese are rarely straightforward," – being very general, avoiding explanations, beating around the bush or giving implied answers - especially when the issue is delicate. Mostly, answers – or Kinyarwanda words in general - have to be "decoded" in order to be understood correctly, depending on context, the particular speech community, the identity of and the relation between the orator and the listener, and the subject matter of the question.<sup>1499</sup> Later, in its judgement, the judges themselves recognized other cultural constraints in relying on witness testimony highlighting that Rwandan witnesses had difficulty "to be specific as to dates, times, distances and locations" and their "inexperience [...] with maps, film and graphic representations of localities" but that had not drawn "any adverse conclusions regarding the credibility of witnesses based only on their reticence and their sometimes circuitous responses to questions."<sup>1500</sup>

### ***Lessons in history: intent and ethnicity***

[...] allow me [...] to elaborate on what we intend to prove with this testimony. [...] the 1994 massacre in Rwanda was not a spontaneous outburst of anger by the people because of the

<sup>1494</sup> During investigations and hearings during trial, the terms *gusambanya*, *kurungora*, *kuryamana* and *gufata ku ngufu* were used interchangeably by witnesses and translated as "rape". UNICTR, *Akayesu Judgement*, §152.

<sup>1495</sup> Since not many people are literate or own a radio, much of the information disseminated by the press in 1994 was transmitted to a larger number of secondary listeners by word of mouth. UNICTR, *Akayesu - Audio Recording of 04/02/97 - AM* (ICTR-96-04-00961; 4 February 1997), from:00:55:00.

<sup>1496</sup> UNICTR, *Akayesu - Audio Recording of 30/01/97 - PM* (ICTR-96-04-00958; 30 January 1997), from: 01:44:00.

<sup>1497</sup> UNICTR, *Akayesu - Audio Recording of 30/01/97*, from: 01:56:50.

<sup>1498</sup> *Ibidem*, from: 01:47:00.

<sup>1499</sup> UNICTR, *Akayesu - Audio Recording of 04/02/97 - AM* (ICTR-96-04-00961; 4 February 1997), from: 00:08:00.

<sup>1500</sup> UNICTR, *Akayesu Judgement*, §156.

death of a popular president. It was something planned meticulously, and carried out ruthlessly and it was not hatched in one night either. It was planned over a long period of time and therefore it becomes necessary mister president to go into the history of Rwanda and illuminate the culture of impunity that has developed in that country.

- Yacob Haile Mariam, Prosecutor<sup>1501</sup>

We judges agreed that you can't avoid this question of history of Rwanda, otherwise it's just one ethnic group killing another ethnic group with no reason why. History is necessary for an understanding of why the conflict occurred. Our first judgment—Akayesu—did this.

- Navanethem Pillay, Judge<sup>1502</sup>

Everything was new at the UNICTR and its personnel came in unprepared and inexperienced, with some judges having no prior experience as a judge, including Pillay. Knowledge about Rwanda or any type of source material was virtually absent in the judges' offices in Arusha, or in matter of fact throughout the tribunal. Not much had been written about it yet, particularly in English, except for a handful of immediate post genocide scholarly books like Prunier's 'Rwanda Crisis', journalistic accounts like Gourevitch's 'We Wish to Inform You', NGO reports like 'Death Despair and Defiance' and a selection of UN documents.<sup>1503</sup> But in the early days of the tribunal, there was no library available to explore literature, let alone legal reference books or dictionaries. In fact, the trial judges were only learning about the substance along the way they were presiding over the cases in which evidence was presented. In that respect the venue of the Akayesu trial, which was the court's first, was not only a judicial courtroom, it was also a classroom. After Ruzindana's lecture in linguistics and oral culture, the Trial Chamber soaked up floods of information about Rwanda during eight days of testimony by Dr. Alison Des Forges.<sup>1504</sup> With the authority of the experienced lecturer that she was, the American historian and Human Rights Watch activist started her testimony with the basics: "Rwanda is a small country characterized by its position, more or less, in the heart of Africa, which meant that, unlike other regions of Africa that suffered the depredations of the slave trade and the early onset of colonialism, Rwanda was, more or less, protected from these occurrences, and, by the fact of its geography."<sup>1505</sup> She then took the court, in what can be described a series of mini-lectures,<sup>1506</sup> through in-depth history<sup>1507</sup> of the country from pre-colonial times well into the early days

<sup>1501</sup> UNICTR, *Akayesu – Audio Recording of 11/02/97* (ICTR-96-04-00977; 11 February 1997), from: 00:04:00. Several times during the hearing, Presiding Judge Kama complained about the translators. So did Akayesu, who stood up to correct the translator.

<sup>1502</sup> Quoted in: Wilson, *Writing History*, p. 72.

<sup>1503</sup> In addition to the testimony of witnesses who attested to killings in Taba, the Chamber took judicial notice of United Nations reports, which documented the 1994 massacres throughout the country: notably, the *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, U.N. Doc. S/1994/1405 (1994); *Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, Bacre Waly Ndiaye, on his mission to Rwanda from 8-17 April 1993*, U.N. Doc. E/CN.4/1994/7/Add.1 (1993); *Special Report of the Secretary-General on UNAMIR, containing a summary of the developing crisis in Rwanda and proposing three options for the role of the United Nations in Rwanda*, S/1994/470, 20 April 1994; *Report of the United Nations High Commissioner for Human Rights, Mr. José Ayala Lasso, on his mission to Rwanda 11-12 May 1994*, U.N. Doc. E/CN.4/S-3/3 (1994). See also, generally, the collection of United Nations documents in *The United Nations and Rwanda, 1993-1996*, The United Nations Blue Books Series, Volume X, Department of Public Information, United Nations, New York. See: UNICTR, *Akayesu Judgement*, §165-166.

<sup>1504</sup> On 11, 12, 13, 18 and 21 February and 22, 23 and 24 May. Altogether, the English verbatim transcripts, which are on file with the author, of these hearings make up 1116 pages of text.

<sup>1505</sup> UNICTR, *Akayesu – Audio Recording of 11/02/97* (ICTR-96-04-00977; 11 February 1997), from: 00:24:40.

<sup>1506</sup> Doris Buss, 'Expert Witnesses and International War Crimes Trials', p.32. Buss writes that the transcript of the testimony "reads like a series of erudite mini lectures delivered to the trial chamber." From the original audio recordings of the proceedings, a similar conclusion can be drawn, yet with the addition that it "sounds" like mini-lectures too. However, listening to the testimony, the listener may observe the profound carefulness, as well as confidence, in deliverance of the testimony that was mostly given in English and at times in French.

of the genocide in 1994. Impressed and excited by her “interesting” expertise, the judges, from early on, were eager students shooting a stream of questions at her: “Doctor, when you say what we would now call ethnic groups, what are you referring to?”; “What does it mean?”; “is that true?” After her first three hours of audience, Judge Kama even apologised: “Madame, I hope you will understand that we are taking a lot of your time because your testimony is particularly of great importance. You know very well Rwanda, as well as its history. And also the judges will be benefiting from your knowledge [...] I hope that we will not be accused of asking too many questions.”<sup>1508</sup> On their minds were fundamental, yet still basic queries about Rwanda. In particular, they desired to know what kind of groups Hutu and Tutsi were and if these would fit the definition of protected groups under the genocide convention. In all, Des Forges’ evidence was considered by the magistrates so authoritative that in the judgement, in no less than 33 paragraphs (out of 744 in total) under the heading “Historical Context of the Events in Rwanda in 1994”, her testimony is “briefly” summarised “in order to understand the events alleged in the Indictment.”<sup>1509</sup> In fact, Des Forges’ testimony, which was a raw version of what had happened in Rwanda, virtually trickled down Arusha as the tribunal’s official version of history. It heavily influenced the minds of the judges in making sense of the causes and dynamics of mass violence in Rwanda, but it also provided them with an explicit narrative structure to discuss evidence and present their findings.<sup>1510</sup> Whereas the chamber had not allowed the defence to call the Rwandan historian Dr. Ferdinand Nahimana as an expert witness,<sup>1511</sup> Des Forges’ explanations on Rwanda remained virtually uncontested by the defence, which did not put a challenging cross-examination, during trial. As a result, the judgement’s historical overview confidently structures and summarizes the socio-political history as told by the American historian up to the genocide.<sup>1512</sup>

A heavy emphasis is put on the historical evolution of Hutu and Tutsi identities. It recounts a history of the “racist” introduction by colonialists and clergy of ethnic markers and divisions in Rwanda in the early twentieth century – via the Social Revolution, political strife during independence, the war, the Arusha negotiations, political extremism, propaganda and inciting language, pogroms, events in Burundi, political killings, the assassination of Habyarimana, the establishment of Bagosora’s Hutu-Power government, the killing of Peacekeepers - all the way up to the massacres from April 1994 onwards.<sup>1513</sup> “So, to sum up, you could say that from the plane crash through, perhaps, the 11th, 12th, there was some confusion about the target. From the 12th [...] or

<sup>1507</sup> Often citing from René Lemarchand and Filip Reyntjens, her own investigations as part of her work for the International Commission of Inquiry and Africa Watch, a branch of HRW at the time.

<sup>1508</sup> UNICTR, Akayesu - Audio Recording of 12/02/97 – AM (ICTR-96-04-00982; 12 February 1997), from: 02:18:28.

<sup>1509</sup> UNICTR, *Akayesu Judgement*, §78.

<sup>1510</sup> See for more general argument: Doris Buss, ‘Expert Witnesses and International War Crimes Trials’, pp. 23-45.

<sup>1511</sup> The Defence argued that hearing Nahimana “would enlighten the Tribunal on the history of Rwanda and enable the Defence to dispute the scientific validity of the theories advanced previously in the present case by Dr. Alison Des Forges, Historian, specialist on Rwanda, called by the Prosecutor to testify as an expert.” Since Nahimana himself was an accused before the tribunal, the chamber questioned his impartiality as an expert witness. See: UNICTR, *The prosecutor versus Jean-Paul Akayesu: Decision on a defence motion for the appearance of an accused as an expert witness* (ICTR 96-4-T; 9 March 1998).

<sup>1512</sup> In fact, her testimony presents a very first overview of the book, *Leave None To Tell The Story*, she was writing, which later from 1999 onwards became the new ‘bible’ at the tribunal and required reading for all staff. Only in 2014 was the book translated into Kinyarwanda (*Nihazasigare N Uwo Kubara Inkuru*).

<sup>1513</sup> UNICTR, *Akayesu Judgement*, §84.

13th killings were beginning on a large scale. The major massacres<sup>1514</sup> were finished by -- most of the major massacres were finished by the 22nd. And then, the government moved into a new stage of more controlled and discrete killings of Tutsi and -- and people said to be associated with the RPF.”<sup>1515</sup> Next to serving as an academic guide through the history of Rwanda, Des Forges’ testimony became crucial in the prosecutor’s framework and the court’s determination that genocide had taken place.

In a section immediately following, carrying the title “Genocide in Rwanda in 1994?” the court deliberates whether the massacres constituted genocide, obviously according to the Genocide Convention. For the panel, uncertainties persisted about the number of people massacred in Rwanda but that could not refute the fact that widespread killings were perpetrated throughout Rwanda.<sup>1516</sup> The testimony of witnesses Zacharia, Dallaire, Cox proved that “killing and causing serious bodily harm to members of a group” were committed.<sup>1517</sup> Then the chambers moves forward to analyse the question if these crimes were “committed with the intent to destroy, in whole or in part, a particular group targeted as such.”<sup>1518</sup> ‘Intent’, in general terms, was the first requirement to be met. Although the chamber considered it “a mental factor which is difficult, even impossible, to determine” it sought to “deduce genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others.”<sup>1519</sup> The chamber then turns to Des Forges. Convinced that the massacres were aimed at exterminating the group that was targeted, the chamber paraphrases Des Forges “on the basis of the statements made by certain political leaders, on the basis of songs and slogans popular among the *Interahamwe*, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that-as they said on certain occasions - their children, later on, would not know what a Tutsi looked like, unless they referred to history books.”<sup>1520</sup> Dr. Zacharia’s testimony that the Achilles’ tendons of many wounded persons were cut to prevent

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<sup>1514</sup> Des Forges described these as follows: “*In other words, in commune after commune the initial effort of local people, with a small amount of military support, was ordinarily not successful. In most cases of massacres, the initial attack did not succeed the first day. But, on the second or third day the assailants had access to soldiers and to police, often with heavier weaponry, who came in to support them and which then permitted the -- the final carrying out of the massacre. A massacre usually began with attack by grenade and gunfire, and ended with the final destruction of the remaining people through machetes and other forms of -- of weapons, clubs, spears and so on, that did not involve use of expensive ammunition. In addition, the use of the barriers to limit the movement of population, the use of patrols to search for and to search and destroy Tutsi, the use of communal labor, of Umuganda to cut down all the bush, to clear the areas where Tutsi could potentially hide and to kill any who were found hiding in the process. The -- the use of whistles to give signals and to set the pace of killing. The use of banana leaves to identify assailants in those large massacres where you had coming together massive numbers of assailants who didn’t know each other and who might, potentially, have distinguishing who was Hutu from who was Tutsi because, as we pointed out, you couldn’t always tell from a person’s physical appearance. So, the assailants wore banana leaves or some other kind of leaves to identify themselves. All of these details you find throughout the country at many different sites and more or less at the same time.*” See: UNICTR, *In the Matter of Jean Paul Akayesu: Transcript* (ICTR-96-4-T; 24 May 1997).

<sup>1515</sup> UNICTR, *Akayesu Transcript* (18 February 1997).

<sup>1516</sup> UNICTR, *Akayesu Judgement*, §114.

<sup>1517</sup> *Ibidem*, §116.

<sup>1518</sup> *Ibidem*, §117.

<sup>1519</sup> “On the issue of determining the offender’s specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.” *Ibidem*, §523.

<sup>1520</sup> The Chamber observed that this testimony was confirmed by prosecution witnesses KK and OO, who testified that Taba’s *Interahamwe* leader Silas Kubwimana had said during a public meeting chaired Akayesu that all the Tutsi had to be killed so that someday Hutu children would not know what a Tutsi looked like. UNICTR, *Akayesu Judgement*, §118.

them from fleeing, argued the chambers, demonstrated the perpetrators' resolve not to spare any Tutsi: "Their plan called for doing whatever was possible to prevent any Tutsi from escaping and, thus, to destroy the whole group."<sup>1521</sup>

On many occasions, continued the chamber, many Tutsi bodies were often systematically thrown into the Nyabarongo river, a tributary of the Nile. The judges had seen pictures of dead bodies floating in the river and Des Forges had "explained that the underlying intention of this act was to "send the Tutsi back to their place of origin", to "make them return to Abyssinia", in keeping with the allegation that the Tutsi are foreigners in Rwanda, where they are supposed to have settled following their arrival from the Nilotic regions."<sup>1522</sup> Dallaire's testimony that "even new-born babies" were not spared and evidence of forced abortions or killings of women carrying foetuses of a Tutsi fathers<sup>1523</sup> were further testimony of "an intention to wipe out the Tutsi group in its entirety."<sup>1524</sup> Tutsi, as members of an ethnic group, were the targets of the violence, said the chamber. On the basis of their identity cards, they were sorted out and separated from Hutu at roadblocks while various news media overtly called for the killing of Tutsi. The 1991 military's report defining the enemy, which was disseminated in 1992,<sup>1525</sup> "could be added to this lot", wrote the chamber, to conclude that "all this proves that it was indeed a particular group, the Tutsi ethnic group, which was targeted [...] because they belonged to said group; and hence the victims were members of this group selected as such."<sup>1526</sup> Then the chamber emphasised that "according to Alison Des Forges' testimony, the Tutsi were killed solely on account of having been born Tutsi."<sup>1527</sup> From the forgoing testimony, the magistrates concluded that genocide was "committed in Rwanda in 1994 against the Tutsi as a group."<sup>1528</sup> But that was not all that the chamber found, it also carefully exposed its understanding of the causes and dynamics of the genocide.<sup>1529</sup> Most interestingly, the judges were of the opinion that "this genocide appears to have been meticulously organized." They had been convinced by some of the testimonies. Des Forges had talked of "centrally organized and supervised massacres,"<sup>1530</sup> Zacharia had talked about lists, General Dallaire mentioned arms caches, the chamber summarised, only to bring into memory "the training of militiamen by the Rwandan Armed Forces and of course, the psychological preparation of the population to attack the Tutsi, which preparation was masterminded by some news media, with the RTLTM at the forefront."<sup>1531</sup> Next to stating that the genocide had been planned and

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<sup>1521</sup> Witness OO testified that during the same meeting, a Parliamentarian had stated that he would rest only when no single Tutsi is left in Rwanda. Ibidem, §119.

<sup>1522</sup> Ibidem, §120.

<sup>1523</sup> Witnesses KK, PP and OO had recounted the use of a proverb according to which if a snake wraps itself round a calabash, there is nothing that can be done, except to break the calabash' ("Iyo inzoka yiziritse ku gisabo, nta kundi bigenda barakimena). In 1994, this meant that if a Hutu woman married to a Tutsi man was impregnated by him, the foetus had to be destroyed so that the Tutsi child which it would become should not survive. In Rwandese culture, breaking the "gisabo", which is a big calabash used as a churn was considered taboo. Yet, if a snake wraps itself round agisabo, obviously, one has no choice but to ignore this taboo in order to kill the snake. UNICTR, *Akayesu Judgement*, §121.

<sup>1524</sup> Ibidem, §121.

<sup>1525</sup> UNICTR, TCI, *Prosecutor Versus Jean-Paul Akayesu: Exhibit 25 A*. (ICTR-96-4-T).

<sup>1526</sup> UNICTR, *Akayesu Judgement*, §124.

<sup>1527</sup> Ibidem, §124.

<sup>1528</sup> Ibidem, §126.

<sup>1529</sup> Similar argument made in: Doris Buss, 'Expert Witnesses and International War Crimes Trials', pp. 23-45.

<sup>1530</sup> UNICTR, *Akayesu Transcript* (24 May 1997).

<sup>1531</sup> UNICTR, *Akayesu Judgement*, §126.

organised by FAR members and Hutu Power political forces,<sup>1532</sup> the chamber tried to place it in its context and venture into an explanation of why it was committed. The genocide, it argued, was “fundamentally different from” but “probably facilitated” by the war, in the sense that the fighting against the RPF forces was used as a pretext for the propaganda inciting genocide against the Tutsi, by branding RPF fighters and Tutsi civilians together, through dissemination via the media of the idea that every Tutsi was allegedly an accomplice of the Inkotanyi. Very clearly, once the genocide got under way, the crime became one of the stakes in the conflict between the RPF and the RAF.”<sup>1533</sup>

### ***Testimony beyond reasonable doubt***

So solely on the basis of witness testimony, the UNICTR was convinced ‘beyond reasonable doubt’ that genocide had taken place. One vital question to this determination was not resolved beyond ambiguity, but rather with a great deal of creativity. It concerned the meaning of Hutu and Tutsi identity concepts in respect to the wording of the Genocide Convention. Settling the issue whether they would empirically constitute protected groups (national, ethnic, racial or religious),<sup>1534</sup> however, became essential to the heart of the case and very *raison d’etre* of the tribunal: the charge of genocide against the Tutsi ethnic group.<sup>1535</sup> *In extenso*, it was important to have a clear marker in terms of crimes against humanity.<sup>1536</sup> The judges had to venture into the question themselves, since the Prosecutor did not specifically state in the indictment against which group the genocide was committed<sup>1537</sup> nor did he file in time his closing brief to explain the matter in further detail.<sup>1538</sup> What was obviously clear was that the genocide was committed against the Tutsi group, but not on which basis. Again, Des Forges was instrumental in setting parameters. Throughout the trial and in the judgement, the question of race (which was the perpetrator’s view, grounded in the Republic’s founding narrative, of the Tutsi – stemming from Ethiopia) appeared not to have been on the docket at all,<sup>1539</sup> resulting in the exclusive focus on ethnicity.<sup>1540</sup> In leading the evidence, prosecutor Haile Mariam, through Des Forges, was in search for an empirical reality that would fit the Genocide Convention and to his mind it was ethnic: “Doctor, the groups that you have been talking about at that time, how could they be categorized, as economic groups, ethnic groups, social groups [...]?”<sup>1541</sup>

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<sup>1532</sup> *Ibidem*, §128.

<sup>1533</sup> *Ibidem*, §127.

<sup>1534</sup> These social categories were defined and operationalised by the chamber as follows: “Based on the Nottebohm decision rendered by the International Court of Justice (ICJ), the Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties. [...] An ethnic group is generally defined as a group whose members share a common language or culture. [...] The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors. [...] The religious group is one whose members share the same religion, denomination or mode of worship.” *Ibidem*, §512-515.

<sup>1535</sup> Wilson, *Writing History*, p. 170.

<sup>1536</sup> Remember that the UNICTR Statute, article 3, defines crimes against humanity in such a way that it has to be committed against a group.

<sup>1537</sup> UNICTR, *Akayesu Judgement*, §701.

<sup>1538</sup> The Prosecutor missed the deadline for filing closing submissions and were, according to Judge Pillay, “not read.” See: Wilson, *Writing History*, p. 174.

<sup>1539</sup> Social anthropologist and tribunal observer Nigel Eltringham critiqued the ICTR’s ignorance of race as a determinant in the genocide. “The Tribunal failed to deal with how Tutsi were targeted: the perception of indelible, racial distinction. The Tribunal missed the opportunity to reveal the wholly ideational nature of the genocidal mentality.” See: Nigel Eltringham, *Accounting for Horror: Post-Genocide Debates in Rwanda* (London: Pluto, 2004), p. 30.

<sup>1540</sup> According to Judge Pillay, “The definitions of race and ethnicity in Akayesu came from Rwandan witnesses, there was an accepted social structure for these things. In the Judgment, we cited the UN treaties and articles but we said that they didn’t fit the Rwandan situation. We had very little help so we relied on the evidence and views of the people of Rwanda.” Cited in: *Ibidem*, p. 175.

<sup>1541</sup> UNICTR, *Akayesu Transcript* (11 February).

During her testimony, drawing on oral history she had collected,<sup>1542</sup> Des Forges narrated a history of a colonially distorted, racially inspired and politically operationalised ethno-genesis and animosity which crested, in the early 1990s through political manipulation into the large-scale violence. Her symposium on ethnicity is lengthy, typically in response to queries from the prosecutor and a decidedly focused bench, and carefully formulated. “Academic experts refer to ethnic groups meaning people who identify themselves as a unit and who signify that identification through their language and culture. In other words, people who speak the same language, worship the same God or gods, experience a common sense of a shared historical past could be qualified as an ethnic group. But, this is a term whose usage evolves and is evolving.”<sup>1543</sup> She continued that in Rwanda these groups “were in the process formation during the course of the 20th century.” The historian added that “social science is not exact.”<sup>1544</sup> “As I defined the idea of ethnic group yesterday, I spoke of two criteria: One being the administrative, which we have just discussed now; the other being the subjective definition, the sense of being Tutsi, the sense of being Hutu. While it's easy to assign a specific date to the beginning of an administrative practice, it is not easy to assign a date to a developing sense of group identity. No doubt it happened faster with some people than with others.”<sup>1545</sup>

To a large extent, the UNICTR judges followed Des Forges. “One can hardly talk of ethnic groups as regards Hutu and Tutsi, given that they share the same language and culture.”<sup>1546</sup> Administratively, however, the colonizers, through state-issued identity cards, had divided Rwanda’s population “into three groups which they called ethnic groups.”<sup>1547</sup> Next to the obligation to carry identity cards, other objective group indicators existed in Rwanda. The Constitution and other laws in place in 1994, for instance, identified Rwandans by reference to ethnic groups.<sup>1548</sup> Moreover, customary rules existed in Rwanda governing the determination of ethnic group, which followed patrilineal lines of heredity.<sup>1549</sup> This administrative *status quo* led Rwandans themselves to have a sense that they belonged to one of the groups.<sup>1550</sup> The dichotomy had become embedded in Rwandan culture and the chamber remarked that witnesses who testified before the Chamber identified themselves by ethnic group, and generally knew the ethnic group to which their friends and neighbours belonged.<sup>1551</sup> Moreover, claimed the chamber without going into detail “the Tutsi were conceived of as an ethnic group by those who targeted them for killing.”<sup>1552</sup> Still, the chamber found it

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<sup>1542</sup> *Idem*.

<sup>1543</sup> *Idem*.

<sup>1544</sup> *Idem*.

<sup>1545</sup> UNICTR, *Akayesu Transcript* (12 February).

<sup>1546</sup> UNICTR, *Akayesu Judgement*, §122, note 56.

<sup>1547</sup> *Ibidem*, §83.

<sup>1548</sup> “Article 16 of the Constitution of the Rwandan Republic, of 10 June 1991, reads, “All citizens are equal before the law, without any discrimination, notably, on grounds of race, colour, origin, ethnicity, clan, sex, opinion, religion or social position”. Article 57 of the Civil Code of 1988 provided that a person would be identified by “sex, ethnic group, name, residence and domicile.” Article 118 of the Civil Code provided that birth certificates would include “the year, month, date and place of birth, the sex, the ethnic group, the first and last name of the infant.” The Arusha Accords of 4 August 1993 in fact provided for the suppression of the mention of ethnicity on official documents (see Article 16 of the Protocol on diverse questions and final dispositions). *Ibidem*, §170.

<sup>1549</sup> *Ibidem*, §171.

<sup>1550</sup> *Ibidem*, §122, note 56.

<sup>1551</sup> *Ibidem*, §171.

<sup>1552</sup> UNICTR, *Akayesu Judgement*, §171.

difficult to make an ultimate determination and continued to quote Des Forges at length in their search for an answer:

As the expert witness, Alison Desforges, summarised: “The primary criterion for [defining] an ethnic group is the sense of belonging to that ethnic group. It is a sense, which can shift over time. In other words, the group, the definition of the group to which one feels allied may change over time. But, if you fix any given moment in time, and you say, how does this population divide itself, then you will see which ethnic groups are in existence in the minds of the participants at that time. The Rwandans currently, and for the last generation at least, have defined themselves in terms of these three ethnic groups. In addition, reality is interplay between the actual conditions and peoples' subjective perception of those conditions. In Rwanda, the reality was shaped by the colonial experience, which imposed a categorisation, which was probably more fixed, and not completely appropriate to the scene. But, the Belgians did impose this classification in the early 1930's when they required the population to be registered according to ethnic group. The categorisation imposed at that time is what people of the current generation have grown up with. They have always thought in terms of these categories, even if they did not, in their daily lives have to take cognizance of that. This practice was continued after independence by the First Republic and the Second Republic in Rwanda to such an extent that this division into three ethnic groups became an absolute reality.”<sup>1553</sup>

Ambivalence prevailed, as well as contradictions. In determining crimes against humanity, the chamber considered that these were committed on “ethnic grounds”, implying that the Tutsi were an ethnic group.<sup>1554</sup> But in determining genocide, based on the evidence and available instruments discussed above, the magistrates were headed towards a conclusion that the Tutsi did not objectively meet any of the criteria of any of the four categories protected under the Genocide Convention. How to rhyme this conclusion with the mandate of the tribunal, to prosecute *génocidaires*? If one of the requirements was not met, the UNICTR’s legal finding would have been that genocide had not been committed in Rwanda. Cognizant of that dilemma and determined to forge ahead, the chamber threw out a lifeline and questioned “whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention.”<sup>1555</sup> In looking for the answer, the chamber revolved to some “isolated comments by a few delegations” to the preparatory works of the convention,<sup>1556</sup> in which it read “that the crime of genocide was allegedly perceived as targeting only “stable” groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more “mobile” groups which one joins through individual voluntary commitment, such as political and economic groups.” From there, they concluded that “a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often

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<sup>1553</sup> Ibidem, §172.

<sup>1554</sup> Ibidem, §661.

<sup>1555</sup> Ibidem, §516.

<sup>1556</sup> William A. Schabas, *Genocide in International Law. The Crime of Crimes* (Cambridge: Cambridge University Press, 2009), p. 152.

irremediable manner.”<sup>1557</sup> In applying this reasoning to the parameters set and evidence elicited during the trial, the chamber could not conclusively prove that the Tutsi qualified as an ethnic group, yet permanent membership to the group was administratively conferred by the state and social customs.<sup>1558</sup> “In any case,” found the chamber, “at the time of the alleged events, the Tutsi did indeed constitute a stable and permanent group and were identified as such by all.”<sup>1559</sup> In doing so, not only did the tribunal “vex” the Genocide Convention,<sup>1560</sup> it also subscribed to the epistemological impasse to legally answer the sociological and anthropological questions as to the objective as well as subjective meanings of Hutu and Tutsi.

#### 4.8 Cultivating the narrative: *Kambanda’s ‘confession’*

The Akayesu judgement was announced to be “historic” and “precedent-setting.”<sup>1561</sup> That may very well be the case in the realm of international criminal justice, in terms of writing history about (or understanding and interpreting) events Rwanda, however, the Akayesu judgement reads as more than a first, yet confident, draft by three judges than as a conclusive account. In their opinion, they reference solely to the evidence tendered by 41 witnesses, a handful UN reports and 155 impressionistic exhibits presented at trial, but somehow, it appears that they brought in knowledge or persuasion from other cases they were conducting. Only two weeks after the Judgement, Judge Keita wrote in his yearly report that “given the position occupied by Jean Kambanda at the time, his plea has implications beyond the issue of his own individual responsibility. In pleading guilty, the former Prime Minister not only acknowledged and confirmed that genocide did indeed occur in Rwanda in 1994 but also indicated that it was organized and planned at the highest levels, both civilian and military.”<sup>1562</sup> Bearing in mind that he – next to Judge Aspegren and Pillay – was presiding over both cases, an important question remains. How much did the chamber, in making contextual findings in Akayesu, had in mind the admissions Jean Kambanda had consented to make to the Prosecutor? At least, considering Kaita’s observations regarding Kambanda’s plea, they must have been already confident that genocide had taken place. But nowhere, do they explicitly mention this in Akayesu’s ruling, nor in other reasoned filings.

A week after the closing statements in the Akayesu trial, the interim government’s former Prime Minister had appeared before the same judges, to “consciously and voluntarily”<sup>1563</sup> plead guilty<sup>1564</sup> to all charges levelled against him, including conspiracy to commit genocide.<sup>1565</sup> Only a few

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<sup>1557</sup> UNICTR, *Akayesu Judgement*, §511.

<sup>1558</sup> Compare: Wilson, *Writing History*, p. 176.

<sup>1559</sup> UNICTR, *Akayesu Judgement*, §702.

<sup>1560</sup> Schabas, *Genocide in International Law*, p. 152.

<sup>1561</sup> UNICTR, ‘Historic judgement finds Akayesu guilty of genocide’, *Press release* (2 September 1998).

<sup>1562</sup> UNICTR, *Third annual report 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* (S/1998/857; 23 September 1998), §3.

<sup>1563</sup> UNICTR, *Kambanda - Audio Recording of 01/05/98 - AM* (ICTR-97-23-00460; 1 May 1998), from: 00:41:10.

<sup>1564</sup> On the saga of Kambanda’s plea, see: Thierry Cruvellier, *Court of Remorse, Inside the International Criminal Tribunal for Rwanda* (Madison: Wisconsin University Press, 2010), pp. 38-48.

<sup>1565</sup> UNICTR, *Kambanda - Audio Recording of 01/05/98 - AM* (ICTR-97-23-00460; 1 May 1998), from: 00:34:33.

days before, Kambanda had penned his signature under a plea agreement with the Prosecutor in which he pledged to cooperate with the tribunal. Not only had he already provided investigators with between 60 and 90 hours of recorded and transcribed testimony<sup>1566</sup> and promised to testify, he consented to a very particular legally framed narrative of the genocide. It tells the story as follows. First, he acknowledged that there was a widespread and systematic attack against civilian Tutsi and moderate Hutu, on political, ethnic or racial grounds, which resulted in the death of hundreds of thousands of persons throughout Rwanda. The purpose of the mass killings of Tutsi was to exterminate them, evidenced by targeting women and children, young people and people alike and the fact that they were pursued in prefectures and commune offices, schools, churches and stadiums.<sup>1567</sup> That apart, Kambanda acknowledged the existence of groups within military, militia, and political structures, which had planned the elimination of the Tutsi and Hutu political opponents.<sup>1568</sup> As Prime Minister at the time, he presided over meetings of the Cabinet Ministers (attended by Pauline Nyiramasuhuko, Eliezer Niyitegeka and Andre Ntagerura, among others) in which the massacres were “actively followed”<sup>1569</sup> or “promoted,”<sup>1570</sup> while reports by the *préfets* on the course of the massacres were discussed.<sup>1571</sup> He, his ministers and government forces were further involved in several local meetings where they called for civil vigilance and support for the FAR in the fight against the RPF and its “accomplices”, understood to be the Tutsi and moderate Hutu.<sup>1572</sup> Later on, his government assumed the responsibility for the actions of the *Interahamwe*.<sup>1573</sup> This militia was trained before the genocide “with the intent to use them in the massacres,”<sup>1574</sup> while the government distributed arms and ammunition to them at roadblocks with the knowledge that these roadblocks were used to identify the Tutsi and moderate Hutu, to separate them and to eliminate them.<sup>1575</sup> As part of “the plan to mobilize and incite the population to commit massacres of the civilian Tutsi population,” media (RTL) were used, including by Kambanda himself.<sup>1576</sup> Besides using media, Kambanda and his Ministers, between April and July, occasionally visited several prefectures, to publicly incite and encourage the population to commit and amplify massacres against Tutsi and moderate Hutu. Also, he was not the only official who distributed weaponry and “was an eyewitness and [...] had knowledge of the mass killings of the Tutsi.” He was informed about it by other Ministers, *Préfets*, *Bourgmestres*, Government civil servants and military personnel who themselves “ordered, instigated, aided and

<sup>1566</sup> Journalist Linda Melvern, who also served as a consultant to the ICTR’s OTP in the Baganza case, claims it is 60 hours without providing a clear reference, while legal scholar Nancy Combs cites 90 hours, referring to the OTP’s sentencing brief (which the author of this dissertation was unable to obtain for cross-checking). Nancy Amoury Combs, ‘Copping A Plea To Genocide: The Plea Bargaining of International Crimes’, *University of Pennsylvania Law Review*, Vol. 15, No. 1 (November 2002), pp. 1-158: 3; Linda Melvern, *Conspiracy to Murder. The Rwandan Genocide* (London & New York: Verso, 2004), p. 2.

<sup>1567</sup> UNICTR, *The Prosecutor Versus Jean Kambanda: Joint Motion for Consideration of Plea Agreement Between Jean Kambanda and The Office of The Prosecutor. Annexure A: Plea Agreement Between Jean Kambanda and The Office of The Prosecutor* (ICTR-97-23-1; 29 April 1998), §18.

<sup>1568</sup> UNICTR, *Kambanda Plea Agreement*, §30.

<sup>1569</sup> *Ibidem*, §24.

<sup>1570</sup> *Ibidem*, §25.

<sup>1571</sup> *Ibidem*, §26.

<sup>1572</sup> *Ibidem*, §27-28.

<sup>1573</sup> *Ibidem*, §29.

<sup>1574</sup> *Ibidem*, §30-31.

<sup>1575</sup> *Ibidem*, §36.

<sup>1576</sup> *Ibidem*, §30-31.

actively engaged in actions wilfully intended to massacre and exterminate the Tutsi and moderate Hutu.”<sup>1577</sup>

On the basis of these admissions, during the hearing of 1 May 1998, after five minutes of deliberations, the bench declared Kambanda guilty of the six counts<sup>1578</sup> the prosecutor had drafted and pressed against him.<sup>1579</sup> Only four months later – a time they also spent writing Akayesu’s judgement – they ‘officially’ pronounced the verdict, containing, for the record, a brief summary of the ‘facts’ Kambanda had admitted to.<sup>1580</sup> Interestingly, in Kambanda’s case there were no hearings and no presentations of any documentary or testimonial evidence at all. That was the modus operandi at the UN tribunals: admitting guilt means that the right to be presumed innocent and the prosecutor’s burden to prove the charges are waived. Therefore, the time frame between his signing of the plea agreement and the chamber finding him guilty only bridged 2 days. As a consequence, the chamber did not make any findings of its own but simply copy-pasted parts of Kambanda’s confession into its judgement. But it did not explain any reasons for the genocide and the government’s responsibility. Kambanda never discussed his plea nor explained himself in court. “I have nothing further to add,” he told the judges when Keita solicited his views a day before sentencing.<sup>1581</sup> Seemingly, it had appeared to Kambanda he did not have to address the court since he had written them a letter. During the plea negotiations and a day prior to the pleading hearing in May, Bernard Muna, the deputy prosecutor in Arusha, had advised Kambanda to write a public account explaining himself. Kambanda had eagerly grasped this opportunity and produced a 35-paged political manifesto (“The Truth of the Rwandan Tragedy”).<sup>1582</sup> For the prosecution, however, the treatise was unacceptable since he claimed no criminal responsibility, only political responsibility. On appearance, the document would make the confessions not look unequivocal. Therefore, Muna reportedly promised to forward the document to the Chamber for consideration, but he never did.<sup>1583</sup>

As a consequence of this horse-trading, the court endorsed as official the narrative of the prosecutor. Whereas in Akayesu the judges were eager to unravel the genocide and learn about Rwanda, in Kambanda they emerged more zealous to secure a conviction than establish facts. One of the results was that two days after a reasoned overview of context and in-depth analysis of the question of ethnicity in Akayesu, they found Kambanda “responsible for the killing of and the causing of serious bodily or mental harm to members of the Tutsi population with intent to destroy, in whole

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<sup>1577</sup> UNICTR, *Kambanda Plea Agreement*, §32-40.

<sup>1578</sup> (1) Genocide; (2) Conspiracy to commit genocide (with others, including Ministers of his Government, such as Pauline Nyiramasuhuko, Andre Ntagerura, Eliezer Niyitegeka and Edouard Karemera); (3) Direct and Public Incitement to Commit Genocide; (4) Complicity in Genocide; (5) Murder as a Crime Against Humanity; and (6) Extermination as a Crime Against Humanity.

<sup>1579</sup> UNICTR, *Kambanda - Audio Recording of 01/05/98 - AM* (ICTR-97-23-00460; 1 May 1998), from: 00:46:10.

<sup>1580</sup> UNICTR, *The Prosecutor Versus Jean Kambanda: Judgement and Sentence* (ICTR 97-23-S; 4 September 1998).

<sup>1581</sup> UNICTR, *Kambanda - Audio Recording of 03/09/98 - AM* (Rec. No. ICTR-97-23-00466; 3 September 1998). However, a day later, during sentencing, the judges lamented the fact Kambanda “offered no explanation for his voluntary participation in the genocide; nor has he expressed contrition, regret or sympathy for the victims of Rwanda, even when given the possibility to do so by the Chamber, during the hearing on 3 September 1998. See: UNICTR, *Kambanda: Judgement*, §51.

<sup>1582</sup> Jean Kambanda, *Le Manifeste De La Vérité Sur “l’Apocalypse” Au Rwanda en 1994* (Dodoma, 30 April 1998).

<sup>1583</sup> Muna promised Kambanda that his written statement would be sent confidentially to the judges only. Two years later, the prosecution office discreetly admitted that the document was never forwarded. Cruvellier, *Court of Remorse*, pp. 44-45.

or in part, an ethnic or racial group, as such, and has thereby committed genocide [...]”<sup>1584</sup> There was no mention at all of the careful considerations they had in proving genocide in Akayesu. Despite this material emptiness as a result of the absence of factual examination in the ‘standard operation procedure’ in guilty pleas, Kambanda’s guilty plea was conceived as a trophy, featured in the OTP’s strategy in cases against other government officials and it is still presented as one of its milestone.<sup>1585</sup> With his confession and pages of interviews in the pocket and his promise to assist the prosecution in the trials against his former henchmen (and woman) the tasks ahead seemed winnable for the OTP. However, from an official milestone he became practical millstone. Days after receiving a life sentence, Kambanda felt betrayed and disgruntledly rescinded all his acknowledgments and appealed to the higher chamber that his confessions were made under duress of two investigators and was asking to give him an actual trial. His appeals brief, allegedly,<sup>1586</sup> spelled out his true thoughts about Rwandan politics in 1994 and the crimes he had admitted to. He presented himself a scapegoat of a tragic situation over which [he had] absolutely no control, as such.”<sup>1587</sup> “No control,” was the red thread in his appeals case and the narrative of his outright denial of the specific charges he had confessed to. When he lost his appeal,<sup>1588</sup> he cut off his contact with the OTP and was sent to prison in Mali.<sup>1589</sup> Only in 2002, Carla Del Ponte sought his help again, brought him to The Hague but a year of negotiations there never led to anything.<sup>1590</sup> He only came back to Arusha once, not on behalf of the OTP, but to testify for three days for the defence of Colonel Bagosora.<sup>1591</sup> Ever since, he maintains that the UNICTR tricked him to outline its narrative on the genocide.<sup>1592</sup>

#### 4.9 Contrasting and ironing out the narrative: Kibuye

Unlike the leaders of Nazi Germany, who meticulously documented their acts during World War II, the organisers and perpetrators of the massacres that occurred in Rwanda in 1994 left little documentation behind. Thus, both Parties relied predominantly upon the testimony of witnesses brought before this Chamber in order to establish their respective cases. A majority of the Prosecution witnesses were Tutsis who had survived attacks in Kibuye Prefecture (survivor witnesses), in which both accused allegedly participated.<sup>1593</sup>

When Judges Kama, Pillay and Aspegren were breaking their heads on the cases of the wolf in sheep’s clothing Akayesu, the opportunistic PM Kambanda and from March 1997 the former

<sup>1584</sup> UNICTR, *Kambanda Judgement*.

<sup>1585</sup> See: UNICTR, ‘ICTR Milestones’, www-text: <http://www.unicttr.org/en/icttr-milestones>.

<sup>1586</sup> The document is not publicly available in the ICTR’s judicial archive.

<sup>1587</sup> Cruvellier, *Court of Remorse*, pp. 46-47.

<sup>1588</sup> UNICTR, Appeals Chamber, *Jean Kambanda (Appellant) v. The Prosecutor (Respondent): Judgement* (ICTR-97-23-A; 19 October 2000).

<sup>1589</sup> UNICTR, ‘Former Prime Minister and Five Other Convicts Sent to Prison in Mali’, *Press Release* (ICTR/INFO-9-2-296.EN; 11 December 2001).

<sup>1590</sup> Cruvellier, *Court of Remorse*, pp. 46-48.

<sup>1591</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (11 July 2006); UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (12 July 2006); UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (13 July 2006).

<sup>1592</sup> In 2013, he published a damning book on the ICTR, which he wrote from his prison cell, denying any responsibility for the genocide, a claim he would echo in a rare television interview in 2015. See: Jean Kambanda, *Rwanda face à l’apocalypse de 1994: Contribution aux progrès de la justice et aux efforts de réconciliation du peuple Rwandais* (Brussels: E.M.E. Sources d’Homme, 2013); John Ray, ‘My Conscience is Clear’: Former Rwanda PM Jean Kambanda tells ITV News he was tricked into his genocide confession, *ITV* (www-text/video: <http://www.itv.com/news/2015-07-21/my-conscience-is-clean-former-rwandan-pm-jean-kambanda-tells-itv-news-he-was-tricked-into-genocide-confession/>, visited: 25 September 2015).

<sup>1593</sup> UNICTR, TCII, *The Prosecutor versus Clément Kayishema and Obed Ruzindana: Judgement* (ICTR-95-1-T; 21 May 1999), §65-66.

*Interahamwe* leader Georges Rutaganda,<sup>1594</sup> Trial Chamber II<sup>1595</sup> had also commenced its work. On its docket were the Kibuye massacres,<sup>1596</sup> the most thoroughly investigated and adjudicated crime scenes at the tribunal.<sup>1597</sup> In the dock, from 11 April 1997, were Kibuye's *préfet* - and former judge and medical doctor - Clément Kayishema and the businessman Obed Ruzindana.<sup>1598</sup> In this first joint-trial, fifty-one prosecution witnesses, most of whom were Tutsi survivors from the crime scenes, had presented a "horrific account" of the annihilation of Tutsi in the Western region and the role the accused had played in it from mid-April 1994.<sup>1599</sup> Both men were found guilty of genocide, yet acquitted of crimes against humanity and war crimes, in the tribunal's fourth judgement.<sup>1600</sup> What transpires from this case is that different judges – congregated in different Trial Chambers faced with different court room dynamics – who are dealing with different accused, prosecutors and witnesses, employ different methodologies and perspectives, pursue different extra-legal ambitions and consequently write different judgements, including findings of historical significance. In itself, that is not surprising. International judges are human beings as well, apply their standards, knowledge and national legal traditions and learn along the way they deal with more similar cases. For the shaping of the historical record established by 'the' tribunal, though, it is crucial not only to recognise this fact, but also to underscore it as a factor that is detrimental to the ascertainment of judicial truth about mass violence in Rwanda throughout the life span of the UNICTR. In the end, particularly in the beginning, the independent trial chambers – and appeal chambers for that matter - themselves were in continuous dialogue about the interpretation of events in Rwanda as well as the narrative framework in which they presented their findings.

First of all, in *Kayishema*, the judges spelled out that they had no extra-legal ambition in terms of history writing on the genocide in larger terms as "it is impossible to simplify all the ingredients that serve as a basis for killings on such a scale."<sup>1601</sup> Although it found it "necessary to address the historical context within which the events unfolded in Rwanda in 1994, in order to understand fully the events alleged in the Indictment and the evidence before the Trial Chamber [...]" The Trial Chamber is of the opinion that an attempt to explain the causal links between the history of Rwanda and the suffering endured by this nation in 1994 is not appropriate in this forum and may be

<sup>1594</sup> UNICTR, 'The trial of Rutaganda before the ICTR begins', *Press release* (Arusha, 18 March 1997).

<sup>1595</sup> Composed of Judge William Sekule (Tanzania), Yakov A. Ostrovsky (Russia) and Tafazzal Hossain Khan (UK).

<sup>1596</sup> Notably: at the Catholic Church and Home St. Jean complex, in Kibuye town, Gitesi commune, on a piece of land which is surrounded on three sides by Lake Kivu; at the Stadium, in Kibuye town; the Church of Mubuga, Gishyita Commune in the south of Kibuye Prefecture, 20 kilometres from Kibuye town; and Bisesero area in the Gishyita and Gisovu communes. UNICTR, *The Prosecutor of The Tribunal against Clement Kayishema & Obed Ruzindana: First Amended Indictment* (ICTR-95-1-1 (sic); 11 April 1997).

<sup>1597</sup> Kibuye was the first prefecture where a contingent of ICTR investigators landed in May 1995 to collect survivor testimonies. Between 1997 and 2005 ten Rwandans were tried for the genocide in Kibuye, including two government ministers, one *préfet*, three Bourgmestres, one pastor, one doctor, one factory manager, one businessman, two town councillors and one restaurant owner. Cruvellier, *Court of Remorse*, p. 81.

<sup>1598</sup> See biographies, based on the testimony of Kayishema's and Ruzindana's wife: UNICTR, *Kayishema & Ruzindana Judgement*, §6-12.

<sup>1599</sup> The Chamber uses this phraseology throughout its judgement. *Ibidem*, §75, 470, 355, 586.

<sup>1600</sup> The third judgement, also rendered by Trial Chamber I, concerned former *Interahamwe* leader Omar Serushago, who had been a substantial OTP informant since 1997 and had pleaded guilty to four (out of five) counts of genocide and crimes against humanity on 14 December 1998. His information, even before he voluntarily came to Arusha, had led to the arrest of several high-level suspects in Kenya in 1997. During the pre-sentencing hearing, Serushago expressed his remorse at length and openly, asking for forgiveness from the victims of his crimes and the entire people of Rwanda. See: UNICTR, TCI, *The Prosecutor of The Tribunal Against Omar Serushago: Transcript* (ICTR-98-39-I, Arusha, 14 December 1998); UNICTR, TCI, *The Prosecutor vs. Omar Serushago: Sentence* (ICTR 98-39-S; 5 February 1999); Cruvellier, *Court of Remorse*, pp. 55-56.

<sup>1601</sup> UNICTR, *Kayishema & Ruzindana Judgement*, §31-32.

futile.<sup>1602</sup> This stance, in contrast to *Akayesu*, may have been the offspring of the a-historical indictment and charges they had to judge. The prosecutors, at trial, had not embarked on an historical narrative to the extent their colleagues had done in the *Akayesu* proceedings. Subsequently, they had called different witnesses to testify to contextual elements. For instance, historian Des Forges was not called as an expert. In her place came Professor André Guichauoa, “Rwandan Scholar” Francois Nsanzuwera.<sup>1603</sup> Michel Guibal,<sup>1604</sup> a French jurist, testified on behalf of the defence. With some professional, academic and personal experience in Rwanda and Burundi – he was in Kigali in the first few days after Habyarimana’s plane was attacked - the sociologist Guichauoa<sup>1605</sup> was the most influential contextual expert. Moreover, the French scholar had been working closely with the OTP since April 1996<sup>1606</sup> and had prepared two substantial reports<sup>1606</sup> that were tendered into evidence by the prosecutor.<sup>1607</sup> In critical parts, his expertise was heavily relied on in making findings on, for instance, ethnicity, but also on the political make-up of Rwanda during the First and Second Republics.<sup>1608</sup> In conclusion of the concise section on historical context, the chamber found that “The ethnic tensions were used by those in power in 1994 to carry out their plans to avoid power sharing. The responsible parties ignored the Arusha Accords and used the militias to carry out their genocidal plan and to incite the rest of the Hutu population into believing that all Tutsis and other persons who may not have supported the war against the RPF were in fact RPF supporters. It is against this backdrop that of thousands of people were slaughtered and mutilated in just three short months.”<sup>1609</sup>

On that premise, the chamber, like its equivalent in *Akayesu*, delved into the question if these slaughters constituted genocide. Yet, in contrast to *Akayesu*, this panel of judges treated the inquiry differently: “Considering the plethora of official reports, including United Nations documents, which confirm that genocide occurred in Rwanda and the absence of any Defence argument to the contrary, one could consider this point, settled.”<sup>1610</sup> In contrast to their colleagues, this chamber did not so much rely on contextual evidence as spelled out by an historian but on the official documentation and the fact that the defence in this case did not deny the charge. Legally, the argument would have held, but the chamber quickly added that it still felt “obliged to make a finding of fact on this issue.”<sup>1611</sup> Without referencing to evidence or testimony from the other trials, notably *Akayesu*, the key witness

<sup>1602</sup> UNICTR, *Kayishema & Ruzindana Judgement*, §31-32.

<sup>1603</sup> In their judgement, they call him a “Rwandan scholar”, without citing his credentials. In fact, this witness was a former Prosecutor in Rwanda who went through working at NGO’s to make it into the ICTR’s OTP appeals section as a legal officer. See, *inter alia*: UNICTR, *Kayishema & Ruzindana Judgement*, §46; Immaculate Mukamuhirwa and François-Xavier Nsanzuwera, ‘Open Letter to Rwanda: Justice for Rwandans’, *Issue: A Journal of Opinion*, Vol. 26, No. 1, Central Africa in Crisis (1998), pp. 2-4; François-Xavier Nsanzuwera, ‘The ICTR Contribution to National Reconciliation’, *Journal of International Criminal Justice*, Vol. 3, No. 4 (September 2005), pp. 944-949; UNICTR, TCII, *The Prosecutor versus Clément Kayishema & Obed Ruzindana. Prosecution Exhibit 77A: Curriculum Vitae Nsanzuwera* (ICTR-95-1-T; undated); UNICTR, TCII, *The Prosecutor versus Clément Kayishema & Obed Ruzindana. Prosecution Exhibit 78 A: Expert Testimony in the Case of the Prosecutor Versus Clément Kayishema* ((ICTR-95-1-T; undated).

<sup>1604</sup> UNICTR, TCII, *The Prosecutor versus Clément Kayishema & Obed Ruzindana. Defence Exhibit 31: Michel Guibal. Detailed Curriculum Vitae* (ICTR-95-1-T; 25 May 1998).

<sup>1605</sup> UNICTR, TCII, *The Prosecutor versus Clément Kayishema & Obed Ruzindana. Prosecution Exhibit 101: Curriculum Vitae, Guichauoa, Andre* (ICTR-95-1-T; 3 October 1997).

<sup>1606</sup> Email correspondence with André Guichauoa, 17 October 2012; UNICTR, Office of The Prosecutor, *Letter from Richard Karegyesa (Chief of Prosecutions) to Prof. André Guichauoa: Re: Request OTP ICTR Work History* (24 September 2012).

<sup>1607</sup> UNICTR, ‘Political Background to the 1994 Rwandan Crisis. Expert Report Prepared at the Request of the International Criminal Tribunal for Rwanda. Document I, by André Guichauoa’, *The Prosecutor versus Clément Kayishema & Obed Ruzindana. Prosecution Exhibit 103 A* (ICTR-95-1-T; April 1997).

<sup>1608</sup> UNICTR, *Kayishema & Ruzindana Judgement*, §34-45.

<sup>1609</sup> *Ibidem*, §54.

<sup>1610</sup> *Ibidem*, §273.

<sup>1611</sup> *Ibidem*, §273.

in this case, on whose “convincing” testimony the chamber relied, was the Ivorian Dr. René Degni-Segui. As the former UN special rapporteur on Rwanda, he had investigated and produced seven reports for the Security Council. Summarising from those writings, Degni-Segui testified that “no one has found any official written document outlining the genocidal plan, there exist sufficient indicators that a plan was in place.”<sup>1612</sup> These pointers included deaths lists, extremist propaganda, civil defence programme and the “screening” of civilians at roadblocks. On that outlined basis, the chamber recounts, in a poor prose with crucial spelling mistakes that equals the language of a political scientist rather than a professional judge<sup>1613</sup> events before and during the genocide. In its narrative that includes many uncorroborated facts and misquotations,<sup>1614</sup> however, are hidden many explanations for the logic of genocide: “The state of fear that ensued, caused by the rumours about the intentions of the RPF to exterminate the Hutus and the terror and insecurity that prevailed in Rwanda, served as a pretext for the execution of the genocidal plan and consequently the retention of power by the extremist Hutus.”<sup>1615</sup> They also show themselves not to be passionate: “Unfortunately, the civil defence programme was used in 1994 to distribute weapons quickly and ultimately transformed into a mechanism to exterminate Tutsis.”<sup>1616</sup> In between the pen strokes, they already answered the question: “The perpetrators of the genocide often employed roadblocks to identify their victims.”<sup>1617</sup> Then after the diminutive exposé, the Trial Chamber finds:

[...] that the massacres of the Tutsi population indeed were “meticulously planned and systematically co-ordinated” by top level Hutu extremists in the former Rwandan government at the time in question. The widespread nature of the attacks and the sheer number of those who perished within just three months is compelling evidence of this fact. This plan could not have been implemented without the participation of the militias and the Hutu population who had been convinced by these extremists that the Tutsi population, in fact, was the enemy and responsible for the downing of President Habyarimana’s airplane. The cruelty with which the attackers killed, wounded and disfigured their victims indicates that the propaganda unleashed on Rwanda had the desired effect, namely the destruction of the Tutsi population. The involvement of the peasant population in the massacres was facilitated also by their misplaced belief and confidence in their leadership, and an understanding that the encouragement of the authorities to guaranteed them impunity to kill the Tutsis and loot their property. Final reports produced estimated the number of the victims of the genocide at approximately 800,000 to one million, nearly one-seventh of Rwanda’s total population. These facts combined prove the special intent requirement element of genocide. Moreover, there is ample evidence to find that the overwhelming majority of the victims of this tragedy were Tutsi civilians which leaves this Chamber satisfied that the targets of the massacres were “members of a group,” in this case an ethnic group. In light of this evidence, the Trial Chamber finds a plan of genocide existed and perpetrators executed this plan in Rwanda between April and June 1994.<sup>1618</sup>

<sup>1612</sup> UNICTR, *Kayishema & Ruzindana Judgement*, §265.

<sup>1613</sup> “The time was ripe in early 1994 for certain so-called Hutu extremists in power in Rwanda who opposed the Arusha Accords, to avoid having to share decision-making positions with opposition groups.” And for example: Bisumungu instead of Bizumungu etcetera.

<sup>1614</sup> For example, the chamber cites from a “UNICEF report which refers to an RTLM broadcast stating that “for babies who were still suckling . . . they [the assailants] had to cut the legs so that they would not be able to walk.” Elsewhere, it paraphrases a witness’ recollection of the content of Leon Mugesera’s speech, which does not correspond with the original speech.

<sup>1615</sup> UNICTR, *Kayishema & Ruzindana Judgement*, §277.

<sup>1616</sup> *Ibidem*, §284.

<sup>1617</sup> *Ibidem*, §287.

<sup>1618</sup> *Ibidem*, §289-291.

In all, Trial Chamber II, found that genocide had been committed, that it had been a national plan and that it targeted Tutsi as an ethnic group. In the rest of their judgement, they embarked on writing a detailed history of how the genocide had unfolded in Kibuye. In fact, the chamber embarked on writing down the micro historical facts, instead of answering larger questions on the unfolding and reasons for the genocide as a whole. Stretching over sixty pages (almost 25 percent of the judgement), they go on describing what happened in Kibuye – “the Chamber finds that events in Kibuye unfolded as follows.”<sup>1619</sup> Throughout the prefecture, they found, that the “plan of genocide implemented by public officials.”<sup>1620</sup> In their narrative examination, the chamber cites heavily from testimonies from survivors and victims, which were the first to be recorded by UNICTR investigators.<sup>1621</sup> Like in *Akayesu*, testimonial proof was the prime basis for establishing individual responsibility, but in terms of more general fact-finding about the genocide the Kayishema and Ruzindana trial also received material evidence, including data from exhumations. Scores of maps, aerial images and photographic slides from the massacre sites were tendered in as exhibits by the prosecutor. But the judges also benefitted from the detailed reports by a specialised forensic anthropologist and a pathologist, which both outlined and categorised the findings of the exhumations and analysis their team of forensic investigators carried out for the tribunal.<sup>1622</sup> Both experts had examined the dead bodies of hundreds of people and described how most of them had been killed by force trauma. In several mass graves they had examined, they found identity cards on the victims indicating that they were all Tutsi. At trial, the anthropologist and UNICTR’s senior forensic advisor, Dr. William Haglund,<sup>1623</sup> testified to the killings methods and recounted that when he was investigating sites in Bisesero that “[...] if one looks through field glasses or a magnifying instrument across [...] this hillside there were many white spots – it looks almost like strange mushrooms growing here and they represented skeletons, the heads of human bodies that were littered on this landscape [...]”<sup>1624</sup> and “in a brief walk around I observed a minimum of 40 to 50 individual skeletons lying about on the hill. These were skeletons on the surface. They represented men, women, children and adults.”<sup>1625</sup> In no other UNICTR trial was such tangible material gathered, presented and accepted and it represents the sole forensic evidence on

<sup>1619</sup> UNICTR, *Kayishema & Ruzindana Judgement*, §293.

<sup>1620</sup> “Persons in positions of authority used hate speech and mobilised their subordinates, such as the gendarmes the communal police, and the militias, who in turn assisted in the mobilisation of the Hutu population to the massacre sites where the killings took place. Tutsis were killed, based on their ethnicity, first in their homes and when they attempted to flee to perceived safe havens they were stopped at roadblocks and some were killed on the spot. Those who arrived at churches and stadiums were attacked and as a result tens of thousands perished.” UNICTR, *Kayishema & Ruzindana Judgement*, §312.

<sup>1621</sup> See, for instance, two documentaries on the first missions by Dutch UN investigators in early 1995: Mirjam Bartelsman en Doke Romeijn, ‘Verdacht’, *Lopende Zaken*, 1995; Mirjam Bartelsman en Doke Romeijn, ‘Getuigen’, *Lopende Zaken*, 1995.

<sup>1622</sup> UNICTR, TCII, *The Prosecutor versus Clément Kayishema & Obed Ruzindana. Prosecution Exhibit 219A: Investigation at Kibuye Roman Catholic Church: Kibuye Rwanda. Volume I.* (ICTR-95-1-T; 24 February 1997); UNICTR, TCII, *The Prosecutor versus Clément Kayishema & Obed Ruzindana. Prosecution Exhibit 291 A: Forensic Investigation of Human Remains at Kibuye Roman Catholic Church and Home St. Jean Complex* (ICTR-95-1-T; 27 November 1997). The exhumations were carried out by a specialised organization called *Physicians for Human Rights*, under the auspices of the ICTR. See for an impressionistic account of the team’s work in Rwanda, the book by one of its members: Klea Kloff, *The Bone Woman. A forensic Anthropologist’s Search for Truth in the Mass Graves of Rwanda, Bosnia, Croatia and Kosovo* (New York: Random House, 2004).

<sup>1623</sup> UNICTR, *The Prosecutor versus Clément Kayishema & Obed Ruzindana. Prosecution Exhibit 110: William Haglund, Ph.D, Resume (March 1997)* (ICTR-95-1-T; 24 November 1997).

<sup>1624</sup> UNICTR, TCII, *The Prosecutor of The Tribunal Against Clement Kayishema and Obed Ruzindana: Transcript* (ICTR-95-1-T; 25 November 1997), p. 65.

<sup>1625</sup> UNICTR, *Kayishema & Ruzindana Transcript* (24 November 1997), p. 82.

massacre sites in Rwanda presented at the Tribunal.<sup>1626</sup> On that basis, but also because of larger-scale early investigations in the region, Kibuye did not only become the most reliable and unlimited source of cases for the UN tribunal to investigate, prosecute and judge, it also remains the best recorded crimes scene. Taba, Akayesu's commune, remained an isolated area and crime scene in the Tribunal's records.

These first trials set out the evidentiary and narrative path the tribunal would walk, although they remained problematic and ambiguous. First of all, the question if the Tutsi were an ethnic group remained unresolved, and second, the premise that the genocide was planned, or conspired for that matter, had been assumed but not put to a serious evidentiary test in the trials. In terms of the latter, the persisting general account about the genocide at that time – as narrated by experts like Des Forges, 'acknowledged' by Kambanda and uncontested by the early defendants – had not yet been charged and litigated. These crucial elements remained contentious at least until the UNICTR's flagship trials against the 'Media-group' and Bagosora, the alleged mastermind of the killings. Around the second millennium, the prevailing understanding of Rwanda, the definitive account on events between 1990 and 1994 and the logic behind the genocide at the UNICTR, apart from many lawyers at the defence side, was capsulated in the phonebook sized book *Leave None to Tell the Story*. Edited<sup>1627</sup> by the court's most trusted and beloved expert witness Des Forges, the 1999 report, of which piles of copies in both English and French were available in the UNICTR's library, was cherished as the 'Bible' and prescribed as obligatory readings for new-comers in Arusha.

#### 4.10 A Machiavellian Plan?

At the outset, the Chamber emphasises that the question under consideration is not whether there was a plan or conspiracy to commit genocide in Rwanda. Rather, it is whether the Prosecution has proven beyond reasonable doubt based on the evidence in this case that the four Accused committed the crime of conspiracy.<sup>1628</sup>

In 2008, fifteen years after the erection of the tribunal, in just thirty-five minutes, Erik Møse, in his characteristically composed and vigilant tenor, often revealing his Norwegian inflection, read out the summary of the UNICTR's most-awaited trial decision:

The judgement in this case, often called the Military I trial, is the result of several years of proceedings. Many of us in the courtroom today have been working with each other for most

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<sup>1626</sup> An exhumation of 27 remains was conducted in a garage in Kigali between 30 May and 16 June 1996. See: UNICTR, *Prosecutor versus Rutaganda. Exhibit 254 A: Forensic Investigations at the Amgar Garage and Nearby Vicinity, 30 May 1996 to 17 June 1996* (ICTR-96-3-T; 1 July 1997). The report, however, was not admitted into evidence since the Prosecutor failed to show a direct link between its findings and his specific allegations. See: UNICTR, TC I, *The Prosecutor Versus Georges Anderson Nderubwwe Rutaganda: Judgement and Sentence* (ICTR-96-3-T; 6 December 1999), §258. Besides Kibuye and the Kigali garage, no other exhumations were carried in Rwanda on the order of the ICTR.

<sup>1627</sup> Based on research by an international team of historians, political scientists and lawyers including Des Forges, Timothy Longman, Michele Wagner, Kirsti Lattu, Eric Gillet, Catherine Choquet, Trich Huddleston and Jemera Rone from early 1995 under the organisational umbrella of HRW and FIDH. The book, the authors stress, was "not meant to establish "judicial truth" as to the guilt or innocence of any person, which is the responsibility of legally established national and international tribunals." But, "indeed," they published "the results of our research in part to encourage public support for the efforts of judicial authorities responsible for finding and judging those guilty of genocide." Des Forges, *Leave None*, pp. 28-31.

<sup>1628</sup> UNICTR, TCI, *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze & Anatole Nsengiyumva: Judgement and Sentence* (ICTR-98-41-T; 18 December 2008), §2092.

of its 409 trial days. [...] The amount of evidence in this case is nearly eight times the size of an average single-accused case heard by the Tribunal.<sup>1629</sup>

For many, the several hundred pages of judgement were iconoclastic. Møse and his two colleagues did not reach the popularly anticipated conclusion and their ruling, seemingly, contravened the dominant plot of the genocide. Some profoundly disillusioned sighs resonated through the public gallery in Arusha.<sup>1630</sup> A heavy-loaded trial - implicating four Rwanda's prime defendants - which lasted 409 days and had examined the most complexly articulated charges, ended with a loss for the prosecution. Its flagship accusation, that the genocide was conspired<sup>1631</sup> at the highest national levels, including the genocide alleged mastermind Bagosora, from late 1990 remained unsubstantiated 'beyond any reasonable doubt.'<sup>1632</sup> After considering all trial evidence - 242 viva voce witnesses<sup>1633</sup> and nearly 1,600 exhibits - the chamber's finding on conspiracy was candid: "[...] a firm foundation cannot be constructed from fractured bricks."<sup>1634</sup> Thus, the most anticipated judgement regarding the mass killings in Rwanda was in deep contrast with the official historiography of the genocide as conceived by the early NGO reports and further progressed by the victorious RPF government.

It did not sojourn there, however, and the decision itself remained free of revisionism.<sup>1635</sup> Conscious of the political, social and historiographical impact their judgement might have, the judges expounded their position towards the extra-legal powers third parties ascribe to them, including authenticating broader matters of historical truth. First, and foremost for the public record, they stressed their precise purpose and underlined that their task is fundamentally "narrowed by exacting standards of proof and procedure, the specific evidence on the record before it and its primary focus on the actions of the four Accused in this trial."<sup>1636</sup> Then, secondly, they emphasized that even in a trial of this magnitude, "the process of a criminal trial cannot depict the entire picture of what

<sup>1629</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (18 December 2008), p. 2.

<sup>1630</sup> Author's observation, Arusha, 18 December 2008.

<sup>1631</sup> Conspiracy to commit genocide was defined as "an agreement between two or more persons to commit the crime of genocide." The Trial Chamber held that "the agreement can be proven by establishing the existence of planning meetings for the genocide, but it can also be inferred, based on circumstantial evidence. The concerted or coordinated action of a group of individuals can constitute evidence of an agreement. The qualifiers "concerted or coordinated" are important: it is not sufficient to simply show similarity of conduct. In certain cases, the existence of a conspiracy to commit genocide between individuals controlling institutions could be inferred from the interaction between these institutions. When based on circumstantial evidence, the finding of a conspiracy must be the only reasonable inference based on the totality of the evidence. UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Judgement*, pp. 2087-2088

<sup>1632</sup> At the time of the judgement, in December 2008, the Tribunal's case law had addressed the issue of conspiracy in eight cases: Kajelijeli, Kambanda, Musema, Nahimana et al., Niyitegeka, Ntagerura et al., Ntakirutimana and Seromba. A conspiracy was found to have existed by the Trial Chambers in those cases only in three of them: Kambanda, Nahimana et al. and Niyitegeka. Prime Minister Jean Kambanda pleaded guilty to conspiring with other ministers and officials in his government to commit genocide after 8 April 1994. The conspiracy conviction in Niyitegeka's trial concerned a specific attack in the Bisesero in June 1994 and was based on his participation and statements in several meetings in that region around the same time. In Nahimana et al., the Trial Chamber convicted the three Accused "for consciously interact[ing] with each other, using the institutions they controlled [Kangura, RTLM and the CDR party] to promote a joint agenda, which was the targeting of the Tutsi population for destruction." The Appeals Chamber, however, reversed the finding in Nahimana et al. because, while the factual basis for the conviction was consistent with a joint agenda to commit genocide, it was not the only reasonable conclusion from the evidence. See: UNICTR, Appeals Chamber, *Juvénal Kajelijeli (Appellant) v. The Prosecutor (Respondent): Judgement* ICTR-98-44A-A; 23 May 2005); UNICTR, Appeals Chamber, *Alfred Musema (Appellant) v. The Prosecutor (Respondent): Judgement* (ICTR-96-13-A; 16 November 2001); UNICTR, Appeals Chamber, *Eliézer Niyitegeka (Appellant) v. The Prosecutor (Respondent): Judgement* (ICTR-96-14-A; 5 July 2004); UNICTR, Appeals Chamber, *THE PROSECUTOR (Appellant and Respondent) v. ANDRÉ NTAGERURA (Respondent), EMMANUEL BAGAMBIKI (Respondent) SAMUEL IMANISHIMWE (Appellant and Respondent): Judgement* (ICTR-99-46-A; 7 July 2006); UNICTR, Appeals Chamber, *The Prosecutor v. ELIZAPHAN NTAKIRUTIMANA AND GÉRARD NTAKIRUTIMANA: Judgement* (Cases Nos. ICTR-96-10-A and ICTR-96-17-A; 13 December 2004); UNICTR, Appeals Chamber, *The Prosecutor v. Athanase Seromba: Judgement* (ICTR-2001-66-A; 12 March 2008). Also in 2011, in the Government II case, the ICTR convicted Justin Mugenzi and Prosper Mugiraneza of conspiracy to commit genocide for their participation in the decision to remove Butare's Tutsi Prefect, Jean-Baptiste Habyalimana. After 2008, Callixte Nzabonimana, was convicted of conspiracy to commit genocide based on two agreements to commit genocide on 18 April 1994 in Murambi, in Gitarama préfecture.

<sup>1633</sup> Eighty-two for the Prosecution and 160 for the Defence. The Defence teams have challenged the credibility of the Prosecution's evidence. In particular, Bagosora and Kabiligi have contested that they had actual authority over members of the Rwandan military, and Nsengiyumva and Ntabakuze have disputed that soldiers under their command committed criminal acts. For some of the events the Accused have presented the defence of alibi, most notably Kabiligi. [...]

<sup>1634</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Judgement*, p. 2112.

<sup>1635</sup> Cruvellier, 'Brainless Genocide', p. 59.

<sup>1636</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (18 December 2008), p. 3.

happened in Rwanda.” Third, they acknowledged, their verdict may not present to final finding. Beyond this actual case that was before them, “other or newly discovered information, subsequent trials or history may demonstrate a conspiracy involving the Accused prior to 6 April to commit genocide.”<sup>1637</sup> In other words, the Trial Chamber, at that moment in time, knowing what it knew and reviewing the evidence presented to them, could not confidently and legally substantiate the most pressing issue at the tribunal, although they show some tendency towards it:

The Chamber certainly accepts that there are indications which may be construed as evidence of a plan to commit genocide, in particular when viewed in light of the subsequent targeted and speedy killings immediately after the shooting down of the President's plane. However, the evidence is also consistent with preparations for a political or military power struggle, and measures adopted in the context of an on-going war with the RPF, measures that were used for other purposes from 6 April 1994.<sup>1638</sup>

Between the lines, and at times explicitly, the chamber condemned the prosecution for its failure to prove beyond a reasonable doubt that the only inference from all its evidence was that the kingpins conspired amongst themselves or with others to commit genocide before it unfolded from 7 April 1994. And indeed, the prosecution, which brings specific charges and carries the subsequent burden of proof, in many incidents, did not prove its case. In that sense, the Judgement is not only a limited verdict in terms of factual findings, it also reads as an indictment to the prosecutor: “[...] *the judgement amounts to several hundred pages. [...] Only the key findings can be highlighted here. [...] It contains many incidents where the Prosecution did not prove its case.*”<sup>1639</sup>

### ***Military I.***

As the Tribunal had a distressed belated and even corrupted start, its work had already been fundamentally tarnished and it had virtually lost all its credibility to deliver prompt, quality and fair justice, let alone unearth the truth about what happened in Rwanda. Interest, like at most tribunals, had waned quickly after the initial media flurry on the first trials and judgements, both in Rwanda as well internationally, where criticism swelled.<sup>1640</sup> Fully aware that the tribunal could only function with its cooperation, Rwanda's government was the most hostile, manipulative and powerful decrier, while international rights organisations lamented its one-sidedness. With a reputation of being a sluggish, exorbitant and a politically dependent institution, quick and popular success was needed, alongside structural improvements. With a more balanced interest towards Rwanda than her predecessor Arbour who preferred working in the Balkans, the robust Carla Del Ponte pushed forward. In an effort to pace up the large backlog of trial proceedings - some suspects had already spent several years in the UN prison without having their case heard by a judge – the Swiss Prosecutor clustered the senior suspects

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<sup>1637</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Judgement*, §2112.

<sup>1638</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (18 December 2008), p. 5.

<sup>1639</sup> *Ibidem*, p. 2.

<sup>1640</sup> See for instance: ICG, ‘International Criminal Tribunal for Rwanda: Justice Delayed’, *Africa Report*, No. 30 (7 June 2001).

in thematic and regional groups, forming six bulky trials: Media, Government I, Government II, Military I, Military II and Butare. While the media trial, trying the *ideologues* running *Kangura* and *RTLM*, would be the tribunal's most provocatively received but popular trial, Military I would be most important, like Milošević at the UNICTY, which had started only shortly before.

On trial were Colonel Théoneste Bagosora, the *directeur de cabinet* of the Ministry of Defence, General Gratien Kabiligi, the head of the operations bureau (G-3) of the army general staff, Major Aloys Ntabakuze, the commander of the elite Para Commando Battalion, and Colonel Anatole Nsengiyumva, the commander of the Gisenyi operational sector. All men were senior military officers in the Rwandan Armed Forces (*FAR*). Bagosora was the alleged kingpin in the genocide conspiracy before 6 April, or as some noted the UNICTR suspect by default,<sup>1641</sup> and the person who enabled the installation of the regime under which guise the genocide was carried out. Broadly speaking and based on a variety of circumstantial pieces of evidence highlighting links in chain that would prove long term planning, the prosecution had alleged that the foursome had conspired amongst themselves and with others from late 1990, or later, through 7 April 1994 to exterminate the Tutsi population. On the other side, at the defence desks, the counsels for the military men disputed that there was a conspiracy, or even genocide for that matter, arguing that the prosecution lacked credible evidence and drew inferences from unproven facts. A main argument they advanced, amongst several alternative explanations of the events in 1994, was that the RPF shot down Habyarimana's plane, which in its turn triggered spontaneous killings. Some of these arguments, wrote the judges, "may provide a fuller picture of the events in Rwanda in 1994, [but] they do not raise any doubt about the Chamber's overall characterisation of the events as genocide, or the key findings which form the basis of the judgement." Thus, although the conspiracy charge was not met with sufficient evidence under the tribunal's standards and temporal mandate, the bench was not satisfied with the defence's arguments as to other serious charges. Bagosora, Ntabakuze and Nsengiyumva were sentenced to life imprisonment for genocide, crimes against humanity and war crimes. Only Kabiligi was acquitted of all charges. Irrevocably, the judges explained that:

The evidence of this trial has reiterated that genocide, crimes against humanity and war crimes were perpetrated in Rwanda after 6 April 1994. [...] These crimes were directed principally against Tutsi civilians as well as Hutus who were seen as sympathetic to the Tutsi-led Rwandan Patriotic Front (RPF) or as opponents of the ruling regime. The perpetrators included soldiers, gendarmes, civilian and party officials, Interahamwe and other militia, as well as ordinary citizens. Nevertheless, as the evidence in this case and the history of the Tribunal show, not every member of these groups committed crimes.<sup>1642</sup>

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<sup>1641</sup> Thierry Cruvellier, 'A Brainless Genocide', *International Justice Tribune*, No. 142 (21 December 2011), pp. 1-2.

<sup>1642</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (18 December 2008), p. 3.

## *Tropical Nazism?*

Clearly, the tribunal's finding shows that the UNICTR had matured by 2008 and was very capable of making more nuanced and further advanced findings about the Rwandan genocide itself, for example by highlighting that "also other persons than Tutsis and moderate Hutus suffered in 1994" and not every Hutu in Rwanda in 1994 was a perpetrator.<sup>1643</sup> Concurrently, the Military I case also highlights that while experienced chambers became more knowledgeable about Rwanda and the genocide, it grew less confident, however, on its causes, planning and more broadly on the epistemology and interpretations of its contexts and facts.<sup>1644</sup> However, in this case, Bagosora was definitively listed among the senior Rwandans responsible for crimes, including genocide, in the immediate hours and days after Habyarimana's death. Because he was the highest authority in the Rwandan Ministry of Defence with authority over the Rwandan military between 6 and 9 April, for a period of 72 hours, he was considered responsible for several killings during those days. Amongst the victims, on 7 April, were 10 Belgian UN soldiers, Prime Minister Agathe Uwilingiyimana, Constitutional Court President Joseph Kavaruganda, as well as opposition party officials and government ministers Frédéric Nzamurambaho, Landoald Ndasingwa and Faustin Rucogoza. Next to these identified prominent individuals, Bagosora was also found to bear responsibility for organised killings perpetrated by soldiers and militiamen at a number of sites throughout Kigali and Gisenyi.<sup>1645</sup>

It seemed that before Christmas 2008, the court, also in other Trial Chambers, had come to realise its inability to answer the vital question to the Rwandan genocide they had adjudicated for over a decade - if, how, when and by whom was a plan to commit genocide contrived before Habyarimana was killed? In a separate trial that reached a judgement at the same day, another infamous suspected 'conspirer', Protais Zigiranyirazo, was also acquitted of conspiracy.<sup>1646</sup> In his trial, the widely nicknamed "Monsieur Z" was convicted of committing genocide and crimes against humanity at Kesho Hill in the Gisenyi prefecture in April 1994. However, the chamber was not satisfied that Zigiranyirazo, who was Habyarimana's brother-in-law and alleged *Akazu* member, was involved in planning the genocide with others, including his sister Agathe Kanziga and Nsengiyumva, prior to April 1994.<sup>1647</sup> Although his case, in terms of scope and responsibilities, was not as big as *Bagosora*, its symbolic and political implications reached identical iconoclastic heights. In the eyes of Rwandans, the UNICTR again failed to prove what was a recognised fact of public knowledge and

<sup>1643</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Judgement*, §5.

<sup>1644</sup> Buss makes a similar argument, although only talking about context, not the epistemology behind it. Buss, 'Expert Witnesses and International War Crimes Trials', p. 25.

<sup>1645</sup> Whereas the main arguments in this chapter concern Bagosora, the other three men are not part of the main text. For the sake of fact, it would be sufficient to summarise that Ntabakuze was found guilty for the participation of his soldiers in killings at Kabeza, Nyanza Hill and the L'Institut Africain et Mauricien de Statistiques et d'Economie (IAMSEA) in Kigali. Nsengiyumva was considered responsible for massacres at Mudende University, Nyundo Parish as well as the targeted killing of civilians in Gisenyi prefecture, the area under his operational command. He was also found guilty of sending militiamen to the Bissero area of Kibuye prefecture to kill Tutsi refugees in June 1994. The Prosecution alleged that Kabiligi participated in the distribution of weapons, meetings to plan the genocide as well as a number of specific crimes, many of which were related to roadblocks in the Kigali area. Kabiligi, however, had advanced a successful alibi for much of this time period. It was also not proven that he had operational authority or that he targeted civilians.

<sup>1646</sup> UNICTR, TCHI, *The Prosecutor v. Protais Zigiranyirazo: Judgement* (ICTR-01-73-T; 18 December 2008).

<sup>1647</sup> Specifically, the chamber faulted the prosecution for not arguing its case properly and presenting evidence that could establish a conspiracy. In particular, the tribunal said: "The Prosecution did not lead any evidence in relation to the allegations in paragraph 8 of the Indictment, which referred to an 11 February 1994 agreement amongst the Accused, Agathe Kanziga, and Colonel Anatole Nsengiyumva to kill the enemy and accomplices, as well as the establishment of a list of Tutsi and Hutu to be killed." See: *Ibidem*, §70-80; §393.

integral part of the popular meta-narrative: the central role of the Akazu in planning the genocide, within the walls of Habyarimana's palace.<sup>1648</sup> Even more shocking to Rwandans was Monsieur Z's full acquittal on appeal two years later, because for the 'lesser crimes' he was convicted he actually had an alibi.<sup>1649</sup>

What was going on at the Tribunal? Were the judges rendering political judgements to frustrate Rwandans in whose name the UNICTR operated, as were the allegation from Kigali? Were the defendants completely innocent of any crime, as revisionists and anti-RPF protagonists were claiming? Was the problem that the Prosecution, who bears to charging responsibility and subsequent burden of proof, had sought to turn and present weak, or hard-to-prove, cases into strong ones, as the tribunal's own experts reveal?<sup>1650</sup> Or, was the tribunal just not equipped and capable to deal with this particular event in history, in this particular country and in its particular culture? Could, or should, the prosecutor not have modified the charges, in light of the evidence he converged, and present a more, legally, realistic cases? Perhaps it is the most devilish choice at the tribunals. Either to target suspected individuals of international crimes and charge them to the maximum and for everything in an attempt to 'cover the entire story', pursue a sense of 'overarching justice' and please the entire affected community? Or, present easy to prove cases in an Al-Capone-style, a minimalistic and effective strategy? When it comes to mass violence or genocide - intrinsically emotionally and politically loaded crimes - the latter is often a publicly unpopular strategy. In line with the prevailing human rights idealism, legal dogmatism and reckless, often idle, believe in transitional justice mechanisms, the UNICTR Prosecution, particularly under Louise Arbour, cherry-picked the overarching justice strategy. In its enthusiasm, the UNICTR's agents in Arusha - like their colleagues at the UNICTY in The Hague and those urging for the establishment of the ICC in Rome - cultivated extraordinary expectations of what their international trials could achieve. While starting off, they were blind and ignorant to the far-reaching symbolic and political implications of not being able to 'deliver the goods'. In either way, the problem as well as the challenge with adjudicating mass violence in such a way that it can lay the responsibilities for its occurrence with individuals, is converging irrefutable proof that would meet the standards applied in a fair trial setting while at the same time satisfying those calling for justice. The presumption that it was capable to do so became the UNICTR's principal delusion and was demonstrated by the Bagosora judgement and its saga as well as the previous media trial.

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<sup>1648</sup> Edmund Kagire, 'Govt disappointed as ICTR acquits key 'Akazu' member', *The New Times*, 17 November 2009.

<sup>1649</sup> UNICTR, Appeals Chamber, *Protais Zigiranyirazo v. The Prosecutor: Judgement* (ICTR-01-73-A; 16 November 2009); Franck Petit, 'Shock at acquittal of Mr. Z', *International Justice Tribune*, No. 94 (25 November 2009).

<sup>1650</sup> As stated by ICTR expert witness André Guichaoua in an interview on the case. See: Franck Petit, 'Shock of the acquittal of Mr. Z', p. 4.

## *Playing Nuremberg*

The Office of the Prosecutor gives priority to investigations into the conspiracy to commit genocide. Based on serious and corroborating leads, it has systematically conducted detailed investigations into the preparation and execution of the conspiracy. It has also formed new investigation teams, on the basis of the political, administrative, military and other institutions, which were operating in Rwanda at the time the acts, were committed, since certain officials of those institutions were implicated in crimes.<sup>1651</sup>

The great crimes of the modern world happened in Rwanda, and I want to prosecute them. [...] What happened there has no real parallel in history. Terrible crimes took place during the genocide, far worse than what happened in the former Yugoslavia. As far as I am concerned, this is our Nuremberg.

- Stephen Rapp, Prosecutor<sup>1652</sup>

A general tendency discerned from atrocity trials is that the first casualty in international criminal prosecutions is the presumption of innocence. It is inherent to the very nature of the crimes; they are so gross and widespread that they reach beyond the stage of international public deniability. Evidently, in those cases the most responsible persons for the atrocities are identified in leadership positions, classically in the political arena, on the battlefield and among elites. It was a lesson learned at Nuremberg and Tokyo and was juxtaposed to the UNICTY and the UNICTR. Most prime suspects in Rwanda were *génocidaires* by default, already condemned in advance by survivors, the RPF, NGOs, diplomats, academics and also the tribunal's investigators. That is why they started targeted investigations, going into the field with lists of names collecting evidence to prove that the suspects are guilty. Nobody cared about this inside-out strategy, which is common to all the international courts, with perhaps the exception being the Special Tribunal for Lebanon (STL) where there is much evidence but no available defendants. The justification appears to be simple; even if there are problems of proof, it is publicly certain that they are guilty. In a similar way was the narrative about the genocide in Rwanda deduced.

Despite the discussion on whether they ought to write history, they do write history and, if so, what kind of history, tribunals simply cannot dodge the past, as explained earlier in this thesis. Criminal intentions, behaviour or elements of mass crime are inferred from past political, social or economic events or conditions. Inference from contextual elements is the key methodology used by the courts.<sup>1653</sup> *Akayesu* is a textbook example thereof. Earlier on in this thesis, we saw that to this effect, professional historians - or experts with acquired historical knowledge - have been called to testify in criminal proceedings pertaining international crimes. Not only do they provide a framework of reference and knowledge but also perspective and interpretations that provide judges with

<sup>1651</sup> UNSC, *Report 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 Rwanda citizens Responsible for Genocide and Other such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994* (UN-doc: S/1999/943; 7 September 1999), §53.

<sup>1652</sup> Cited in: Dina Temple Raston, *Justice on the Grass. Three Rwandan Journalists, Their Trial fo War Crimes, and a Nation's Quest for Redemption* (New York: Free Press, 2005), p. 104.

<sup>1653</sup> See for a useful discussion: Mark Klamburg, *Evidence in International Criminal Trials. Confronting Legal Gaps and the Reconstruction of Disputed Events* (Leiden & Boston: Martinus Nijhoff Publishers, 2013).

understanding. They illuminate context, details and provide explanations. At the UNICTR, the prosecutor's office from the early days adopted and advanced a specific socio-historic narrative of the genocide, which was informed by the work and testimony of Des Forges. The American activist historians, flanked by expert colleagues Reyntjens and Guichauoa, had hoped that the UNICTR's investigative means would be used to lay bare the full scope of the genocide and its causes, assembling irrefutable and tangible evidence. Yet, the experts the UNICTR was relying on were soon disenchanted by the lethargic legal realities. As engaged academics and routine experts in Rwanda cases and inquiries around the globe, they had gained new insights, nuanced their perspectives and pressed on other issues. Meanwhile, Des Forges lamented the fact OTP investigators had made no serious endeavour to gather documentary or forensic evidence,<sup>1654</sup> whereas Reyntjens, on the record, suspended his work for the OTP as it did not pursue indictments on RPF crimes.<sup>1655</sup>

But the Prosecution in Arusha, which had started its work built on the early case theories and expert advice, could not be as flexible as the experts themselves, nuancing as they were going, unbound by legal mandates and political pressures from the Security Council to start completing their work and from Rwanda not to pursue RPF crimes. No, the OTP had already settled with the limitations of its investigations, publicly arrested suspects, filed indictments, aired accusations and outlined their case theories. For them, there was virtually no way back. Modification would have heralded their early defeat, procedurally but also in the face of history. Once the major leadership trials were to commence, however, the evidentiary foundation at the tribunal as a whole was very meagre and inherently fluid – and at worst tainted. As we saw before, its precedent setting case, Akayesu, was solely based on witness testimony and the confessors (Kambanda, Serushago and Ruggiu) had merely signed their guilty pleas without any evidentiary basis.<sup>1656</sup> Moreover, despite the fact that in the early days the confessors had recognised and confirmed that there had been genocide and that it had been organised and planned at the highest political and military levels, later on, as *insider witnesses* in other trials, their testimonies were found to be riddled with detailed lies, inventions, contradictions and inconsistencies.<sup>1657</sup> Thus, throughout the UNICTR's lifespan, the evidentiary base for prosecutions was almost exclusively testimonial and floating on a commonly accepted macro- narrative progressed by the experts in the 1990s.

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<sup>1654</sup> Des Forges, 'Legal Responses to Genocide in Rwanda', p. 53.

<sup>1655</sup> Like Des Forges, Reyntjens is one of the leading experts in Rwandan law, politics and history and has testified in Rwanda trials and before commission of inquiry around the world. He has testified for the prosecution in the ICTR trials against Georges Rutaganda (1997) and Bagosora (2004) and later for the defence in the case against Joseph Kanyabashi (2007). In addition, he testified before parliamentary commissions in Switzerland, Belgium and France and Rwanda trials in Canada, the United States of America (USA), Switzerland, Belgium, Finland, Denmark and the United Kingdom (UK). Author's interview, Filip Reyntjens, Telephone, 31 August 2012.

<sup>1656</sup> UNICTR, *Prosecutor v. Jean Kambanda: Joint Motion for Consideration of Plea Agreement Between Jean Kambanda and the Office of the Prosecutor, Annexure A Plea Agreement Between Jean Kambanda and the Office of the Prosecutor* (ICTR-97-23-1; 29 April 1998); UNICTR, *Prosecutor versus Jean Kambanda: Judgement & Sentence* (ICTR-97-23-S; 4 September 1998) & UNICTR, Appeals Chamber, *Jean Kambanda versus The Prosecutor: Judgement* (ICTR-97-23-A; 19 October 2000). The former Prime Minister – during the genocide – was the first to plead guilty at the UNICTR. His appeal was later dismissed. UNICTR, *Prosecutor v. Omar Serushago. Plea Agreement between Omar Serushago and the Office of the Prosecutor* (ICTR-98-37; 4 December 1998); UNICTR, *Prosecutor v. George Ruggiu. Plea Agreement between Georges Ruggiu and the Office of the Prosecutor* (ICTR-97-32-DP; 11 April 2000). See for details: Nancy Amoury Combs, *Guilty pleas in International Criminal Law. Constructing a Restorative Justice Approach* (Stanford 2007), pp. 91-113.

<sup>1657</sup> Kambanda immediately stopped his cooperation after the OTP demanded a life sentence and Serushago's and Ruggiu's testimonies in the *Media trial* were riddled with lies, inconsistencies and contradictions UNICTR, *Nahimana, Barayagwiza & Ngeze Judgement*, §817-824 & 548-549.

As outlined above, colleagues and friends in the human rights field have described Des Forges as the OTP's 'personal guide to understanding the genocide and making sense of how to proceed against its authors'.<sup>1658</sup> She had deduced a scenario of a "tropical Nazism"<sup>1659</sup> in Rwanda, a common reference framework applied by comparative genocide scholars in the field of social sciences: ideally, it follows a "process" of classification, symbolisation, dehumanisation, organisation, polarisation, preparation, persecution, extermination and denial. Most of these elements were reviewed in every genocide trial up to 2006, when the tribunal finally accepted as a 'judicial notice' that (1) Hutu, Tutsi and Twa are protected groups under the Genocide Convention; (2) between 6 April and 17 July 1994 there were widespread and systematic attacks against civilians based on ethnic identification; and (3) between 6 April and 17 July 1994 there was a genocide against the Tutsi ethnic group.<sup>1660</sup> In 2006, the UNICTR – after twelve years of litigation - had thus established that the Rwandan genocide was a fact beyond legal dispute. In itself, that was a remarkable accomplishment. Notwithstanding that, the foundation of the prosecution's thesis on if and how it was planned, however, was seriously undermined in the tribunal's flagship trials – Media and Military I - which both extensively dealt with Rwanda's history. A central element unresolved was the conspiracy and plan to commit genocide before the murder of Habyarimana. Like Adolf Hitler's plan to exterminate the European Jews, the OTP had set out to excavate and expose such a plan in Rwanda to kill Tutsi, led by Théoneste Bagosora in a conspiracy with the military, the government and the media.<sup>1661</sup> At first glance it may be a logical comparison. Indeed, genocide had been committed in Europe in the 1940s and genocide had been committed in Rwanda in 1994. Nevertheless, the fact that the events carry the same label/classification does not mean that the very events and their circumstances are the same. Simply put, what the international community, experts and prosecutors ignored was that Africa is not Europe, Rwanda is not Germany, the 1940s are not the 1990s, the Third Republic is not the Third Reich, Bagosora was not Hitler, Hutu Power was not the Nazi party, the *Interahamwe* was not the SS, Hutu's were not Germans, Tutsi's were not Jews, the *Jenoside* was not the Holocaust and most certainly, Arusha was not Nuremberg. Overall, the differences overshadow commonalities, even including the application of the Genocide Convention to the events. The Nazi leadership was tried for crimes against peace and crimes against humanity; the Rwandans were tried for genocide. Applying the Holocaust perspective in prosecutions was likely the foundational problem in the process of truth seeking, truth finding, fact ascertainment and establishing a judicial account of events in Rwanda at the tribunal as a whole. The UNICTR's media trial was a first example thereof.

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<sup>1658</sup> Kenneth Roth, 'Alison Des Forges. Remembering a Human Rights Hero', in: Scott Strauss & Lars Waldorf (eds.) *Remaking Rwanda. State Building and Human Rights after Mass Violence* (Wisconsin 2011), pp. xxiii-xxv: xxiv.

<sup>1659</sup> Borrowed from: Chrétien, 'Un "nazisme tropical"', pp. 131-142.

<sup>1660</sup> UNICTR, *Karemera, Nzirorera Judicial Notice*.

<sup>1661</sup> At the start of the case against Bagosora, in 1996, Prosecutor Richard Goldstone had already announced that he was "proceeding to interview witnesses and collect documents to determine the merits of the allegations that massacres were planned and led to the mass murder of a large number of victims protected under international law." UNICTR, (OTP), *Application By The Prosecutor For A Formal Request For A Deferral By The Kingdom Of Belgium In Respect Of Colonel Théoneste Bagosora* (ICTR-96-7-D; Kigali, 15 May 1996), §2.2.

[RTLM] [o]ften talked about the history of Rwanda, how the history of Rwanda evolved, with emphasis on domination and colonization of Tutsis over Hutus. And they referred to 1959, saying that it was the victory of the Hutus over that colonization.

– Thomas Kamilindi, Witness<sup>1663</sup>

A first attempt to really try to lay bare the ideological spine of the genocide was made in the trial that was furthermore supposed to put the tribunal back on the world map and under popular attention: the media case. On the docket were lethal words and the folks who had either articulated them or provided a platform for their public ventilation. Balancing between the freedom of expression and hate speech, this legal folder focused on direct and public incitement to commit genocide through political rallies, print media and radio broadcasts. But next to media and narrative analysis, the case also sought to unstitch a conspiracy - through the institution's principal agents - between RTLM, *Kangura* and the CDR. Next to CDR-party president, RTLM shareholder and former lawyer Jean Bosco Barayagwiza stood the protuberant French-trained historian Dr. Ferdinand Nahimana and editor Hassan Ngeze; the latter two scripted, dictated and disseminated the historical prevalent Hutu discourse in the early 1990s.<sup>1664</sup> All three indictments, produced by the so-called 'propaganda team', which in this case were coalesced, accordingly spelled out lengthy "historical contexts" of Rwanda. Going back to the Hutu revolution and ploughing through the succeeding 35 years of political and violent ordeals of Rwanda, all way outside the temporal scope of the tribunal, seemed a peculiar strategy since one of the accused was a Rwandan history professor.<sup>1665</sup> Yet, rather than being a recitation of crimes, it served as the meta-narrative, although at times poorly written, framing key events and processes that led up to the mass killings,<sup>1666</sup> in which the long list of charges were to be understood.<sup>1667</sup> It was the same historical prefab, based on Des Forges' writings, which starred in most of the late 1990s indictments. In this case, however, it all came down to the proviso that these men had used words, carefully crafted in a highly metaphorical historical discourse, to kill. The prosecution's overall case scenario was clear: "The Prosecution theory of the media case is that the

<sup>1662</sup> Former RTLM presenter Valerie Bemeriki testified that the radio station was often called 'Radio Nkotsa' (Nkotsa is a bird that signifies doom and bad omens. UNICTR, TCI, *The Prosecutor of The Tribunal against Ferdinand Nahimana, Hassan Ngeze & Jean Bosco Barayagwiza: Transcript* (ICTR-99-52; 14 October 2002), p. 2.

<sup>1663</sup> Testimony by Rwandan journalist Thomas Kamilindi: UNICTR, *Nahimana, Ngeze & Barayagwiza Transcript*, p. 68.

<sup>1664</sup> See for a detailed study on the media: J.P. Chretien, J.F. Dupaquier & M. Kabanda, *Rwanda: les médias du génocide* (Paris: Karthala, 1995). See for a more general study: Allan Thompson (ed.), *The Media and the Rwanda Genocide* (London: Pluto Press, 2007).

<sup>1665</sup> UNICTR, *The Prosecutor Against Ferdinand Nahimana: Amended Indictment* (Kigali, 15 November 1999); UNICTR, *The Prosecutor Against Jean-Bosco Barayagwiza: Amended Indictment* (Kigali, 13 April 2000); UNICTR, *The Prosecutor Against Hassan Ngeze: Amended Indictment* (Kigali, 10 November 1999).

<sup>1666</sup> Temple Raston, *Justice on the Grass*, p. 101.

<sup>1667</sup> They were all charged on counts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity (persecution and extermination). Additionally, Hassan Ngeze was charged with crimes against humanity (murder). The Accused are charged with individual criminal responsibility under Article 6(1) of the Statute for these crimes. Nahimana was additionally charged with superior responsibility under Article 6(3) in respect of direct and public incitement to commit genocide and the crime against humanity of persecution. Barayagwiza and Ngeze were additionally charged with superior responsibility under Article 6(3) in respect of all the counts except conspiracy to commit genocide. In the Indictments, Ferdinand Nahimana and Jean-Bosco Barayagwiza were also charged with the crime against humanity of murder, and Barayagwiza was charged on counts of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. On 25 September 2002, the Chamber granted the Defence motion for acquittal in respect of these counts. UNICTR, *Le Procureur c. Ferdinand Nahimana, Jean Bosco Barayagwiza and Hassan Ngeze: Judgement* (ICTR 99-52-1; 3 December 2003); UNICTR, *The Prosecutor Against Ferdinand Nahimana: Amended Indictment* (Kigali, 15 November 1999); UNICTR, *The Prosecutor Against Jean-Bosco Barayagwiza: Amended Indictment* (Kigali, 13 April 2000); UNICTR, *The Prosecutor Against Hassan Ngeze: Amended Indictment* (Kigali, 10 November 1999).

incitement of ethnic hatred and eventually ethnic violence by the media was one of the vehicles by which the plan to exterminate the Tutsi population was executed. The media was therefore part of the wider conspiracy to commit genocide. The timing of its creation, its use before and during the genocide, and the philosophy of the extremist politicians who created the media support this theory.”<sup>1668</sup> At the end, since criminal trials are about individual criminal responsibility, “the objective of the Prosecutor is to seek out people like these, those cool minded theorists who conceived, planned and executed the genocide of the Tutsi and the extermination of political opponents and other innocent citizens in Rwanda.”<sup>1669</sup> In clear language, the Prosecution had outlined what they had set out to do.

### ***Prosecuting the narrative***

For the judges, precedent setting was equally important: “this case raises important principles concerning the role of the media, which have not been addressed at the level of international criminal justice since Nuremberg. The power of the media to create and destroy fundamental human values comes with great responsibility. Those who control such media are accountable for its consequences,” said Judge Pillay at the end of the trial.<sup>1670</sup> Ferdinand Nahimana was listening attentively and sceptically when he was convicted and sentenced to life imprisonment.<sup>1671</sup> Like he did on the first day of the case its evidentiary hearings, an event both his co-accused had boycotted.<sup>1672</sup> Back then, in October 2000, in a furthermore fully packed courtroom and before a crowded public gallery, Deputy Prosecutor Bernard Muna, in his public opening statement, went as far as comparing the “quickest killing in human history” in Rwanda to the Holocaust, quoting historian Raul Hilberg,<sup>1673</sup> where “the whole process took nine years.”<sup>1674</sup> By comparison, he said, “the Hutu leaders went from stage one to stage four within a few weeks.”<sup>1675</sup> He was vainly conscious of the historical significance of the trial he was inaugurating. Since Julius Streicher, known as “Jew-baiter number one” and publisher of the anti-Semitic weekly *Der Stürmer*, no ideologue had stood trial before an international jurisdiction for inciting large scale atrocities.<sup>1676</sup> Muna called Nahimana<sup>1677</sup> the “intellectual high priest of Hutu

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<sup>1668</sup> UNICTR, TC, *The Prosecutor v. Ferdinand Nahimana (ICTR-97-11-I), Jean-Bosco Barayagwiza (ICTR-97-19-I) & Hassan Ngeze (ICTR-97-27-I): Pre-Trial Brief, Prosecutor’s Pre-Trial Brief Pursuant to Rule 73 bis (B)(i)* (8 September 2000).

<sup>1669</sup> UNICTR, *Nahimana, Barayagwiza & Ngeze Transcript* (23 October 2000), p. 35.

<sup>1670</sup> UNICTR, TCI, *The Prosecutor V. Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze: Summary* (ICTR-99-52-T; 3 December 2003), §8.

<sup>1671</sup> The Trial Chamber found Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze guilty of conspiracy to commit genocide; genocide pursuant to Article 6(1) of the Statute and, with respect to Jean-Bosco Barayagwiza, also pursuant to Article 6(3) of the Statute; of direct and public incitement to commit genocide pursuant to Article 6(1) and, with respect to Ferdinand Nahimana and Jean-Bosco Barayagwiza, also pursuant to Article 6(3) of the Statute; of persecution as a crime against humanity pursuant to Article 6(1) and, with respect to Ferdinand Nahimana and Jean-Bosco Barayagwiza, also pursuant to Article 6(3) of the Statute. Hassan Ngeze, Jean-Bosco Barayagwiza and Ferdinand Nahimana were finally found guilty of extermination as a crime against humanity pursuant to Article 6(1) of the Statute and, with respect to Jean-Bosco Barayagwiza, also pursuant to Article 6(3) of the Statute. The Trial Chamber acquitted the three Accused on the Counts of complicity in genocide, and murder as a crime against humanity. It also acquitted Jean-Bosco Barayagwiza on the Count of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.

<sup>1672</sup> Barayagwiza said he was boycotting the trial because it was not going to be fair. Ngeze was also absent to protest the fact that issues of Kangura being used as evidence have not yet been translated into English and French.

<sup>1673</sup> Raul Hilberg, in his book the “Destruction of the Jews in Europe” describes four stages in the process which led to their destruction: “Classification as a Jew, expropriation of property, restrictions to ghettos, and camps and eventual extermination. Although the destiny of the Jews was clearly sealed with the proclamation of the Nuremberg plans, which described what it was to be Jewish, the whole process took nine years.”

<sup>1674</sup> UNICTR, *Nahimana, Barayagwiza & Ngeze Transcript* (23 October 2000), pp. 51-52.

<sup>1675</sup> *Ibidem*, p. 52.

<sup>1676</sup> Streicher was convicted for acts of incitement to murder and extermination constituting persecution on political and racial grounds in connection with War Crimes and constituting crimes Against Humanity. International Military Tribunal (IMT), *Judgement*, pp. 301-304.

Supremacy”, Barayagwiza “the master manipulator of the truth both at home and abroad” and Ngeze “the venomous vulgarian and purveyor of racial libel and slander.”<sup>1678</sup> As the tone was set, Muna accused the trio to be principally responsible for what was broadcasted or printed as part of a strategized plan to spread the mass killings throughout the country. After a quick introduction of Lemkin and his labour for the genocide convention, he went on to state that “there cannot be genocide without a conspiracy.”<sup>1679</sup> The Cameroonian prosecutor compared such a plot to a moving train that “would stop at the prefecture and prefect and his assistants would be invited to join the conspiracy, after it had been explained to them or after they had been reproached for not recognising that the hour had come to eliminate the Tutsis.”<sup>1680</sup> Then he asked the chamber, “How could this have been done without consultation, organisation, without planning? I am sure, that at the end of this case, this question will be answered beyond reasonable doubt.”<sup>1681</sup> Confidentially, he then implicitly alluded to Nuremberg, promising, “We will not ask you to convict these men merely on the testimony of their perceived foes. Every count in the indictment will be proved by credible evidence and is supported by hundreds of hours of taped radio broadcasts and newspapers generated by the prisoners themselves.”<sup>1682</sup>

Powerful words were used to inaugurate the trial that was to judge the rhetoric of hate. Muna, the orator, was however taken off the case and in May 2001 Stephen Rapp, the same American lawyer who would later lead the trial against Charles Taylor, took the lead as senior prosecutor. Although highly ambitious and a firm student of the Nuremberg proceedings,<sup>1683</sup> he could not help to see the trial unrolling into nothing more than intense ‘wordfare’, fierce and spirited cross-examinations by Ngeze’s American lawyer and courtroom intrigues between witnesses, a problem also faced by the judges. A continuous intense atmosphere and clash of intellectual cultures hung over the proceedings,<sup>1684</sup> with the inflammatory and flamboyant Ngeze and erudite Nahimana and their respective counsels vigorously participating in their defence and examination of witnesses.<sup>1685</sup> From his prison cell, Barayagwiza, who boycotted the entirety of the proceedings, embarked on overwhelming the chamber with letters complaining about his abused fair trial rights. For the judges it was difficult to control the courtroom and even they experienced it as a personal challenge.<sup>1686</sup> Often,

<sup>1677</sup> During cross-examination, the prosecution, accused Nahimana of writing Nazi-style literature, in particular his Ph.D. thesis. Stephen Rapp also referred to a 15-page essay written by Nahimana in 1993 with the title “Rwanda : problems and solutions.” In the essay, Nahimana talks of a conspiracy by a “Tutsi league” to destabilise the country. “Isn’t this similar to the Nazi theory of an international Jewish conspiracy that was blamed for European problems”, Rapp asked Nahimana. “In doing that, weren’t you playing with fire given the situation in Rwanda at the time”, he added. See: ‘Rwandan Professor had “Nazi-Style” Literature, Prosecutor Tells Rwanda Tribunal, *Hirondelle News Agency*, 26 September 2002.

<sup>1678</sup> UNICTR, *Nahimana, Barayagwiza & Ngeze Transcript* (23 October 2000), pp. 41-42.

<sup>1679</sup> *Ibidem*, p. 46.

<sup>1680</sup> He goes on saying “The prefect and his lieutenants would then join the conspiracy and smaller trains would go into the Communes where Bourgemestres and Councillors would also be convinced to join the conspiracy. UNICTR, *Nahimana, Barayagwiza & Ngeze Transcript* (23 October 2000), p. 51.

<sup>1681</sup> UNICTR, *Nahimana, Barayagwiza & Ngeze Transcript* (23 October 2000), p. 53.

<sup>1682</sup> *Idem*.

<sup>1683</sup> Reportedly, he played videos of the Allied trial during potluck dinners and was known amongst ICTR colleagues as a “Nuremberg geek.” See: Temple Raston, *Justice on the Grass*, pp. 103-104.

<sup>1684</sup> As evidenced by the audio-recording available in the ICTR’s archives.

<sup>1685</sup> See interview Pillay, <https://www.youtube.com/watch?v=JkVCfd1jybU>. As a result of courtroom dynamics in the media trial, in which lawyers and witnesses at certain times were exchanging insults and even calling each other “stupid,” even the Rwanda government complained about the conduct of the proceedings: ‘Kigali unhappy with cross-examination of prosecution witnesses, *Hirondelle News Agency*, 27 February 2001.

<sup>1686</sup> See interview Pillay, <https://www.youtube.com/watch?v=JkVCfd1jybU>

witnesses ended up in heated debates with the defence, the prosecution and even the chamber.<sup>1687</sup> On other occasions, after being lured into rhetorical and emotional traps laid out by highly skilled defence lawyers, witnesses contradicted themselves, including Georges Ruggiu.<sup>1688</sup>

Initially listed to be in the dock next to Nahimana and his worst enemy Ngeze, Ruggiu, the Belgian RTLTM presenter, had signed a guilty plea and sworn to work with the OTP in this particular trial. Yet, when his confession was put to the test, he embarked on refuting elements of its guilty plea and even inventing, on the spot, new versions of events. Under those circumstances, wrote the chamber, it could not determine from his testimony “where the truth lies – whether he is speaking the truth now when he was saying he was lying earlier or whether he was earlier speaking the truth and is lying now.”<sup>1689</sup> Two other prosecution insiders also buried their evidence under their own riddles and broad accusations, apparently in order to settle old personal scores irrelevant to the case. Dieudonné Niyitegeka, shielded from the public as Witness X,<sup>1690</sup> the former *Interahamwe* leader – who was never pursued by the UNICTR but used as a key informant to investigators - went on to damn to prosecutor’s witness Ruggiu even further, instead of directly implicating Nahimana. Whereas Ruggiu’s testimony was found not to be credible, Niyitegeka was only found to be “generally credible.”<sup>1691</sup> Another confessant and OTP co-operator, Omar Serushago, was so keen to recall to have seen Ngeze so many times at execution sites that he was implicating himself in crimes beyond to what he had acknowledged in his guilty plea, including rapes. His declarations, implicating everybody, were so confused and incompressible that the judges would only admit it if other evidence validated them.<sup>1692</sup>

### ***Trial of the historians***

By all means, the Media trial was, per substance, perhaps the most remarkable trial. Probing the role of media in mass violence, unravelling Hutu Power Ideology and implicating the ideologues themselves, this trial was to shed light into the mental state behind the genocide. Paradoxically enough, the trial that was to arouse renewed public interest in the tribunal was largely obscured. Countless witnesses were heard in closed session and only a dozen transcripts from the trial proceedings are publicly available, mainly from the defence case. Much of its content also did not make into the trial Judgement.<sup>1693</sup> One example thereof is the testimony of the fifteenth witness, Rwandan historian José Kagabo, a former colleague of Nahimana, who testified that he was known “an inciter of hatred.”<sup>1694</sup> From media sources at the tribunal, it appears that an “unprepared”

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<sup>1687</sup> ‘Media trial adjourned amid further heated exchanges’, *Hirondelle News Agency*, 15 March 2001.

<sup>1688</sup> ‘I lied in my book to protect RTLTM, says convicted radio presenter’, *Hirondelle News Agency*, 28 February 2000.

<sup>1689</sup> UNICTR, *Nahimana, Barayagwiza & Ngeze Judgement*, §549.

<sup>1690</sup> Witness X testified on condition he received immunity from prosecution, which he did shortly before his testimony. He maintained that this letter was important for his credibility. The Chamber, however, found it more likely that it was *quid pro quo* for his testimony. *Ibidem*, §547.

<sup>1691</sup> See: *Ibidem*, §547.

<sup>1692</sup> Cruvellier, *Court of Remorse*, pp. 74-77; UNICTR, *Nahimana, Barayagwiza & Ngeze Judgement*, §821.

<sup>1693</sup> In particular, at the time of writing, the transcripts from the prosecution’s case (between 23 October 2000 and 12 July 2002) are not available in the tribunal’s judicial archive.

<sup>1694</sup> ‘Media trial adjourned to April 4<sup>th</sup>’, *Hirondelle News Agency*, 29 March 2001.

prosecution<sup>1695</sup> was marred by problems with its linkage witnesses,<sup>1696</sup> a sheer volume of them insiders close to the accused, including former friends, colleagues and a range of journalists. They were brought to Arusha to testify as to the specific behaviour and actions of the accused; to pinpoint their actual influence in and control over the media outlets and talk about meetings where the accused had allegedly met together. Not only were proceedings tarnished by unrelenting rows between the OTP and the defence over witness credibility and allegations of interference and fabrication of testimonies. A score of dispatches from the Public Gallery described Rwandan witnesses, who refused to testify,<sup>1697</sup> suddenly had mental problems,<sup>1698</sup> were lacking<sup>1699</sup> or had stormed out of the courtroom.<sup>1700</sup> Unquestionably, the trial had a murky jump, even before the substance of the charges was dealt with: the deadly gist of the media articles and broadcasts and its effects.

Muna's promise to have a Nuremberg-type of documentary trial was broken on the same day he had made it. From early on, his office had only translated segments of articles in *Kangura* collected, transcribed and translated a selection of radio broadcasts. Most of the material was either not ready in time or just incomplete, handpicked by the prosecution.<sup>1701</sup> It took over a year, until March 2002, for the chamber to admit the first 130 audiocassettes holding dozens of RTLM broadcasts as prosecution exhibits.<sup>1702</sup> Together with a score of translations from *Kangura* excerpts, including the infamous Hutu Ten Commandments, the testimonials and writings of the accused themselves was the main base for the second stage in the trial: the evaluation of propaganda between 1990 and 1994. Contrasting earlier trials, the substance led to a virulent contention between foreign experts and the original Rwandan authors. Disagreements immediately were in full swing from the first day of evidentiary hearings. Swiss journalist Philippe Dahinden, who had been working with Reporters Without Borders in Rwanda and had been a member of the 1993 Commission of Inquiry, had already testified about meetings he had with RTLM chief editor Gaspard Gahigi and Nahimana, who had described to him Nahimana as "the top man" and to Barayagwiza as "number two."<sup>1703</sup> On *Kangura's* publication of the Hutu Ten Commandments,<sup>1704</sup> he said it "sent a shockwave a shock

<sup>1695</sup> 'Tribunal rebukes prosecution for being "unprepared"', *Hirondelle News Agency*, 20 March 2001.

<sup>1696</sup> 'Prosecution unable to produce witness list', *Hirondelle News Agency*, 2 May 2001.

<sup>1697</sup> 'Witness refuses to testify', *Hirondelle News Agency*, 25 June 2001.

<sup>1698</sup> 'Another witness not in a position to testify', *Hirondelle News Agency*, 28 June 2001.

<sup>1699</sup> 'Trial adjourned to Wednesday for lack of prosecution witnesses', *Hirondelle News Agency*, 2 July 2001.

<sup>1700</sup> 'Media case adjourned to February', *Hirondelle News Agency*, 6 December 2001.

<sup>1701</sup> Muna had said the OTP "did not think that it was necessary to translate the *Kangura* and the Beer adds [...] we [have] taken out the extracts of the *Kangura* which we believe is pertinent to this case [...] and which was incriminating the Accused person. [...] I think that would be luxury if we could just get the whole *Kangura*, translate it, [...] it is fun, bare luxury. I would like to read the whole damn article. I am curious to know what is in the whole article, but the point is that, I don't think that the Tribunal has all these resources to translate the whole *Kangura* so that the Prosecutor can have the liberty of amusing himself in the evening when he has nothing else to do, to read what Mr. Ngeze was writing at the time." UNICTR, *The Prosecutor of The Tribunal Versus Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze: Transcript* (ICTR-99-52-T; 23 October 2000), pp. 192-194.

<sup>1702</sup> Prosecution witness Kaiser Rizvi, a former ICTR investigator, testified on the chain of custody of the cassettes. The court had initially refused to admit them or provisionally admitted them pending authentication. The defendants repeatedly objected to the admission of the cassettes saying that Rizvi had not produced sufficient proof as to who had made the original recordings and whether or not the recordings had been tampered with. Rizvi said most of the cassettes had been obtained from the USA State Department in Washington and the Rwandan Patriotic Front (RPF) secretariat archives in Kigali, Rwanda. Other cassettes were obtained from individuals who, according to Rizvi, directly recorded RTLM broadcasts. Rizvi could not testify as to who recorded the tapes from the USA State Department or those from the RPF secretariat. See: 'Rwanda tribunal admits alleged recordings from "hate radio" as exhibits', *Hirondelle News Agency*, 8 March 2002.

<sup>1703</sup> A video recording (Exhibit P3) made by Dahinden of his discussions with Gahimana and Nahimana was introduced into evidence and shown in court: UNICTR, *The Prosecutor Versus Ferdinand Nahimana, Jean Bosco Barayagwiza and Hassan Ngeze: Nahimana et al - Audio Recording of 30/10/00 - PM* (ICTR-99-52-02016; 30 October 2000); UNICTR, *Nahimana, Barayagwiza & Ngeze Transcript* (31 October 2000), p. 144.

<sup>1704</sup> Even though *Kangura* was not the first and only media outlet to have published these. UNICTR, *Nahimana, Barayagwiza & Ngeze Judgement*, §143.

wave among the people” while RTLM was “radio that killed.”<sup>1705</sup> Ngeze’s lawyer, John Floyd, put up a strong line of defence, trying to discredit the journalist’s expertise, accusing him of “rattling on”, “misleading the court” and at times calling him a spy rather than an independent journalist.<sup>1706</sup> Another expatriate journalist, Colette Braeckman,<sup>1707</sup> from Belgium, said that RTLM was putting oil on the fire testified that she had met with Prime Minister Agathe Uwilingiyimana in December 1993, “who of her own initiative, told me that the radio RTLM was mounting a campaign, an ethnic hate campaign”.<sup>1708</sup> In rebuttal, the defence teams sought to discredit her evidence as it, according to them, was based on hearsay.<sup>1709</sup> Aside from the two western journalists, whom the chamber considered to be credible and useful, the prosecution put heavy weight on the testimony of historians.<sup>1710</sup>

Effectively, the media trial became the debating ground for historians, including the prime accused Nahimana. First up as the prosecution witness was Rwandan José Kagabo, a former colleague of Nahimana, who talked about Nahimana racist views and policies: “he acted as an extremist, using both his power and status as a historian [...]”.<sup>1711</sup> But the Rwandan historian, who was not called as an expert witness, did not leave a big impression on the judges. His name was not even mentioned in the judgement. More weight was brought in by the OTP in 2002 when they called a handful of experts.<sup>1712</sup> Between March and July 2002, at the close of their case, they called four experts, including Ruzindana<sup>1713</sup> and Des Forges,<sup>1714</sup> both of whom who had already appeared in court in the Akayesu trial.<sup>1715</sup> Jean Pierre Chrétien and Marcel Kabanda, two other historians, who had edited a book on the Rwandan media, also came to Arusha to testify, largely about Rwanda’s media history and content of Kangura. Nahimana, who was not allowed as an expert in his trial, called in the expertise from German historian Helmut Strizek. In contrast to proceedings in *Akayesu*, the defence lawyers did not only heavily contest the OTP experts’ very methodologies, expertise and credibility; they furiously contested their analysis of the facts. For the judges, who nevertheless accepted their reports and found their testimonies credible, this was reason to form a more nuanced analysis of the history of Rwanda. Although, it copy pasted the entire section on historical context from the Akayesu judgement – again based on Des Forges’ testimony - into the Media judgement,<sup>1716</sup> it acknowledged “that much of the evidence set forth above is not disputed as a matter of fact. What is disputed, vigorously, is the analysis of these facts.”<sup>1717</sup> Having said that, the chamber, based on the evidence in the media trial,

<sup>1705</sup> UNICTR, *Nahimana, Barayagwiza & Ngeze Transcript* (31 October 2000), p. 180; ‘Witness says Nahimana was driving force behind killer radio’, *Hirondelle News Agency*, 24 October 2000.

<sup>1706</sup> UNICTR, *The Prosecutor Versus Ferdinand Nahimana, Jean Bosco Barayagwiza and Hassan Ngeze: Nahimana et al - Audio Recording of 30/10/00 – PM* (ICTR-99-52-02016; 30 October 2000)

<sup>1707</sup> She also authored a book on the genocide: Colette Braeckman, *Terreur Africaines: Burundi, Rwanda, Zaïre, les racines de la violence* (Paris: Fayard, 1996).

<sup>1708</sup> UNICTR, *Nahimana, Barayagwiza & Ngeze Transcript* (29 November 2001), pp. 22-25.

<sup>1709</sup> UNICT, *Minutes of Proceedings: Trial Day-107* (No: ICTR-99-52-T: Arusha, 29 November 2001).

<sup>1710</sup> ‘Closing Statements’

<sup>1711</sup> UNICTR, *Prosecution Exhibit P23A2: Witness Statement* (ICTR-99-52-T; Paris, 22 May 1999), p. 2.

<sup>1712</sup> See for a detailed analysis of their expertise and critique by the defence on that expertise: UNICTR, *Nahimana Judgement Appeal*, §196-215 & 277-295.

<sup>1713</sup> ‘Media trial adjourned to April 4<sup>th</sup>’, *Hirondelle News Agency*, 26 March 2001.

<sup>1714</sup> She filed an expert report: UNICTR, *Rapport du Témoin expert Alison Des Forges dans le procès Nahimana, Ngeze, and Barayagwiza devant le Tribunal pénal international pour le Rwanda* (ICTR-S-99-52-0045; 29 April 2002).

<sup>1715</sup> Also former Rwandan Prosecutor François Xavier Nsanzuwerwa testified again and his evidence was heavily relied on.

<sup>1716</sup> ‘The Chamber notes that in the first judgement of this Tribunal. the history of Rwanda was examined in detail from the pre-colonial period. The Chamber accepts the importance of this history, particularly in this case, and for this reason sets forth largely, *in extenso*, the comprehensive review of the historical context as described in the *Akayesu* judgement. UNICTR, *Nahimana, Barayagwiza & Ngeze Judgement*, §106.

<sup>1717</sup> *Ibidem*, §118.

affirmed the historical findings, but noted that “the accused have introduced much historical background that further elaborates on various aspects on it.”<sup>1718</sup> In conclusion, the chamber sharpened their view on how the genocide had unfolded, by finding, for instance, “that within the context of hostilities between the RPF and the Rwandan Government, which began when the RPF attacked Rwanda on 1 October 1990, the Tutsi population within the country was systematically targeted, as suspected RPF accomplices. This target included a number of violent attacks that resulted in the killing of Tutsi civilians. The RPF also engaged in attacks on civilians during this period. Following the shooting of the plane and the death of President Habyarimana on 6 April 1994, widespread and systematic killing of Tutsi civilians,<sup>1719</sup> genocide, in Rwanda commenced.”<sup>1720</sup>

Most importantly, in accepting evidence that was beyond its temporal jurisdiction - including *Kangura* magazine from 1990, the tribunal inscribed another element in its historical narrative: the role of the media in the lead up to the genocide. Page after page, the judgement compiles analyses and meticulously discusses *Kangura*’s editorial policy<sup>1721</sup> and selected content<sup>1722</sup> as well as RTLM<sup>1723</sup> broadcasts.<sup>1724</sup> After reading through its articles, editorials and cartoons, the chamber found that *Kangura* “conveyed contempt and hatred for the Tutsi ethnic group, and for Tutsi women in particular as enemy agents, and called on readers to take all necessary measures to stop the enemy, defined to be the Tutsi population [...] Through fear-mongering and hate propaganda, *Kangura* paved the way for genocide in Rwanda, whipping the Hutu population into a killing frenzy.”<sup>1725</sup> Pillay told Ngeze he was its main protagonist, who was in a “position to inform the public and shape public opinion towards achieving democracy and peace for all Rwandans. Instead of using the media to promote human rights, you used it to attack and destroy human rights. [...] You abused the trust of the public by using your newspaper to instigate genocide. [...] You poisoned the minds of your readers, and by words and deeds caused the death of thousands of innocent civilians.”<sup>1726</sup>

On RTLM’s role before 6 April 1994 the chamber was clear: “The Chamber finds that RTLM broadcasts engaged in ethnic stereotyping in a manner that promoted contempt and hatred for the Tutsi population. RTLM broadcasts called on listeners to seek out and take up arms against the

<sup>1718</sup> “In particular, the Accused Ngeze introduced into evidence numerous historical works that clearly establish the history of ethnic identity and conflict in Rwanda, which has roots long preceding 1959, contrary to the statement made in paragraph 1.1 of the Indictments of the Accused.” See: *Ibidem*, §107.

<sup>1719</sup> Testimony from a former *Interahamwe* leader, Witness T, narrates the massacres in the first days after the shooting down of Habyarimana’s plane. UNICTR, TC III, *The Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse: Transcript* (ICTR-98-44-T; 24 May 2006), pp. 62-65.

<sup>1720</sup> See: UNICTR, *Nahimana, Barayagwiza & Ngeze Judgement*, §120-121.

<sup>1721</sup> Including the history of its creation (May 1990), ownership and its distribution (between 1,500 & 3,000 copies per issue depending on sales and period and no publication during the genocide).

<sup>1722</sup> Specifically: themes (ethnicity and call for action); the Hutu Ten commandments (*Kangura* No. 6); *Kangura* cover No. 26 of November 1991 (depicting a Machete and the text “what weapons shall we use to conquer the Inyenzi once and for all”); Editorials (“the triangle that is disturbing peace” [November 1990], “Hutu should help defend the Hutus [July 1991], “A cockroach Cannot Give Birth to a Cockroach” [February 1993], “Ruhengeri And Byumba Attacks, The Tutsis Took Champagne” [February 1993], “If One Asks Generals Why They’re Favoring Tutsis” [November 1991]); Publications of lists of names; Cartoons; articles from the five 1994 issues of *Kangura* (“The Last Lie” [January], “Who Will Survive the War of March? [January], “How Will the UN Troops Perish?” [February], “One Would Say That Tutsis Do Not Bleed, Tat Their Blood Does Not Flow” [February] ; and a joint *Kangura/RTLM* competition. UNICTR, *Nahimana, Barayagwiza & Ngeze Judgement*, §122-257.

<sup>1723</sup> Including the history of its creation (April 1993), its ownership (largely MRND party members and CDR leadership), management (*Nahimana, Barayagwiza*); the editorial board, the staff (editors and presenters) and its daily control. UNICTR, *Nahimana, Barayagwiza & Ngeze Judgement*, §489-619.

<sup>1724</sup> Including the role of radio in Rwanda, its programming, its reach and its impact. Several hundred tapes of broadcasts were introduced and the chamber only took into consideration those “most incriminating and the most exculpatory”, distinguishing between broadcasts before and after 6 April 1994 and specifically focusing on the issue of ethnicity and call for action. Notably, the chamber discussed broadcasts of interviews – including with *Nahimana* - in which “reductionist” historical discourse was used. *Ibidem*, §324-486; 347.

<sup>1725</sup> UNICTR, *Nahimana, Barayagwiza & Ngeze Summary*, §64

<sup>1726</sup> UNICTR, *Nahimana, Barayagwiza & Ngeze Summary*, p. v.

enemy. The enemy was identified as the RPF, the Inkotanyi, the Inyenzi, and their accomplices, all of whom were effectively equated with the Tutsi ethnic group by the broadcasts.”<sup>1727</sup> After 6 April 1994, said the chamber, the “virulence and the intensity of RTLM broadcasts propagating ethnic hatred and calling for violence increased. These broadcasts called explicitly for the extermination of the Tutsi ethnic group.”<sup>1728</sup> Advancing the testimony of historians Des Forges and Chrétien, the chamber further found “that RTLM broadcasts exploited the history of Tutsi privilege and Hutu disadvantage, and the fear of armed insurrection, to mobilize the population, whipping them into a frenzy of hatred and violence that was directed largely against the Tutsi ethnic group.”<sup>1729</sup> In sentencing him to life imprisonment, Judge Pillay, told Nahimana: “you were a renowned academic, Professor of History at the National University of Rwanda. You were Director of ORINFOR and founded RTLM radio station as an independent private radio. You were Political Adviser to the Interim Government sworn in after 6 April 1994 under President Sindikubwabo. You were fully aware of the power of words, and you used the radio – the medium of communication with the widest public reach – to disseminate hatred and violence. You may have been motivated by your sense of patriotism and the need you perceived for equity for the Hutu population in Rwanda. But instead of following legitimate avenues of recourse, you chose a path of genocide. In doing so, you betrayed the trust placed in you as an intellectual and a leader. Without a firearm, machete or any physical weapon, you caused the deaths of thousands of innocent civilians.”<sup>1730</sup>

#### 4.11 Clashing perspectives, clashing narratives

At the end of the trial, the judges,<sup>1731</sup> wrote a judgement that was sweeping in its broad and generous inferences and findings on the meta-narrative on the genocide and the role of propaganda therein, even mounting its temporal jurisdiction by accepting evidence from before 1994 and condemning the trio on that basis. Four years later, conversely, in 2007, the appeals chamber<sup>1732</sup> annulled some of its most important findings.<sup>1733</sup> It took a very legalistic perspective, trying to apply its jurisdiction very strictly. As a consequence, it reversed the trial chamber’s findings made on events or statements made

<sup>1727</sup> UNICTR, *Nahimana, Barayagwiza & Ngeze Judgement*, §486.

<sup>1728</sup> *Ibidem*, §486. The chamber continues: “Both before and after 6 April 1994, RTLM broadcast the names of Tutsi individuals and their families, as well as Hutu political opponents. In some cases, these people were subsequently killed, and the Chamber finds that to varying degrees their deaths were causally linked to the broadcast of their names. RTLM also broadcast messages encouraging Tutsi civilians to come out of hiding and to return home or to go to the roadblocks, where they were subsequently killed in accordance with the direction of subsequent RTLM broadcasts tracking their movement. Radio was the medium of mass communication with the broadest reach in Rwanda. Many people owned radios and listened to RTLM – at home, in bars, on the streets, and at the roadblocks. The Chamber finds that RTLM broadcasts exploited the history of Tutsi privilege and Hutu disadvantage, and the fear of armed insurrection, to mobilize the population, whipping them into a frenzy of hatred and violence that was directed largely against the Tutsi ethnic group. The Interahamwe and other militia listened to RTLM and acted on the information that was broadcast by RTLM. RTLM actively encouraged them to kill, relentlessly sending the message that the Tutsi were the enemy and had to be eliminated once and for all.

<sup>1729</sup> *Ibidem*, §488. During the delivery of the judgement Pillay said “RTLM broadcasting was a drumbeat, calling on listeners to take action against the enemy and enemy accomplices, equated with the Tutsi population. The phrase “heating up heads” captures the process of incitement systematically engaged in by RTLM, which after 6 April 1994 was also known as “Radio Machete”. The nature of radio transmission made RTLM particularly dangerous and harmful, as did the breadth of its reach. Unlike print media, radio is immediately present and active. The power of the human voice, heard by the Chamber when the broadcast tapes were played in Kinyarwanda, adds a quality and dimension beyond language to the message conveyed. Radio heightened the sense of fear, the sense of danger and the sense of urgency giving rise to the need for action by listeners. The denigration of Tutsi ethnicity was augmented by the visceral scorn coming out of the airwaves - the ridiculing laugh and the nasty sneer. These elements greatly amplified the impact of RTLM broadcasts.” *Ibidem*, §99.

<sup>1730</sup> UNICTR, *Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze: Summary*, p. V.

<sup>1731</sup> The Trial Chamber was composed by Navanethem Pillay (presiding), Erik Møse & Asoka de Zoysa Gunawardana.

<sup>1732</sup> The Appeals Chamber was composed of Fausto Pocar (presiding), Mohamed Shahabuddeen, Mehmet Güney, Andréia Vaz & Theodor Meron.

<sup>1733</sup> UNICTR, Appeals Chamber, *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Appellants) v. The Prosecutor (Respondent): Judgement* (ICTR-99-52-A; 28 November 2007).

before 1 January 1994, before the UNICTR's mandate. In a sense, it demonstrated the court's incapacity and power – and perhaps unwillingness - to make overarching findings on how, why and when the genocide was conceived in the years preceding the massacres. *In extenso*, it ruled out the conspiracy among the defendants. The appeals judges found that prosecutor had miscarried in demonstrating the existence *in 1994* of a conspiracy to commit genocide between *Radio Television Libre de Mille Collines* (RTLM), newspaper *Kangura* and the *Coalition pour la Defence de la République* (CDR) party. They furthermore ruled out an analogous genocidal plot between their three respective representatives.<sup>1734</sup> Whereas the trial judges had in 2003 accepted hate-filled radio broadcasts and publications from before 1994 - but outside its jurisdiction - as evidence for *continuing crimes*, which ultimately culminated in the achievement of the crimes' intended purpose: genocide. Since the massacre happened in 1994, the trial judges found they had jurisdiction to try these crimes. The appeals judges however, strictly applying the tribunal's temporal jurisdiction, ruled that culpability could only be based on events in 1994.<sup>1735</sup>

With regards to the substance, the appeals judges applied a much stricter perspective than their colleagues in the trial chamber.<sup>1736</sup> Whereas the judges in 2003 made broad findings on the role of the media before April 1994 in the acts of genocide, the appeals chamber re-examined the question if there was causal link between, on the one hand, RTLM's broadcasts, the articles that were published in *Kangura* and the activities of the CDR and, on the other hand, the acts of genocide. And they disagreed substantially with the trial chamber. In sum, they considered that the Trial Chamber “could not find beyond all reasonable doubt that the broadcasts made prior to 6 April 1994 contributed significantly to the commission of murders, instigating as it were the commission of acts of genocide, and the Trial Chamber's findings on this issue are therefore invalidated.”<sup>1737</sup> Nevertheless, the appeals judge rubber-stamped the conclusion that *RTLM's* broadcasts after 6 April 1994 contributed significantly to the commission of acts of genocide.<sup>1738</sup> A similar conclusion was reached with respect to *Kangura* articles.<sup>1739</sup> However, the appeals chamber did not rule out the relevance of pre-1994 materials, but narrowed down their usefulness so far that “*RTLM* broadcasts or

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<sup>1734</sup> “The Appeals Chamber finds that a reasonable trier of fact could not conclude beyond reasonable doubt, on the basis of the elements recalled above, that the only reasonable possible inference was that the Appellants had personally collaborated and organized institutional coordination between RTLM, the CDR and *Kangura* with the specific purpose of committing genocide.” UNICTR, *Nahimana, Barayagwiza & Ngeze Appeals Judgement*, §292.

<sup>1735</sup> The Appeals Chamber argued “that the qualifications of inchoate crime and continuing crime are independent from one another. It is the Appeals Chamber's view that the Trial Chamber erred in holding that incitement to commit genocide continues in time until the completion of the intended acts. On the contrary direct and public incitement is completed as soon as the words in question are uttered, broadcast or published. The Trial Chamber could not have jurisdiction over incitement committed before 1994 on grounds that such incitement continued in time until the occurrence of genocide. [...] Lastly, the Trial Chamber should have mentioned more clearly the broadcasts which, in its opinion, amounted to direct and public incitement to commit genocide; by failing to do this the Trial Chamber erred.

<sup>1736</sup> See also: William Schabas, ‘Appeals Judgement in the ‘Media Case’’, *PhD Studies in Human Rights*, 11 December 2007 (blog-text: <http://humanrightsdoctorate.blogspot.nl/2007/12/appeals-judgment-in-media-case.html>, visited: 17 October 2015).

<sup>1737</sup> UNICTR, Appeals Chamber, *Nahimana et al. v. The Prosecutor: Summary of Judgement* (ICTR-99-52-A; 28 November 2007), p. 10.

<sup>1738</sup> UNICTR, *Nahimana Summary Appeals Judgement*, p. 10.

<sup>1739</sup> “The Appeals Chamber also considers that a reasonable trier of fact could not have found beyond all reasonable doubt that *Kangura* publications had contributed significantly to the commission of acts of genocide. The Appeals Chamber notes in particular that the Trial Chamber does not state the issues of *Kangura* published in 1994 that would have contributed significantly to the commission of acts of genocide. This ground of appeal is allowed.” *Idem*.

*Kangura* newspaper editions before 1994 could however be taken into account as contextual factors that would permit a better understanding of the broadcasts or newspapers published in 1994.”<sup>1740</sup>

Thus, the deductions reached by the trial chamber and the appeals chambers heavily clashed. As shown above, the latter struck down most of the ‘historical’ findings of the initial judgement. How was that possible? Had the trial judges done a bad job and did they get the facts wrong? Considering the reconsiderations in the plot, that may appear to be a logical assumption. However, whereas the historian – and others outside of the enclosed world of international justice and law – may perceive the differences as being a rewriting of history, in reality, they are more of a legal interpretative nature – albeit obviously with serious implications in substance and perceived understanding of the genocide. There is something else at play, however, pertaining to the UNICTR as a learning institution. The strong dichotomy in the two media judgements indicates a movement and crucial change, within the tribunals, towards a stricter interpretative construction of what they were set up to do, and on how to do it. In earlier days, the UNICTR – like its bigger sister the UNICTY - had applied a very broad and liberal interpretative approach to legal provisions prohibiting mass crimes and stipulating individual criminal liability and the contextual circumstances in which they were committed. In a bid to judge history, they had sought to extend their purpose and work terrains, trotting way outside strict and literal interpretations of their mandates. It appears that for more than ten years trial judges in Arusha had favoured a simplistic understanding of a genocidal process or had consoled themselves with the determinism of an *a posteriori* interpretation of history.<sup>1741</sup> After the media trial, which was very liberal in its findings on the role of the media and its agents in the alleged genocide planning, apparently for the first time, however, the appeals chamber strictly broke with that tradition and dedicated itself to a “principle of strict construction of criminal law.”<sup>1742</sup> As an unsurprising result of this *modus operandi*, many findings made under the old interpretative framework, starting with the media case, were struck down, largely because of jurisdictional arguments and rising reasonable doubts on the narratives. Progressively, some judges over the course of years and different trials had also become real ‘specialists’ on Rwanda themselves and along the way they grew more sceptical, or less naïve, towards how the facts, if at all found, reasonably fitted the official historiography presented in the indictments by the prosecution. A direct consequence thereof was that the UNICTR’s reading of history, or account on the genocide prior to April 1994, in its judgements from 2007 onwards changed significantly. More and more, they became constricted within a legal straitjacket and focused on the period after April 1994. This new stance would significantly impact the tribunals’ conspiracy trial against Bagosora. If conducted earlier, its outcome would, most likely, have been different. Judge Møse, in particular, was part of that change. In the media case he, and of course his two colleagues, was still open to broad interpretations of history and

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<sup>1740</sup> UNICTR, *Nahimana Summary Appeals Judgement*, pp. 13-14.

<sup>1741</sup> Cruvellier, ‘Brainless Genocide’, p. 61.

<sup>1742</sup> William Schabas, ‘Appeals Judgement in the ‘Media Case’.

the uses and abuses of the past, but when he presided over the Military case he became extremely cautious and particularly careful towards the facts presented at trial and the interpretations thereof.<sup>1743</sup>

### *Conspiracy?*

This is the first time in the history of this Tribunal that the evidence that we are discussing has been put before jurists for evaluation, not historians, not political scientists, not Alison Des Forges, jurists. And it is the only tribunal, the only case in this Tribunal, that's based upon the actual documentary evidence of the United Nations and of the state department of the United States, not who remembers something about a particular date.

- Peter Erlinder, Defence<sup>1744</sup>

No. Perhaps here we see the difference between a lawyer and a historian. A historian must take account of the incredible complexity and nuance and cannot take one brief instant of time when the pen is picked up to sign a paper.

- Alison Des Forges, Expert Witness<sup>1745</sup>

The appeals judgement in the Media Trial came six months after the closing arguments in the UNICTR's most significant 5-year marathon trial. At the end of May 2007, Gambian Prosecutor Hassan Jallow summarised again what the trial was about:

Your Honours, the conspiracy began to show itself from around October 1990, following the RPA attack on Rwanda in that year. Following this attack, we know the FAR targeted, imprisoned and killed civilian Tutsi and their accomplices. All four of the Accused, senior military officers at the time, were responsible for these arrests and killings. [...] By 1991, the conspiracy was well formulated and thought through. Bagosora, Ntabakuze and Nsengiyumva worked together on a commission to define the enemy. The product of their efforts was a document referred to in this courtroom as the "definition of the enemy" document. That document was widely circulated in the Rwandan army, and it defined again the enemy to be the Tutsi."<sup>1746</sup>

Without doubt, but of course unaware of the appeals judgement in Nahimana's trial, the Prosecutor was still assured about the conspiracy charge and referred back to the Media Judgement, which had established a pre-April 1994, plot.<sup>1747</sup> But according to Jallow, Bagosora and the other accused were not only part of the propaganda conspiracy. Their responsibility was all-encompassing: "[...] they prepared, they planned, they ordered, they directed, they incited, they encouraged and they approved

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<sup>1743</sup> From early 2003, after hearing the first two witnesses in the Bagosora trial, the panel of three judges were replaced by a new panel consisting of Judge Mose as the presiding judge, accompanied by Judges Jai Ram Reddy and Sergei Alekseevich Egorov.

<sup>1744</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (1 June 2007), p. 63.

<sup>1745</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (8 July 2002), p. 37.

<sup>1746</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (28 May 2007), pp. 12-13.

<sup>1747</sup> "The Accused had collaborators too. The RTLM assisted in this process and, of course, all four Accused, either as shareholders or otherwise, supported the RTLM and its propaganda. We know Bagosora, for example, was one of the RTLM's largest shareholders. We know Kabiligi supported the work of the RTLM by even awarding special military privileges to the RTLM journalist, Ruggiu. Of course, the moment the broadcasts on RTLM stopped, the privileges were withdrawn. The support, therefore, was conditional. As long as the RTLM served as a tool to disseminate ethnic hatred and facilitate the genocide, the four Accused would continue their support. The diary we recall of Father Otto Mayer captures the role of RTLM in this memorable phrase where he said, "The RTLM stirred up the old demons with every peasant in the remotest regions of the country" was subjected. The *Kangura* newspaper was there as well. It was hostile towards the Tutsi; boldly printing the Hutu -- the so-called "Hutu Ten Commandments" and thus elevating the ethnic tension to a level equal to God's proclamations of the laws of man to Moses. And in this version of the law -- in this version of the law, *Kangura* created the Tutsi woman to be the apple to the Hutu Adam." UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (28 May 2007), pp. 13-14.

the killing of innocent civilian Tutsi men, women and children, as well as other civilians who were considered their accomplices.”<sup>1748</sup>

Four days later after the defence lawyers had presented their alternative versions of events in Rwanda between 1990 and 1994 – that the killings were a chaotic outburst attributable to the RPF’s shooting down of Habyarimana’s plane<sup>1749</sup> - and the role of their clients in it, prosecution attorney Drew White reminded the judges about the societal and historical impact their judgement may leave. He warned them “to be careful not to revise the history from an *Alice in Wonderland* story, based on fanciful notions of what the evidence might have been. [...] You're not making a record here of the entire Rwanda genocide for the entire history of the world. Your task is much more discrete.”<sup>1750</sup> White then pushed further, asking the judges to consider the “future after the trial” and alluring to recent statements Kofi Annan had made on “never forget” and “working to prevent another genocide,” only to suggest that “once the facts are found [...] they ought to be denounced [...] as enemies of the human race. And we should do that to support the cry for the future by the secretary general. Because it's the right thing to do.”<sup>1751</sup> On the other side of the courtroom sat the 65-year-old defendant Bagosora. His direct response was short, but clear.<sup>1752</sup> At the end of the hearings he told the judges “that I have been, and remain, a victim of an ignominious propaganda of the RPF and its allies, and I believe that you alone are capable of rehabilitating me in society” and then generally requested “all people of goodwill to free their minds from the intoxication, mind poisoning, caused by this propaganda, which has caused me immeasurable prejudice.”<sup>1753</sup> Reciting the gist of his 17 days of testimony in 2005, that the “excessive massacres” had happened beyond his control, Bagosora declared “that I did not kill anyone, neither did I give any order for anyone to be killed.”<sup>1754</sup> Meanwhile, in the hallways of the Arusha International Conference Centre, Bagosora’s lawyer Raphael Constant told reporters he had little hope for his client to be acquitted, since “this tribunal was established to some extent to convict Mr Bagosora. If that does not happen, it will shut down the next day.”<sup>1755</sup>

### ***Bagosora and 28 others***

Perhaps there was some truth in Constant’s remark. After all, the prosecution had from the start brandished Bagosora as the kingpin in the genocide, the mastermind behind the whole enterprise. In Arusha, the Bagosora had become synonymous to the very crime committed in Rwanda, like Hitler

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<sup>1748</sup> Ibidem, p. 5.

<sup>1749</sup> Bagosora’s defence team argued that the RPF shot down the plane and that this subsequently unleashed chaotic and spontaneous killings and argued that “If the RPF is responsible, then Colonel Bagosora is not responsible for this event.” See, for instance: UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (29 May 2007), p. 53.

<sup>1750</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (1 June 2007), p. 46.

<sup>1751</sup> Ibidem, p. 46.

<sup>1752</sup> He had testified at large during the trial in 2005. Also, his version of events in Rwanda, he had already written up in an essay while in exile in Cameroon: Colonel BEMS BAGOSORA Théoneste, *l’Assassinat du Président Habyarimana ou l’ultime operation du TUTSI pour sa reconquete du pouvoir par la force au Rwanda* (Yaoundé, 30 October 1995).

<sup>1753</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (1 June 2007), pp. 64-65.

<sup>1754</sup> To continue stating that “Furthermore, in this statement, I am supported by the lack of Prosecution evidence regarding any form of participation by me in the massacres that took place during the period referred to.” Ibidem, pp. 64-65.

<sup>1755</sup> Xan Rice, ‘Five years on, genocide accused awaits his faith’, *The Guardian*, 2 June 2007.

was to the Holocaust. And whereas the meta-narrative on the Rwandan genocide was presented as a kind of Tropical Nazism, Arusha was likened as an African Nuremberg and Bagosora depicted as Rwanda's Hitler: the most responsible by default. As in Nuremberg – and in the vein of the Eichmann trial in Jerusalem and Milošević trial in The Hague - ambitions and expectations at the tribunal were high: history would be unravelled and judged. And indeed, the Military I trial against Bagosora and three others<sup>1756</sup> relied heavily on the theory of a longstanding conspiracy. Even though prosecutor Carla Del Ponte opened the trial with the proviso that “the tribunal can never write the whole history of the Rwandan tragedy of 1994, in particular the Rwandan genocide, its genesis and its realisation,” the charges were formulated in strong historical terms.<sup>1757</sup> It was a leftover from her precursors. While Goldstone had quickly written up an indictment after Bagosora's arrest in 1996,<sup>1758</sup> Louise Arbour transformed it into a ‘global charge sheet.’ In an attempt to generate an historical record of the Rwandan genocide,<sup>1759</sup> she charged Bagosora in conjunction with 28 others.<sup>1760</sup> Literally a heavy document, it was an epistle that unmasked an obsessive prosecutor. As if written with the pen of an historian, the 357-paged indictment's first twenty-nine pages deal exclusively with the history of Rwanda, starting with the ‘revolution of 1959’.<sup>1761</sup> It then introduced the “concise statement of the facts: preparation”:

From late 1990 until July 1994, Théoneste Bagosora, Augustin Ndindiliyimana, Augustin Bizimungu, Aloys Ntiwiragabo, Gratién Kabiligi, Protais Mpiranya, Aloys Ntabakuze, François-Xavier Nzuwonemeye, Anatole Nsengiyumva, Samuel Imanishimwe, Augustin Bizimana, André Ntagerura, Pauline Nyiramasuhuko, André Rwamakuba, Édouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera, Félicien Kabuga, Tharcisse Renzaho, Emmanuel Bagambiki, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, Elie Ndayambaje, Ladislav Ntaganzwa, Shalom Arsime Ntahobali, Bernard Munyagishari, Omar Serushago and Yussuf Munyakazi conspired among themselves and with others to work out a plan with the intent to exterminate the civilian Tutsi population and eliminate members of the opposition, so that they could remain in power. The components of this plan consisted of, among other things, recourse to hatred and ethnic violence, the training of and distribution of weapons to militiamen as well as the preparation of lists of people to be eliminated. In executing the plan, they organized, ordered and participated in the massacres perpetrated against the Tutsi and moderate Hutu population. In a letter dated 3 December 1993, certain FAR officers revealed to the UNAMIR Commander the existence of what they called a "Machiavellian plan" conceived by military who were mainly from the North and who shared the extremist Hutu

<sup>1756</sup> The case also concerned General Gratién Kabiligi (head operations bureau of army general staff), Major Aloys Ntabakuze (Para Commando Battalion commander) and Colonel Anatole Nsengiyumva. UNICTR, *Bagosora et al.: Amended Indictment* (ICTR-96-7-I; 31 July 1998).

<sup>1757</sup> UNICTR, *Prosecutor versus Théoneste Bagosora et al.: Opening Statement* (ICTR-96-7-T; 2 April 2002).

<sup>1758</sup> Bagosora was arrested in Cameroon following a Belgian arrest warrant, in which he was charged with direct responsibility for the massacres which followed the attack against the plane of President Juvénal Habyarimana on 6 April 1994, and for the murder on 7 April 1994, of 10 UNAMIR soldiers from the Belgian contingent stationed in Kigali, Rwanda. See: Tribunal de Première Instance de l'arrondissement de Bruxelles, *Pro Justitia. Mandat d'arrêt par Défaut*, dossier 57/95, notices no. 30983332/95 (Brussels, 29 May 1995). The first ICTR Prosecutor Richard Goldstone signed an indictment – very similar to the Belgian one – listing four counts of genocide, crimes against humanity and war crimes. UNICTR, *The Prosecutor of the Tribunal Against Théoneste Bagosora: Indictment* (ICTR-96-7-I; 5 August 1996). It was based though on the wording of provisional charges that stipulated Bagosora “committed, on Rwandan territory, between January and July 1994, by planning, conspiracy, direct and public incitement, order, commission, omission, complicity, or by otherwise aiding or abetting in the planning, preparation or execution of genocidal acts against the Tutsi population of Rwanda, with intent to destroy, in whole or in part, a national ethnic or racial group, as such, thereby committing the crime of genocide embodied in Articles 2 and 6 of the Tribunal Statute.” UNICTR, OTP, *The Prosecutor of the Tribunal Against Théoneste Bagosora: Request For Transfer And Provisional Detention Under Article 40 Bis Of The Rules Of Procedure And Evidence Of The International Criminal Tribunal For Rwanda* (Kigali, 16 May 1996).

<sup>1759</sup> Don Webster, ‘The Uneasy Relationship between the ICTR and Gacaca’, in: Strauss & Waldorf (eds.), *Remaking Rwanda*, pp. 185-186.

<sup>1760</sup> The “28” included: Augustin Bizimungu, Augustin Ndindiliyimana, Gratién Kabiligi, Aloys Ntiwiragabo, Protais Mpiranya, Aloys Ntabakuze, F-Xavier Nzuwonemeye, Anatole Nsengiyumva, Samuel Imanishimwe, Augustin Bizimana, André Ntagerura, Pauline Nyiramasuhuko, Édouard Karemera, André Rwamakuba, Mathieu Ndirumpatse, Joseph Nzirorera, Félicien Kabuga, Tharcisse Renzaho, Emmanuel Bagambiki, Alphonse Nteziryayo, Sylvain Nsabimana, Joseph Kanyabashi, Elie Ndayambaje, Ladislav Ntaganzwa, Bernard Munyagishari, Omar Serushago, Yussuf Munyakazi & Shalom Ntahobali. UNICTR, *Prosecutor versus Théoneste Bagosora & 28 others: Indictment & Supporting Material* (ICTR-98-37; 6 March 1998), pp. 40-53.

<sup>1761</sup> UNICTR, *Bagosora & 28 others Indictment*, p. 2.

ideology. The objective of the Northern military was to oppose the Arusha Accords and keep themselves in power. The means to achieve this consisted in exterminating the Tutsi and their "accomplices". The letter indicated moreover the names of political opponents to be eliminated. Some of them were in fact killed on the morning of 7 April 1994."<sup>1762</sup>

There was no doubt in the mind of the team that had worked on the indictment that the genocide in Rwanda was a conspiracy that was relentlessly planned and executed by Hutu Power, a movement that surrounded Bagosora. But the tribunal's judges barred a Nuremberg-style mammoth trial, on procedural grounds.<sup>1763</sup> Arusha would not become Africa's Nuremberg. It was a blow in the face of the prosecutor, who then decided to chop up the charges in smaller trials, grouped around certain individuals. In Bagosora's case she soon filed an amended indictment, now alongside three others. The language of the shipwrecked mega trial was copy pasted to the new charge sheet, almost in its entirety. Only some names were expunged.<sup>1764</sup> Of the more than 60-page indictment, the first ten pages set out the 'historical context,' before it goes on to formulate the individual accusation: from late 1990 to July 1994, the former colonel conspired with other extremist Hutus to execute a "Machiavellian Plan" to exterminate all Tutsis and their Hutu 'accomplices'.<sup>1765</sup> Some minor details were altered in the final operative indictment, but the main accusation was set in stone.<sup>1766</sup>

### *At trial*

Trial Chamber III of the International Criminal Tribunal for Rwanda, composed of Judge Lloyd G. Williams presiding, Judge Pavel Dolenc and Judge Andréia Vaz, is now sitting in open session, today, Tuesday, the 2nd of April 2002, for the commencement of trial in joint trial, No. ICTR-98-41-T, in the matters of the Prosecutor v. Théoneste Bagosora, the Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze, and the Prosecutor v. Anatole Nsengiyumva.

- Court Officer<sup>1767</sup>

Much of the UNICTR's work surrounded Bagosora, the alleged mastermind who had been in the Tribunal's detention centre already since 1996. His trial, however, only started in 2002, two months after the start of the Milošević trial in The Hague, 6 years and one month after Bagosora's arrest and 8 years after the genocide. Yet, the accused were still protesting delayed disclosure of evidence,

<sup>1762</sup> UNICTR, *Bagosora & 28 others Indictment*, p. 54.

<sup>1763</sup> The confirming judge wrote that the joint indictment was "not maintainable in its current form" and that he had no jurisdiction to confirm the charges against 11 of the 29 accused since they were already in custody and charged separately. In relation to five other accused, the judge could not exercise jurisdiction since they were already under the jurisdiction of another judge. With respect to the rest of the accused, whom were at large, the judge refrained from determining the merits of the charges. UNICTR, Before Judge Tafazzal Hossain Khan, *The Prosecutor versus Théoneste Bagosora and 28 others: Dismissal of Indictment* (ICTR-98-37-I; 31 March 1998) V. Conclusion. The decision was upheld by the Appeals Chamber: UNICTR, Appeals Chamber, *Prosecutor versus Théoneste Bagosora and 28 others: Decision on the admissibility of the prosecutor's appeal from the decision of a confirming judge dismissing an indictment against Théoneste Bagosora and 28 others* (ICTR-98-73-A; 8 June 1998).

<sup>1764</sup> With regards to the main charge it now stated: "From late 1990 until July 1994, Théoneste Bagosora, Augustin Ndindiliyimana, Augustin Bizimungu, Aloys Ntiwiragabo, Gratien Kabiligi, Protais Mpiranya, Aloys Ntabakuze, François Xavier Nzuwonemeye, Anatole Nsengiyumva, Augustin Bizimana and Tharcisse Renzaho conspired among themselves and with others to work out a plan with the intent to exterminate the civilian Tutsi population and eliminate members of the opposition, so that they could remain in power. The components of this plan consisted of, among other things, recourse to hatred and ethnic violence, the training of and distribution of weapons to militiamen as well as the preparation of lists of people to be eliminated. In executing the plan, they organized, ordered and participated in the massacres perpetrated against the Tutsi population and of moderate Hutu. UNICTR, *Prosecutor versus Théoneste Bagosora et al.: Amended Indictment* (ICTR-96-7-I; 31 July 1998), §5.2.

<sup>1765</sup> UNICTR, *Bagosora et al.: Amended Indictment*, pp. 2-11; §5.2.

<sup>1766</sup> UNICTR, *The Prosecutor versus Théoneste Bagosora: Amended Indictment* (ICTR-96-7-I; Kigali, 12 August 1999).

<sup>1767</sup> UNICTR, *Bagosora, Nsengiyumva, Kabiligi & Ntabakuze Transcript* (2 April 2002), p. 1.

including the French translation of Alison Des Forges' expert report – whose testimony was cancelled that day - and several statements of prosecution witnesses.<sup>1768</sup> Citing a breach of fair trial rights, for them it was enough reason to skip the opening statements uttered by Chief Prosecutor Carla Del Ponte and senior trial attorney Chile Eboe-Osuji. First up, in this “highest profile media event”,<sup>1769</sup> was the Swiss Prosecutor, who told the judges that the “principal perpetrators of genocide in Rwanda in 1994 are the four men before you.”<sup>1770</sup> In contrast to the many lofty opening statements by prosecutors at the international tribunals, she appeared to be robust and realistic: [...] if the existence of genocide in Rwanda in 1994 is no longer at issue and is not arguable, the sure issue that is partially to be resolved is, who was responsible?<sup>1771</sup> Wary of the widely expected extra-legal effects that the trial might have sparked, she was quick to warn:

This Tribunal, unfortunately, can never write the whole history of the Rwandan tragedy, particularly that Rwandan genocide, its genesis, its implementation. We do not have the means, and ultimately that is not our mandate.”<sup>1772</sup>

Del Ponte's stance that the trial was about individual criminal responsibility promised a trial in the sense Hannah Arendt would have had appreciated, leaving aside the ulterior questions. Yet, only a couple of minutes later, the senior trial lawyer in the case, Eboe-Osuji – who would later become a judge at the ICC - took a drastic turn and asked the very question Arendt had critiqued: “why did people commit that ugly crime in that country?”<sup>1773</sup> He sort of had an immediate riposte, mulling together two elements. First, according to Osuji “some Hutus intended a final solution to the ethnic problems of Rwanda” while secondly “there was a venal subtext in this story [...]: The wind of political reform was blowing strongly and it was threatening to blow away some of the privileges of some powerful Rwandan elites, including the four defendants [...] they would rather plunge their own country in a blood bath of genocide.”<sup>1774</sup> The Canadian-Nigerian lawyer – who is now a judge at the ICC - must have struggled with the fact that he was litigating a historical charge sheet, which trotted at least three years outside of the tribunal's jurisdiction. In order to somehow veil that the case may go out of bounds, he went on to recognise that motives in the province of criminal justice “were second-class citizens” which only at times “must be put into this juristic context” and that “we must beware, Your Honours, to avoid losing our way in that jungle of motives.”<sup>1775</sup> But then, several minutes into his presentation he brought to the fore the crux of what he was going to prove: “[...] a conspiracy whose object was the whole or a partial destruction of the Tutsi ethnic group from Rwanda.”<sup>1776</sup> And where he had first pursued to relax the judges that they were not to get lost in a jungle of motives, he

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<sup>1768</sup> Ibidem, p. 29.

<sup>1769</sup> Carla Del Ponte (with Chuck Sudetic), *Mevrouw de Aanklager* (Amsterdam: De Bezige Bij, 2008), p. 325.

<sup>1770</sup> UNICTR, *Bagosora, Nsengiyumva, Kabiligi & Ntabakuze Transcript* (2 April 2002), p. 143.

<sup>1771</sup> Ibidem, p. 140.

<sup>1772</sup> Ibidem, p. 142.

<sup>1773</sup> Ibidem, p. 145.

<sup>1774</sup> Ibidem, p. 146.

<sup>1775</sup> UNICTR, *Bagosora, Nsengiyumva, Kabiligi & Ntabakuze Transcript* (2 April 2002), p. 147.

<sup>1776</sup> Ibidem, p. 154.

bluntly explained to them that they would “hear evidence of this common plan and objective perhaps even involving a web that may appear so contrived in its complexity as to confound the casual observer.”<sup>1777</sup> The judges frowned their eyebrows, for this promised to become a trial especially about motives, which were only traceable in the past.

Although the prosecution claimed “the provenance of this conspiracy among the defendants may be traced to as far back as October 1990 when the RPF attacked Rwanda” they defined one particular event as the birth cradle of the genocide plans. “For now,” said Osuji, “we begin the story from the 4th of December 1991.”<sup>1778</sup> On that day, Habyarimana had appointed the infamous commission to prepare a secret report on how to defeat the enemy, whom they referred to as the “ENI” and how to defeat them in the media, on the battlefield of war, and on the political arena. Bagosora, as we saw earlier in this chapter, was the chairman of it, while Lieutenant Colonel Anatole Nsengiyumva, Major Aloys Ntabakuze were members. Generally known as the Bagosora commission, Osuji christened it the “ENI Commission” or “Enemy Commission.”<sup>1779</sup> From that moment onwards, the genocide eclipsed like an organic chain of events. “Yes, the stories in this trial will betray a complex chain of events sometimes resembling the movement of stormy clouds ushering in a heavy storm as we saw happen in fact, and what a tangled web they wove,” the prosecutor claimed, to conclude that:

Yet, Your Honours, amidst all of that, one thing is clearly discernible: the calculating hands of the conspirators, among them the Defendants in this case. However hard, they tried hide their hands, it was all out in the end. They guided the events. They constantly stoked the fire of fear and hate of Tutsis. They were making genocidal plans and they were leading the way to their ultimate goal: [...] tubatsembetsembe. That is the Kinyarwandan expression for "let us exterminate them", "them" being Tutsis. Your Honour, we say that was the basic objective, the conspiracy.”<sup>1780</sup>

No trial at the UNICTR was the same and all had their own specific courtroom dynamics and lines of argument. They were all different.<sup>1781</sup> No defendant is the same and trial chamber changed in composition. Also they bring in different lawyers, from other legal traditions, national cultures and with different professional capacities and experience. Prosecution teams similarly change and their agents may adopt new strategies or alter the discourse in which they frame the cases. So was the case in *Bagosora*. Despite an indictment that reads like a Rwandan version of Nazism, the prosecutors in this case explicitly refrained from highlighting this analogy. In their version of events, Bagosora was undeniably the kingpin in the genocide, highlighting his central role in the planning and referring to statements he allegedly made when he returned from the Arusha talks in 1993 saying he was “going

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<sup>1777</sup> Ibidem, p. 157.

<sup>1778</sup> Ibidem, p. 158.

<sup>1779</sup> Idem.

<sup>1780</sup> Ibidem, p. 178.

<sup>1781</sup> See for the trial between 1997 and 2002: Cruvellier, *Court of Remorse*.

home to prepare the second apocalypse.”<sup>1782</sup> Nevertheless, they did not want to go as far as to compare him to Hitler, as it was “not necessary to do so, neither did he need to be a Hitler, to be -- in order to be the driving force of the Rwandan genocide, as he did” but stressed that “he was at the centre of the conspiracy, and you will hear evidence of what he did to execute it and to conceive it.”<sup>1783</sup> In their attempt to show Bagosora’s role in the genocide and decipher the organisation of the mass killings in 1994, the prosecutor had essentially assembled major general ‘facts’ and allegations, that were already ready known in 1995, to concoct the narrative of the way the Rwandan genocide against Tutsi had been thought out and planned.<sup>1784</sup> That, maybe, is the most problematic red thread throughout the UNICTR’s lifetime. Despite the differences per trial some bad habits had been ingrained at the root-level, including, amongst other things, the prosecutor’s selective, uncritical, widespread and systematic reliance on anonymous testimony from witnesses, who were often interviewed years after the events. Aside from these generally unverifiable sources, the prosecutor’s inventory of evidence had from the beginning been flimsy, to say the least. Irrespective of the question whether it even exists, the OTP’s investigators had never produced any direct or conclusive material that would even reasonably confirm the extraordinary charges it was bringing against those who stood accused in Arusha, including Bagosora. As in the earlier trials, the best evidence available still came from the experts who themselves had stood at the cradle of the prosecutor’s theories, already seven years before.

An historical indictment demanded a meticulous exhumation of the past and it was no surprise that Alison Des Forges featured as the prosecutions first witness and Filip Reyntjens towards the end of its case.<sup>1785</sup> From its 82 witnesses in this case, the two experts served not only to connect the whole narrative together, but also to tender in evidence (such as Bagosora’s diary) and testify to crucial facts, for which the tribunal had not produced ‘smoking-gun-type-of-evidence.’ Their role would be bigger than Chile Eboe-Osuji made the judges believe. After a lull of no less than months since his opening statements he called the American activist historian Des Forges as his first witness, on 2 September 2002.<sup>1786</sup> Only a month earlier she had concluded her testimony in the media case, as an expert, but from the start the defence quarrelled with the chamber and the prosecutor over the question if she would actually constitute an expert. On the first day, from the witness stand, Des Forges was mainly a spectator of heavy litigation on her professionalism, methodology and knowledge.<sup>1787</sup> In challenging her on every point imaginable – including her research methodology, her professional history and earlier testimonies she had given at the tribunal and elsewhere - the defence sought to cast doubt on her credibility as an expert and reliability of her evidence. Highly aware of the importance the prosecutor attached to her testimony, they would accept, at maximum, her as an expert on pre-

<sup>1782</sup> UNICTR, *Bagosora, Nsengiyumva, Kabiligi & Ntabakuze Transcript* (2 April 2002), p. 181.

<sup>1783</sup> *Ibidem*, pp. 190-191.

<sup>1784</sup> Compare: Cruvellier, ‘Brainless genocide’, p. 60.

<sup>1785</sup> The trial chamber heavily relied on them, as “as experts in Rwandan history.” Des Forges’ name appears no less than 199 times in the judgement and Reyntjens’ name 145 times.

<sup>1786</sup> See on Des Forges’ testimony during the Bagosora trial particularly: Buss, ‘Expert Witnesses and International War Crimes Trials’, pp. 37-42.

<sup>1787</sup> UNICTR, *Bagosora, Nsengiyumva, Kabiligi & Ntabakuze Transcript* (2 September 2002), n.p..

1990 Rwandan affairs, outside the scope of the allegations. Of the eighteen days she was profoundly cross-examined, Eboe-Osuji only had explained his strategy for calling her testify first: “ Your Honour, we are calling Ms. Des Forges [...] to give the story of the history of Rwanda and give her opinion on whether or not there were [...] systemic violations that one might recall when one starts talking about genocide in Rwanda.”<sup>1788</sup> She was called as the first witness, continued the prosecutor, “so that when she is done [...] we will call other factual witnesses and the evidence of such factual witnesses will be put now in the context of what you would have heard from Ms. Des Forges, both in terms of the history of the country and in terms of the context in which -- what happened -- on the events that happened, and the context in which each of these witnesses will be coming to testify. It would make better sense to the trier of fact to call her first.”<sup>1789</sup> In other words, the prosecutor, who was litigating a case informed and framed by Des Forges’ her very own theory of the genocide, needed her to provide the entire narrative and factual framework through which the rest of the evidence was to be perceived.

In contrast to Akayesu and to a lesser extent the media trial, the dynamics during Des Forges’ testimony were more combative, at times even hostile.<sup>1790</sup> Without much interference or questions from the bench, her responses to questions were tightly controlled by continuous jurisdictional and substantial challenges from the defence, particularly on the framing of the events between 1990 and 1994 and the use of the word genocide.<sup>1791</sup> However, the framework had been erected, one that the judges were familiar with from other cases. Throughout the rest of the trial, it would definitely become the overarching spectre from which the OTP sought to present its case and on which basis the defence tried to challenge the merits of case. As observers and adjudicators of those substantial but completely inharmonious narratives on the genesis and nature of the genocide, the judges themselves had no other option than to make reasoned findings not only on the available evidence but on the framework as a whole. And since the case scenario was strongly built on the structures of a particular but dominant and generally accepted historiography, any finding by the tribunal would have been interpreted as a judgement of history; either as a revision or as an acknowledgment.

### ***A Prosecution condemned***

To influence collective memory through legal proceedings, it is helpful for prosecutors to be familiar with accepted genres of storytelling. In other words, prosecutors must discover how to couch the trial's doctrinal narrative within "genre conventions" already in place within the particular society. These conventions are by no means universal and will often require some rather fine-grained “local knowledge.”

- Mark Osiel<sup>1792</sup>

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<sup>1788</sup> Idem.

<sup>1789</sup> Idem.

<sup>1790</sup> Buss, ‘Expert Witnesses and International War Crimes Trials’, pp. 37-42.

<sup>1791</sup> Idem.

<sup>1792</sup> Osiel, ‘Ever Again’ , p. 524.

In 2008, more than fourteen years after the events, the man whose name had become emblematic to the ugliest crime in Rwanda received his sentence by the UNICTR. Bagosora was found guilty of genocide, crimes against humanity and war crimes for ordering and authorising various killings and rapes between 6 and 9 April 1994. But the ‘mastermind’ mantra of a diabolical national conspiracy and planning of the genocide between him, his three co-accused and others before 6 April was struck down by the UN tribunal.<sup>1793</sup> The billion-dollar charge was ruled out however. Six years of trial proceedings and deliberations did not provide the legal answer - *beyond reasonable doubt* - to the historically framed inquiry into the alleged pre-6 April 1994 planning, process and organisation behind the extermination of Rwandan Tutsis and their ‘accomplices.’ Within the circumstances, the trial against four persons, it was not proved. What was reason? According to the judges, several elements commonly considered to be crucial in the planning of the 1994 massacres were “not supported by sufficiently reliable evidence” or did “not necessarily demonstrate *criminal intent*.”<sup>1794</sup> “Confronted with circumstantial evidence,” the magistrates carefully wrote in their decision, “the tribunal *may* only convict where conspiracy is the *only* reasonable inference from the evidence.”<sup>1795</sup> Applying that test, the chamber concluded that the prosecution did not prove beyond a reasonable doubt that the only reasonable inference to be drawn from the evidence is that the four accused conspired amongst themselves - or with others - to commit genocide before it unfolded from 7 April 1994. In fact, supposed elements of the conspiracy to commit genocide, as alleged by the prosecution, were either dismissed or found unconvincing.

As a result of the OTP’s shoddy work, the judgement that was expected to shed light on the mechanics of the Rwandan genocide reads as a lamentation, at times even an indictment, against the party that had promised to substantiate historiography: the prosecution. Despite its observation that the “question under consideration is not whether there was a plan or conspiracy to commit genocide in Rwanda,” in its decision, the trial chambers breaks down all the elements that led to its acquittal on the conspiracy count.<sup>1796</sup> In its allegation that Bagosora and his co-accused conspired “to work out a plan”, the prosecution had put forward that the components of this plan included, amongst others, speeches and incitement, the training of militia groups and the writing up of death lists. To show Bagosora’s involvement in the extended planning and preparations for genocide before 1994, the OTP had pointed to certain key pieces of evidence or alleged events. In particular, they had highlighted the work of the “Enemy Commission”, Bagosora’s 1992 reference to planning the “apocalypse”, secretive clandestine organisations (AMASASU), Jean-Pierre’s warnings to Dallaire, the “Machiavellian Plan” letter, the preparation of lists, the creation, arming and training of civilians and RTLM. All elements,

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<sup>1793</sup> Guichaoua, *From War to Genocide*, pp. 322-327.

<sup>1794</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Judgement*, §12.

<sup>1795</sup> *Ibidem*, §9.

<sup>1796</sup> Rather, wrote the chamber, the question is whether the Prosecution has proven beyond reasonable doubt based on the evidence in this case that the four Accused committed the crime of conspiracy. *Ibidem*, §2092.

evidence and events are deeply ingrained in the popular narrative on the genocide. From the judgement, however, a more nuanced interpretation transpires. Ultimately, observed the chamber, since this case was built only on circumstantial evidence, a conspiracy could only be proved if it is “the only reasonable inference based on the totality of the evidence.”<sup>1797</sup> In other words, like in the media case, the facts may all be consistent with a joint agenda to commit genocide, but they must be exclusively so: no other explanation may plausibly exist.

With such a tall evidentiary bar, the case ought to be crystal clear and the evidence robust.<sup>1798</sup> But in respect to Rwanda - where facts, truths and sources are generally hazy - those two elements are strikingly absent. For starters, the Prosecution only pleaded the formation of a conspiracy before 7 April 1994, not when it commenced or was unfolding.<sup>1799</sup> Also, the prosecution was not clear about when they thought the alleged planning had started. In the 1999 indictment they were convinced the conspiracy took place from “late 1990”, but at the end of the trial they only maintained “the planning aspect of conspiracy extended a significant time prior to the events in 1994.”<sup>1800</sup> In fact, the OTP was pleading “there was no plan in 1992 to conduct genocide in April 1994. There’s no evidence of that,” instead there was a tendency towards a conspiracy.<sup>1801</sup> Indeed, at trial, even the prosecutor’s experts could not agree on the question. Des Forges elucidated that the “organisational” phase of the planned genocide “dates to the period of 1993 and early 1994,” although “a very small group of people” had been conceptualising and planning the genocide for a “much longer time than for the great majority of later participants”<sup>1802</sup> Two years later, the other OTP expert, Reyntjens, added to the confusion: “I do not believe [...] and I could well be wrong, I mean, I don't have all information, but that in my view there has been no particular moment in time when a number of conspirators sat together and decided, "We are going to organise a genocide. This is our machinery. This is our ideology. This is how we're going to do it, to spread it, to convince people to join it." [...] What I believe is that the genocidal instrument and ideology have developed incrementally, probably starting on the 1st of October 1990, and there have been some killings then which I would -- which were, as I have already said, I think, in a context of the beginning of the war and may have been, to some extent, spontaneous or organised just by local authorities, not by central authorities.”<sup>1803</sup> In rebuttal, the defence’s historians, Bernard Lugan and Helmut Strizek testified they “not only in the state of my knowledge and in the current state of research, I have not found any proof of planning”<sup>1804</sup> or that “there was no command, no planning. It was a spontaneous act of unruly, uncontrollable people who went on a killing spree. And

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<sup>1797</sup> Ibidem, §2088.

<sup>1798</sup> In this case, the chamber took a very lenient stance towards allegations and evidence preceding the Tribunal’s temporal jurisdiction. It would except such evidence if the chamber deemed such evidence relevant and of probative value and there is no compelling reason to exclude it. Such evidence can be relevant to: clarify a given context; establishing by inference the elements (in particular, criminal intent) of criminal conduct occurring in 1994; and demonstrating a deliberate pattern of conduct. Ibidem, §2091.

<sup>1799</sup> Arguably, the chamber, could have made a finding that Bagosora was conspiring, for instance, since the evening of 6 April, the moment he was among the highest authorities in the country.

<sup>1800</sup> UNICTR, TCI, *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze & Anatole Nsengiyumva: Prosecution Closing Brief* (ICTR-98-41-T; 20 April 2007), §35.

<sup>1801</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (1 June 2007), pp. 41-42.

<sup>1802</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (26 September 2002), p. 36.

<sup>1803</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (20 September 2004), pp. 9-10.

<sup>1804</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (15 November 2006), p. 7.

it is actually this argument which [General Dallaire] confirms here that there were uncontrollable and mass actions.”<sup>1805</sup>

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<sup>1805</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (12 May 2005), p. 68.

### *Planning the ‘Apocalypse’?*

On that premise, the chamber in its decision meticulously ticked off whether the prosecution’s evidence on alleged meetings showed that there was high level planning and conspiracy to commit genocide. First it discussed the so-called ENI document, in which a military commission headed by Bagosora defined the enemy in ethnic terms, and of which only parts were presented by the prosecution as a crucial step towards a criminal conspiracy with criminal purpose.<sup>1806</sup> Despite the fact that “that the over-emphasis on the Tutsi ethnicity in the document is troubling,” the chamber did not conclude that the ambiguously worded “document or its circulation to soldiers in the Rwandan army in themselves” evidenced a conspiracy around late 1991 to exterminate the Tutsi ethnic group.<sup>1807</sup> Instead, the UNICTR judges found that “defining the enemy is normal and necessary in times of war” to “adapt its strategies and order its resources.”<sup>1808</sup> Moreover, observed the chamber, the Commission in itself was not composed of extremists and included a number of moderates. However, sentient to the weight their ruling was carrying and not blinded by historical revisionism, the judges were careful to observe that even though a conspiracy was not the only inference, the ENI document still “can be interpreted as equating Tutsi civilians with members of the RPF,” which was an “important precondition of the genocide” and “is therefore significant as an early illustration of the tendency to polarise Rwandan society along ethnic lines.”<sup>1809</sup>

Having outlawed one of the central elements in the chain of events cited in the general historiography on the genocide, the chamber then turned to another key event that features in all the writings on the genocide: Bagosora’s “Apocalypse” statement.<sup>1810</sup> According to the popular readings Bagosora told a RPF delegate, when leaving the Arusha peace talks in 1992 that he was returning to Rwanda to ‘prepare the apocalypse.’<sup>1811</sup> When read in the context of what happened in 1994, the statement is bitterly disturbing. In a bid to corroborate the proclamation, the Prosecution traced down the men who first reported on it: protected witnesses XAM and KT, both members of the RPF delegation in Arusha. But their anonymous evidence showed deep discrepancies. Witness XAM, who was the only one to provide direct evidence in court, repeatedly told the chamber that Bagosora made the statement during lunch time in an elevator, sometime in October 1992, while witness KT claimed in a written statement that the incident occurred in a morning around Christmas 1992. Aside from Bagosora’s testimony that he was only in Arusha between 2 and 26 December, that was the only available evidence on the famous statement. For the judges, it was unreliable and did not prove the accusation.<sup>1812</sup> The tone was set for the rest of the evaluation of the evidence.

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<sup>1806</sup> Only an excerpt distributed on 29 September 1992 was presented at trial as the entire report is no longer available.

<sup>1807</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Judgement*, §205.

<sup>1808</sup> *Ibidem*, §200-201.

<sup>1809</sup> *Ibidem*, §209.

<sup>1810</sup> See also: Cruvellier, ‘Brainless Genocide’, pp. 61-62.

<sup>1811</sup> AR, *Death, Despair and Defiance*, p. 113.

<sup>1812</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Judgement*, §211-222.

In the next 35 pages, the chamber struck down all the allegations of seven ‘conspiracy meetings between 1992 and 1994.’<sup>1813</sup> In evaluating the evidence, which exclusively consisted of witness testimony, the chamber went into a mode of repetition in lamenting the inconsistencies, credibility and overall uncorroborated prosecution evidence. It stopped for a moment to observe that the “lack of consistency raises some concern about the credibility of the Prosecution’s evidence on this point. The Chamber therefore declines to accept the specific details of each of the witnesses’ accounts.”<sup>1814</sup> Even key evidence fell apart.<sup>1815</sup> Two days before the genocide, on 4 April, Bagosora attended a crowded and noisy dinner at the Méridien Hotel in Kigali organised by the Senegalese contingent of UNAMIR. The prosecution alleged that Bagosora, in the company of Colonel Luc Marchal and General Roméo Dallaire, had said that “the only solution to the political impasse was to eliminate all the Tutsis.” At trial, the prosecution’s evidence was blurry, even second-hand. Dallaire testified that Marchal had told him some 12 days later that Bagosora had stated that the war was at hand and that “a final solution was going to happen”, involving elimination of Tutsis.<sup>1816</sup> Reyntjens testified that, later in July 1994, Marchal had told him during an interview that Bagosora had said “the Arusha Accord was going to lead nowhere, except to disaster, and that the only course of action would be to exterminate all Tutsi.”<sup>1817</sup> But the source himself, Colonel Marchal, testified for the defence.<sup>1818</sup> Already in 1997 he told UNICTR investigators he had become uncertain whether Bagosora had used the term “Tutsi” or “RPF” and at trial could not recall if Bagosora had called for their elimination.<sup>1819</sup> For the chamber it became clear, because Marchal had explained his different accounts as confusion about what was said “the exact content of the statement raises some doubt concerning what was said.”<sup>1820</sup> Again, accuracy to the very facts charged was absent in the prosecution’s testimonial evidence. The case suffered from it and its effects were devastating for the record. But the prosecution case crumbled even further.

When it came to the preparation and use of lists, the chamber repeated the same riddle. Yes, there were lists, they said, based on the fact that nobody contested their existence.<sup>1821</sup> The links to the accused however, remained mostly unclear. There was no answer to the origin of the lists and moreover they included not just Tutsi, but also included the broad spectrum of Habyarimana’s opponents, including Hutu. It led to a very general conclusion: “Nsengiyumva given his role as head of the military intelligence bureau (G-2) on the army staff would have been involved in the

<sup>1813</sup> Meetings at Camp Kanombe, 1992 – 1993; MRND Meeting, Umuganda Stadium, 27 October 1993; Distribution of Weapons, Bugarama, 28 January 1994; Meeting at Ruhengeri Military Camp, 15 February 1994; Meeting at Gisenyi MRND Headquarters, February 1994; Butare Meeting, February 1994; and Senegalese Dinner, 4 April 1994. Amongst other things, the Prosecution submitted that Kabiligi participated in a meeting in February 1994 in Ruhengeri with local military commanders to inform them of a plan to commit genocide; that around the same time that Nsengiyumva and Bagosora met in Butare prefecture with other officials to draw up lists of Tutsis to kill and also participated in a rally in Gisenyi prefecture, where they described the enemy as Tutsis.

<sup>1814</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Judgement*, §244.

<sup>1815</sup> Cruvellier, ‘Brainless Genocide’, p. 62.

<sup>1816</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (19 January 2004), pp. 19-20; UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (22 January 2004), p. 46.

<sup>1817</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (15 September 2004), pp. 33-34; UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (17 September 2004), pp. 15-21.

<sup>1818</sup> Testifying for the defence were other guests of the dinner, including Bagosora, Bagosora’s wife, UNAMIR’s Lieutenant Colonel Babacar Faye and UN Special Representative General Booh Booh.

<sup>1819</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (2 November 2005), pp. 15-23.

<sup>1820</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Judgement*, §354.

<sup>1821</sup> No lists were produced at trial, only Alison Des Forges and Filip Reyntjens testified to their existence in the early 1990’s.

preparation of lists and that Bagosora in light of his position was likely aware of them. It also concluded that Ntabakuze made use of lists to arrest people in October 1990. It was not proven that Kabiligi was involved in this effort.”<sup>1822</sup> Yet, on the substantial charge, that these lists were prepared or maintained with the intent to kill Tutsi civilians, the UNICTR was not satisfied. It reached a similar conclusion on the creation of civilian militias: “The Chamber has found that Bagosora, Nsengiyumva and Kabiligi participated in varying degrees in the arming and training of civilians. [...] However, when viewed in the context of the immediate aftermath of the RPF’s violation of the cease fire agreement, it does not necessarily show an intention to use the forces to commit genocide.”<sup>1823</sup> With respect to the existence of Zero Network and the AMASASU and the question if the accused were members of them, the chamber could make no conclusion since the “available information concerning [it] was limited and to a large extent second-hand.”<sup>1824</sup> The same was the case with the death squads. Based on the testimony of six witnesses, including Reyntjens, a residential watchman in the Kiyovu quarter and Dallaire, the chamber was convinced about their existence and role in killings before April 1994. However, said the chamber, “the mere fact that such groups existed and were engaged in criminal acts does not mean that it was preparing a genocide.”<sup>1825</sup> Moreover, all the sources on Bagosora’s involvement or membership of these *escadrons de la mort* were all second-hand and limited.<sup>1826</sup>

Moving on to RTLM, the judges lamented the prosecutor’s amateurism for not listing “the relevant allegations in the indictments.” Yet, citing the testimony of Des Forges, Ruggiu and some other witnesses, they went as far as stating for the record that it was “clear that RTLM played a significant role in sowing ethnic discord before 6 April 1994 and in inciting genocide against members of the Tutsi population after the death of President Habyarimana on 6 April.”<sup>1827</sup> Bagosora, Nsengiyumva and Ntabakuze were all shareholders, but the judges found the linkage with the ENI report too far-fetched to conclude that “RTLM’s calls for the population to support the army” illustrated army control of the station,” even when they shared common some goals.<sup>1828</sup> With 50 shares, Bagosora was amongst the largest shareholders, but, said the judges, “the evidence referred to by the Prosecution is inconclusive and, even if true, does not concretely show a specific connection between the Accused and RTLM.”<sup>1829</sup> Nevertheless, the judges appeared to at least make some factual findings and wished to mention that Bagosora’s “relatively significant ownership interest in the station is noteworthy. It amounted to three times his monthly income.”<sup>1830</sup> Seemingly, the prosecutor’s

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<sup>1822</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Judgement*, §2322.

<sup>1823</sup> *Ibidem*, §2102.

<sup>1824</sup> *Ibidem*, §2114.

<sup>1825</sup> *Ibidem*, §2106.

<sup>1826</sup> *Ibidem*, §617.

<sup>1827</sup> *Ibidem*, §-649.

<sup>1828</sup> *Ibidem*, §762. Later, they write: “However, in the Chamber’s view, the security provided by Presidential Guard at the station after 6 April, the housing provided to some RTLM staff at the Hôtel des Diplomates, and the role played by the army in moving RTLM’s transmitter from Kigali to Gisenyi prefecture reflect a more substantial form of assistance by the army to the station. This evidence is indicative of the army’s efforts to ensure that RTLM continued its broadcasts, thus reflecting its general approval of the editorial content. By itself, however, it does not demonstrate any overall editorial control by the army of the station’s broadcasts. *Ibidem*, §764.

<sup>1829</sup> *Ibidem*, §762.

<sup>1830</sup> *Ibidem*, §764.

evidence was convincing on some matters. But it was not so on one of the most vital pieces of evidence on the planning of the genocide: Dallaire's genocide fax and a letter outlining a Machiavellian plan.

Like Bagosora's Apocalypse statement, no other element has been highlighted in the literature as much as the General Dallaire's warning to the UN that genocide was coming. On 10 January 1994, an informant by the name of "Jean-Pierre" informed UNAMIR of a secret plan to train militia to exterminate the Tutsis and their "accomplices". At least, that is what is generally believed and what was claimed by the prosecutor in the Bagosora trial.<sup>1831</sup> It is a remarkable story.<sup>1832</sup> In early January 1994, Prime Minister designate for the Broad-Based Transitional Government, Faustin Twagiramungu, told Dallaire, that a member of the Interahamwe's high command had information concerning its secret plan to exterminate Tutsis. On 10 January 1994, Lieutenant-Colonel Frank Claeyns and Colonel Luc Marchal, along with two other UNAMIR officers, met with Jean-Pierre. The man claimed to be a former Para Commando, previous member of the Presidential Guard and current top-level trainer of *Interahamwe*. His information was shocking. He told UNAMIR that approximately 1,700 to 1,900 *Interahamwe* had been trained in the use of military equipment at Camp Kanombe and other camps around Kigali. He also told the Peacekeepers that Kigali was divided into 20 cells and that each cell was responsible for exterminating Tutsis registered in their cell. In his estimation, 1,000 Tutsis could be killed in Kigali every 20 minutes. Lists had already been prepared to assist in this purpose. Jean-Pierre also informed UNAMIR of weapons caches in Kigali and that both the Minister of Defence and Colonel Bagosora were involved in a plan to distribute weapons to militiamen. Furthermore, Jean-Pierre spoke of a plan to get Belgians to overreact to the militia's provocations in order to trap them and force UNAMIR to withdrawal. Dallaire was briefed on the informant's information and sent a code cable to the UN headquarters in New York.<sup>1833</sup> In hindsight, the information Jean Pierre forwarded to UNAMIR was prophetic. For the prosecution, its content was the ultimate proof that the genocide was being planned and that Bagosora was named in relation to it, at least from the very starting point of the tribunal's jurisdiction. But through their entire case, so much doubt was already cast over its evidence and witnesses that suspicions towards this mysterious informant reigned supreme.

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<sup>1831</sup> The Prosecution refers to General Roméo Dallaire, Major Brent Beardsley, Lieutenant-Colonel Frank Claeyns, Witnesses A and BY as well as Expert Witnesses Alison Des Forges and Filip Reyntjens. Defence Jacques Roger Booh-Booh, Luc Marchal, BRA-1, Joseph Bukeye, ALL-42, as well as Expert Witnesses Strizek, Bernard Lugan and Serge Desouter.

<sup>1832</sup> This calibrated section represents an edited version of the narration in the judgement and is based on the testimonies by General Roméo Dallaire, Major Brent Beardsley, and Lieutenant-Colonel Frank Claeyns. See: UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Judgement*, §509-511; UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (20 January 2004); UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (22 January 2004); UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (26 January 2004); UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (27 January 2004); UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (3 February 2004); UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (4 February 2004); UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (5 February 2004).

<sup>1833</sup> On 11 January, Special Representative Booh-Booh received a cable from Kofi Annan, the head of the United Nations Department of Peacekeeping Operations, addressed to both Booh-Booh and Dallaire, asking them to see President Habyarimana about dismantling the weapons caches cited by Jean-Pierre. Booh-Booh was also asked to meet with Ambassadors of Western countries and, if need be, put pressure on President Habyarimana. Annan's telegram denied Dallaire permission to inspect the weapons caches cited by Jean-Pierre, stating that the UNAMIR mandate did not extend far enough for such an operation.

Claeys was Jean-Pierre's sole UNAMIR contact and met with him five times. But little was known about him. Witnesses A and BY, both high-ranking Interahamwe leaders testified they knew Jean-Pierre and confirmed he was in charge of distributing weapons from the Ministry of Defence to the MRND. But they also suspected him of diverting weapons. Beardsley and Claeys testified about a videotape that had shown Jean-Pierre at an MRND rally, giving directions with a hand-held radio to uniformed Interahamwe. Yet, some of the testimony suggested that Jean-Pierre was not whom he claimed to be. Joseph Buckeye, Jean-Pierre's former employer, for instance, identified Jean-Pierre as a man named "Turatsinze" and refuted he had military training. Marchal<sup>1834</sup> speculated that Jean-Pierre could have been an RPF agent whose information was part of RPF machinations,<sup>1835</sup> a theory that was supported by witness ALL-42.<sup>1836</sup> This RPF member testified that Jean-Pierre was an RPF agent who had infiltrated the Interahamwe and that his actions were part of a plan to manipulate UNAMIR. Dallaire also conceded that there was a risk that the information provided by Jean-Pierre had been manipulated, but at the time felt that there were reasonable grounds to rely on his intelligence. At first glance, the chamber appeared to go along with Dallaire: "When looking at how the events unfolded in Kigali after the death of President Habyarimana, the Chamber notes the similarity of how they corresponded to Jean-Pierre's information. His account could therefore be true." But then they grew suspicious. It almost was too good to be true, especially in light of an unsigned letter of December 1993 supposedly from a Rwandan military officer to Dallaire outlining President Habyarimana's "Machiavellian plan" to commit massacres throughout the country and commit targeted assassinations of certain political officials in order to incite the RPF to violate the cease-fire agreement. The letter, however, was anonymous, disputed and lacked details on which officers were part the purported plan. In that light, they observed, the evidence based on Jean-Pierre's information is entirely second or third-hand. Moreover, his whereabouts and circumstances concerning his disappearance are unknown. Also, witnesses A and BY, both high placed Interahamwe leaders, did not corroborate Jean-Pierre's information about the plan to kill Tutsis. To some extent, Jean Pierre's information had been corroborated, including the creation of lists, weapon catches and training of *Interahamwe*. Regardless, the judges wrote him off: "the Prosecution's reliance on this evidence is problematic since there are lingering questions concerning the reliability of this evidence and because it does not directly implicate the Accused. This evidence therefore has limited probative value in establishing the Accused's role in a conspiracy."<sup>1837</sup>

#### 4.12 A prosecutorial narrative derailed

It remains important to note that, based on the evidence, Bagosora was found guilty of superior

<sup>1834</sup> Who had already testified on the informant before the Belgian police in 1995. Service de police judiciaire de la Justice militaire, 'feuille d'audition', *Annex A/1 au PV No 1299 du 23/11/95* (Brussels, 23 November 1995).

<sup>1835</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript* (30 November 2006), p. 32.

<sup>1836</sup> *Ibidem*, pp. 1-4.

<sup>1837</sup> See: UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Judgement*, §2103.

responsibility for actions of Rwandan army soldiers committed in the first few days of the genocide.<sup>1838</sup> He was responsible for killings *during* the genocide but not for planning or organising these killings *before* the genocide. By far, the Bagosora judgement is the tribunal's most complicated writing, for many reasons, but it is also the most nuanced, if read closely. Despite the fact that the chamber found that against the backdrop of targeted killings and massive slaughter perpetrated by civilian and military assailants immediately after the assassination of Habyarimana, as well as earlier cycles of violence, they surely show that the genocide was not spontaneous and carries elements of a prior groundworks or even a conspiracy.<sup>1839</sup> But, in the view of the chamber, even if these preparations are completely consistent with a plan to commit genocide, they are also consistent with preparations for a political or military power struggle.<sup>1840</sup> That is a nuanced conclusion, made in the narrow space in which the judges were operating.<sup>1841</sup> In this specific case, however, and in light of the evidence presented at trial, "it is possible that some military or civilian authorities did intend these preparations as part of a plan to commit genocide", but this has not yet been sufficiently proved with regards to Bagosora and the three other accused.<sup>1842</sup>

In sum, the prosecution at Bagosora's trial did not prove the most important elements of the planning. Its theory of a tropical Nazism was not upheld. Overall, from the judgement, the conclusion can be drawn that "the Rwandan army was no more a "genocidal" army than the Second Republic of Juvénal Habyarimana was a "Nazi regime" or Rwanda was a fascist country since 1959," as has been officially progressed by the victorious RPF regime.<sup>1843</sup> As shown above, the creation and work of a military commission to define "the enemy" chaired by Bagosora in 1991 were not considered as criminal. Bagosora and others had played a role in the creation, arming and training of civil militias and maintaining lists of "RPF accomplices", but the judges could not conclude that "these efforts were directed at killing Tutsi civilians with the intention to commit genocide." Bagosora's reported warning in 1992 that he was going to "prepare the apocalypse" proved to come from two dubious witnesses who contradicted themselves. His alleged role in clandestine organisations, such as the AMASASU, the Zero Network or death squads was supported by considerable evidence, yet it was

<sup>1838</sup> "There were other organised killings involving the Rwandan military, at times working in conjunction with Interahamwe and other militiamen throughout Kigali, during the first 72 hours after the death of President Habyarimana. [...] In its judgement, the Chamber has found that Bagosora was the highest authority in the Ministry of Defence and exercised effective control over the Rwandan army and gendarmerie from 6 until 9 April, when the Minister of Defence returned to Rwanda. For the legal reasons given in the judgment, he is therefore responsible for the murder of the Prime Minister, the four opposition politicians, the 10 Belgian peacekeepers, as well as the extensive military involvement in the killing of civilians in Kigali during this period. The same conclusion applies to Ntabakuze with respect to crimes committed by members of the Para Commando Battalion in Kabeza." Ibidem, §23-25.

<sup>1839</sup> "The Chamber simply cannot accept that elite units of the Rwandan army would spontaneously engage in sustained gun and grenade fire with Rwandan gendarmes and United Nations peacekeepers, murder and assault the Prime Minister of their country, and kill five prominent personalities, unless it formed part of an organised military operation pursuant to orders from superior military authorities." Ibidem, §20.

<sup>1840</sup> "The Chamber certainly accepts that there are indications which may be construed as evidence of a plan to commit genocide, in particular when viewed in light of the subsequent targeted and speedy killings immediately after the shooting down of the President's plane. However, the evidence is also consistent with preparations for a political or military power struggle and measures adopted in the context of an on-going war with the RPF that were used for other purposes from 6 April 1994. Consequently, the Chamber is not satisfied that the Prosecution has proven beyond a reasonable doubt that the only reasonable inference to be drawn from the evidence is that the four Accused conspired amongst themselves or with others to commit genocide before it unfolded from 7 April 1994. The Chamber has acquitted them of Count 1 of each of their Indictments." Ibidem, §13.

<sup>1841</sup> "In relation to the Prosecution submissions about conspiracy, the Chamber points out, first, that the question is whether it is proven beyond a reasonable doubt, based upon the evidence in this case, that the four Accused committed the crime of conspiracy to commit genocide. Second, when confronted with circumstantial evidence, the Chamber may, according to established case law, only convict where conspiracy is the only reasonable inference. Third, the evidence implicates the Accused in varying degrees." Ibidem, §9.

<sup>1842</sup> "The Chamber has found that some of the Accused played a role in the creation, arming and training of civilian militia as well as the maintenance of lists of suspected accomplices of the RPF or others opposed to the ruling regime. However, it was not proven beyond a reasonable doubt that these efforts were directed at killing Tutsi civilians with the intention to commit genocide." Ibidem, §11.

<sup>1843</sup> Guichaoua, *From War to Genocide*, p. 327.

indirect, second-hand and did not mean they were preparing genocide. Testimony about a meeting in Butare in February 1994, where Bagosora allegedly drew up a list of Tutsis to be killed, was not considered credible. The Chamber reached the same conclusion with respect to Kabiligi's alleged speech about genocide in Ruhengeri in February 1994. Moreover, there were concerns over the reliability of the information provided by Jean-Pierre and an anonymous letter outlining a "Machiavellian Plan". "In reaching its finding on conspiracy, the Chamber has considered the totality of the evidence, but a firm foundation cannot be constructed from fractured bricks," concluded the judges.<sup>1844</sup>

Read in isolation, the judgement may indeed be perceived as an iconoclastic and revisionist writing, although on the other hand, the judges "managed to set limits on the rewriting of history by the victors."<sup>1845</sup> In court, the alleged masterminding role of Bagosora in the genocide was reduced to that of a "temporary project manager" for 65 hours (between 6 and 9 April 1994).<sup>1846</sup> Then, on appeal, Bagosora's factual responsibility was even trimmed down even more and his life sentence was reduced to 35 years.<sup>1847</sup> The appeals chamber concluded that 'there is no finding or sufficient evidence that Bagosora ordered or authorised any of the killings for which he was found to bear superior responsibility' - but that he 'failed to take the necessary and reasonable measures to prevent these crimes,' while he was in a position to do so.<sup>1848</sup> Thus, while the historical lead-up to events in 1994 were crucial to the UNICTR's understanding of the genocide, it appears that on the basis of testimony from 242 witnesses, nearly 1600 exhibits and around 4500 pages of submissions from the prosecution and defence, the UNICTR judges were not able to – *beyond any reasonable doubt* - corroborate historiography on the architecture of the Rwandan genocide. The contrast is stark. On trial Bagosora was found guilty of genocide; not of 'masterminding' it since 1990 as generally thought, but by omission just when it started on April 1994. On the surface, the trial appears to be the sobering illustration of justice's powerlessness to substantiate historiography.<sup>1849</sup> That may be true, but it is too simplistic. It overlooks changing dynamics within the institution. What the Bagosora trial also shows is that while the tribunal's chambers grew more knowledgeable of what happened, became more critical towards the evidence and increasingly detached from the NGO narratives, they simply became less certain about what happened, how, when and why.<sup>1850</sup> Besides, while progressively becoming a professional law institution, judges became much more rigorous in testing the evidence and found witnesses testimony less convincing, credible and reliable. That has had a huge impact on how judges

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<sup>1844</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Judgement*, §1221.

<sup>1845</sup> Guichauoa, *From War to Genocide*, p. 322.

<sup>1846</sup> André Guichauoa, quoted in: Thierry Cruvellier, 'ICTR: Rwandan genocide – No Masterplan', *Radio Netherlands Worldwide International Justice*, 19 December 2011.

<sup>1847</sup> Bagosora's convictions for genocide, crimes against humanity and war crimes were upheld. However, it reversed Bagosora's convictions for the killings of Augustin Maharangari, Alphonse Kabiligi, and the peacekeepers murdered before his visit to Camp Kigali, as well as for the killings in Gisenyi town, at Mudende University, and at Nyundo Parish. The appeals chamber also set aside the finding that Bagosora was responsible for ordering crimes committed at Kigali area roadblocks, but found him liable as a superior instead. In addition, the appeals chamber reversed a number of Bagosora's convictions for murder as a crime against humanity and for other inhumane acts as a crime against humanity for the defilement of Rwandan Prime Minister Uwilingiyimana's corpse. UNICTR, 'Appeals Chamber Delivers Judgement in the Bagosora and Nsengiyumva Case,' *Press Release* (ICTR/INFO-9-2-695.EN; 14 December 2011).

<sup>1848</sup> UNICTR, Appeals Chamber, *Théoneste Bagosora & Anatole Nsengiyumva v. The Prosecutor: Judgement* (ICTR-98-41-A; 14 December 2011), §670 – 671.

<sup>1849</sup> Cruvellier, 'Brainless Genocide', p. 73.

<sup>1850</sup> Buss, 'Expert Witnesses and International War Crimes Trials', pp. 37-42.

worked. Writing ten years after the Akayesu judgement, the judges – followed the appeals chamber’s new restricted stance as highlighted in the 2007 Media judgement – completely dropped the ambition to simply understand the genocide as a whole and to author an historical record. Instead, they became way more critical towards the evidence, careful in their writings and much narrower in focus.<sup>1851</sup> That being the case, the core theory of the case was destined to fall apart. Ever since they had been drafted in 1997 with an intention to unravel the entire Rwandan genocide, the prosecutor’s charges, evidence and motivation had remained unaltered and static. When they went to trial in 2002, they were simply not prepared and up to date as to the realities of a maturing international justice system, which after ten years was no longer a naïve copy of Nuremberg. The sad reality of that system is that perhaps the prosecution was too late. Had Bagosora been tried at the same time as Akayesu and Kambanda, the judges at that time would have probably convicted him of the conspiracy.

By 2007 that was most certainly no longer the case. In fact, by then the trial judges had already explicitly outlined that ‘the process of a criminal trial cannot depict the entire picture of what happened in Rwanda’, emphasising that their task is narrowed by exacting standards of proof and procedure as well as its focus on the accused and the specific evidence placed before it.<sup>1852</sup> It did, however, make the important finding that the evidence may indicate a plan to commit genocide - in particular when viewed in the light of the subsequent targeted and speedy killings immediately after the shooting down of Juvénal Habyarimana’s aircraft - but that this was *also* consistent with preparations for a political or military power struggle in the context of an on-going war with the RPF. Yet, applying their narrow judicial focus, it was not for them to judge on that. They concluded that other or newly discovered information, subsequent trials or history may very well demonstrate a conspiracy - involving the accused - prior to 6 April 1994 - to commit genocide.<sup>1853</sup>

On 31 December 2015, the UNICTR formally closed its doors, after 5,800 days of proceedings. A month earlier, the tribunal had already held a closing ceremony, which included the inauguration of a new Peace Park in Arusha, “in memory of the victims and survivors of the Rwandan genocide and to the work of the ICTR [...]”.<sup>1854</sup> According to Judge Vagn Joensen, the Tribunal’s President, praised the “more than 3,000 witnesses who bravely recounted some of the most traumatic events imaginable during UNICTR trials.”<sup>1855</sup> But he did not go into detail about the contents and relevance of those testimonies for the historical record, nor on any of the findings by the judges. For Joensen, the largest legacy of the Tribunal is its development of “international legal concepts and providing a model for domestic judiciaries by codifying numerous facets of international criminal law and international humanitarian law that, at the time of the Tribunal’s establishment, were either

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<sup>1851</sup> *Idem*.

<sup>1852</sup> UNICTR, *Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Judgement*, §5.

<sup>1853</sup> *Ibidem*, §1221.

<sup>1854</sup> UNICTR, ‘Address to the United Nations Security Council: Final Report on the Completion Strategy of the International Criminal Tribunal for Rwanda by Judge Vagn Joensen, President’, *ICTR News*, 9 December 2015.

<sup>1855</sup> UNICTR, ‘Address by Judge Vagn Joensen’.

undeveloped or non-existent.”<sup>1856</sup> Obviously, he referred once against to the seminal judgement in the *Akayesu* case, that was not only the first judgement by an international court on the crime of genocide but also an “acknowledgment by an international court that genocide against the Tutsi had occurred in Rwanda in 1994, which was subsequently treated by the Tribunal as a fact of common knowledge that could not be disputed.”<sup>1857</sup> He then summed up how the 45 judgements had “significantly impacted the evolution of international law, including the first conviction for rape and sexual violence as a form of genocide as well as the first judgement against a Head of Government since the Nuremburg and Tokyo Tribunals. Further, by strengthening the jurisprudence on sexual violence crimes through the extended form of Joint Criminal Enterprise and by holding those in power accountable, the UNICTR has issued judgements that serve as powerful deterrents to those committing similar crimes in the future while also sending a clear message to the international community that all those who commit genocide or other atrocities, regardless of their position, will no longer go unpunished.”<sup>1858</sup> Several weeks later, the very political body that set up the UNICTR, the UN Security Council, copy-pasted most of Joensen’s remarks, acknowledging in addition though the “substantial contribution of the ICTR to the process of national reconciliation and the restoration of peace and security, and to the fight against impunity [...]”<sup>1859</sup>

Amidst the self-praising statements, the legacy in terms of truth finding about the genocide is only to be found in a single paragraph in the UNICTR’s report, which was published already a month before the tribunal even delivered its very last appeals judgement. Surprisingly, it is even shallower and more ambiguously phrased than what would actually transpire from the 45 judgements that the UNICTR issued in its 21 years of operation. In a paragraph titled “establishment of a genocidal campaign, it reads in full:

In the course of its investigations and prosecutions, the Office of the Prosecutor established beyond dispute that, during 1994, there was a campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda’s Tutsi population. This genocidal campaign was orchestrated at the highest levels of government, including by members of the interim Government. It engulfed the entire country and was perpetrated by a variety of means, including large-scale massacres at places of refuge such as churches and government offices. Directives issued by the interim Government called for the use of roadblocks to identify, kill or rape Tutsis. Public media was used to incite the population to commit acts of violence against the Tutsi population and those perceived to be sympathetic to them. Widespread and systematic acts of sexual violence were perpetrated against Tutsi women and girls. In addition, politically motivated killings took place against those opposed to the genocidal campaign waged by the interim Government.”<sup>1860</sup>

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<sup>1856</sup> *Idem.*

<sup>1857</sup> *Idem.*

<sup>1858</sup> *Idem.*

<sup>1859</sup> UNSC, ‘UN tribunal on Rwandan genocide formally closes – major role in fight against impunity’, *Press Release*, 31 December 2005.

<sup>1860</sup> UNSC, *Report on the completion of the mandate of the International Criminal Tribunal for Rwanda*, §55.

#### 4.13 Conclusions

This chapter has shown that history matters in Rwanda, as any other place that has experienced mass atrocities and identity-based violence. I have traced down that in the young, seemingly divided nation, it is a lifeline. People from various walks of life keep a tight grip on it, twist it and throw it out again. Owning the past, or at least controlling its narrative, is a survival strategy in the present. Those who pen down the narrative of history, carve a corridor into the future. Owning the discourse on the past is also a strategy of political survival. Without doubt, Rwanda's past has been - and still is - significantly disputed; not only inside Rwanda, but also in the Diaspora and among foreign students of the republic. This chapter has tackled the thorny issue of history in Rwanda; how it was conceived by colonial powers, how it became a driver for decolonisation, how it was instrumentalised into the lead up of the genocide, how it was reset after the genocide and how the post-genocide government instrumentalised it in its repression and social engineering, through transitional justice mechanisms, of society. Particular readings of history have served those in power as much as those opposed to power in Rwanda as foundational narratives. In Rwanda, it is a historical political tradition, or at least a continuum. Under German and Belgian occupation, whites reigned supreme over blacks and Tutsi, who were conceived to the whitest blacks, were privileged over Hutu. Hutu on their turn, perceived themselves as the true natives of Rwanda and both the Belgians and the Tutsi as foreign colonisers and suppressors. Bending the racist discourse of the European occupiers, the Hutu, during the First Republic persecuted and discriminated against Tutsi as part of its founding narrative. Only under the Second Republic, was the racial question, translated to an ethnic question. Animosity between Hutu and Tutsi in Rwanda continued but it was overshadowed by internal political divisions, economic crisis and a younger generation demanding change. The real problem was posed however by a larger Tutsi Diaspora living outside Rwanda, as refugees.

As shown in this chapter, the historiography of Rwanda before, during and after the genocide is a highly contested one. There are only a few points of consensus, either they be factual (as to historical events) or imagined (as pre-colonial history). The most heavily debated historical event remains the genocide in 1994, in particular its context of war, political strife and extremism. Whether transitional mechanisms have helped establish the truth about what happened is equally controversial. Protagonists have claimed that Gacaca has uncovered the reality on the micro-level, that ordinary trials showed agency on the mid-level and the UNICTR on the macro-level. Moreover, they have praised the non-judicial endeavours to spark reconciliation, healing and reintegration. Antagonists have claimed exactly the opposite, arguing that Gacaca were used to enforce a state narrative on the general population, that ordinary courts are used to silence critics and that the tribunal in Arusha was a total sham as it never dealt with the RPF on the macro political and military level. Moreover, they have argued that the non-judicial transitional justice worked against reconciliation, healing and

reintegration. In this almost bipolar heated, politicised and normative debate about the politics of transitional justice and whether it is even empirically possible to make even a slight guess on the real-time effects of the judicial and non-judicial post-genocide reckonings in Rwanda, I have limited this study to three questions: how to understand the invocations of historical narratives at the UNICTR, how do its judgements square with historiography and how to approach the UNICTR trials as historical sources.

Regarding the first question, I have shown that the invocation of historical narratives at the UNICTR stems from several reasons. First of all, agency mattered. Those doyens who researched, exposed and publicised the human rights abuses and the genocide from the mid-1990s onwards were either professional historians, were trained in history or were interested in history. In the first NGO-led commission of inquiry in 1993, there were at least two historians, amongst whom was Alison Des Forges, who also happened to have been the key researcher for Human Rights Watch on Rwanda since 1992. Des Forges' explanation of the genocide as a linear project became the leading narrative of the history of the genocide. Other rights organisations, such as African Rights, which was also led by a historian, Rakiya Omaar, from early on polished this narrative in an analogy to the Holocaust. Others, like academics, journalists and tribunal-staff, picked up this narrative of a 'Tropical Nazism' to be the true story about what had happened in Rwanda. At the UNICTR, the genocide narrative in early historiography – as progressed by Prosecution consultant and expert Des Forges – was then transformed into case theory by non-Rwandan prosecutors who had no knowledge at all about Rwanda. Despite of that, some prosecutors had the ambition for the tribunal to fully uncover the extent of the genocide and made it a historical ambition to prove their case theory, not as law, but as history. Secondly, law and legal history mattered. The UNICTR was the first international tribunal to deal with a genocide case (Akayesu). Informed by the Genocide Convention as judicial response to the Holocaust, the first response by prosecutors was a logical one: if the mass killing of European Jews was a linear, conspired and planned crime, the mass killing of Rwandan Tutsi must be treated similarly for it to fit the legal characterisation of the crime of genocide. Totally obscuring the uniqueness of the Rwandan case, the *modus operandi*, became to litigate a kind of tropical Nazism. In so doing, and by working anachronistically and in hindsight, all elements that would look like prior planning for genocide – such as defining the enemy, organising civil defence and inflammatory media – were too simplistically interpreted by prosecutors as genocide. Third, but closely related, was the fact that in order to prove the *mens rea* requirement for genocide, the prosecutors chose to frame particular political, social and military events, decisions and choices as process of genocidal strategizing from key leadership suspects. Next to that, prosecutors had to show that the Tutsi constituted a protected group under the Convention. In order to argue that they were either a *de facto* ethnic group or perceived racial group, they had to present to judges the evolution of these two group-identity markers in a country where both Hutu and Tutsi shared the same language, history, culture,

religion and traditions. However, particularly in terms of the *mens rea*, prosecutors were uncritical, arguably blind, towards alternative inferences of pre-genocide events, particularly in the more complex context of the civil war, rise of democracy and political infighting in Rwanda. From the start, the UNICTR prosecutors invoked history, valorised a historical narrative and sought to substantiate that particular version through oral historical evidence while risking that another reading of history, thus shedding reasonable doubt, was amongst the possibilities. I have shown the inherent dangers of having to prove case theories and presenting them as objective versions of history with a capital H or the truth, for that matter, with a capital T.

If prosecutors litigate a very particular reading of history, according to a young and yet uncomplicated historiography, what impact would that have on judgements rendered by judges who have to weigh the evidence put before them? Or, more concretely, how do the UNICTR judgements square with historiography? From what transpired from the key trials discussed above, there cannot be a simple answer, particularly if one considers that the tribunal itself over the years matured into a more professional institution. At the start, the non-Rwandan, the non-experienced and non-specialised judges, were eagerly learning about international criminal law and procedure, Rwandan history and the atrocities that had taken place. In their first case, Akayesu, judges easily subscribed to the NGO-narrative presented by Des Forges, the testimony of witnesses and the basics of political events in Rwanda. In what was a highly complex case involving an accused who from one day to the other turned into a *génocidaire*, the reading of the trial chamber of what happened in Rwanda was copy-pasted from the early historiography and available information at the time. Basically, in the early days, the UNICTR applied a very broad and liberal interpretative approach to legal provisions prohibiting mass crimes and stipulating individual criminal liability and the contextual circumstances in which they were committed. In a bid to judge history, they had sought to extend their purpose and work terrains, trotting way outside strict and literal interpretations of their mandates. It appears that for more than ten years, trial judges in Arusha had favoured a simplistic understanding of a genocidal process or had consoled themselves with the determinism of an *a posteriori* interpretation of history. But the UNICTR was also a learning institution. As time progressed and judges increasingly detached themselves from the normative and emotional aura surrounding the atrocities, became more informed about the sophisticated realities in Rwanda and grew critical towards the troublesome nature of the evidence produced by the prosecution, the judgements became more carefully written and nuanced. Increasingly and progressively, trial chambers and appeals chambers struck down generally held historical findings of their predecessors. From 2003, the trial chambers and appeals chambers moved towards a stricter interpretative construction of what they were set up to do, and on how to do it. After the media trial, which was very liberal in its findings on the role of the media and its agents in the alleged genocide planning, apparently for the first time, however, the appeals chamber strictly broke with that tradition and dedicated itself to a principle of strict construction of criminal law. As an

unsurprising result of this *modus operandi*, many findings made under the old interpretative framework, starting with the media case, were struck down, largely because of jurisdictional arguments and rising reasonable doubts on the narratives. Progressively, some judges over the course of years and different trials had also become real ‘specialists’ on Rwanda themselves and along the way they grew more sceptical, or less naïve, towards how the facts, if at all found, reasonably fitted the official historiography presented in the indictments by the prosecution. Moreover, as the tribunal’s chambers grew more knowledgeable of what happened, became more critical towards the evidence and increasingly detached from the NGO narratives, they simply became less certain about what happened, how, when and why. Besides, while progressively becoming a professional law institution, judges became much more rigorous in testing the evidence and witnesses’ testimony and found it less convincing and credible. A direct consequence thereof was that the UNICTR’s reading of history, or account on the genocide prior to April 1994, in its judgements from 2007 onwards changed significantly. More and more, they became constricted within a legal straitjacket and focused on the period after April 1994. This new stance significantly impacted the tribunals’ conspiracy trial against Bagosora, in which judges were simply not able to infer from the evidence the unchanged prosecution’s case theory. Its stricter approach does not mean that the genocide did not happen, it simply means that the tribunal ruled out the prosecution’s narrative on when, why and how it was committed.

In some way, the UNICTR judges have advanced alongside the development of historiography and increasingly found that the genocide was rather an event triggered by contingency than conspiracy. To an extent, this is in line with the consensus on the Rwandan genocide within the serious, detached non-politicised academia. Sober recent scholarship, based on UNICTR elicited evidence, also suggest the genocide evolved into a full-scale campaign from 12 April onwards and was rather the result of a political crisis-management in times of war than a pre-planned event.<sup>1861</sup> However, using the UNICTR archives, read conjointly and in lieu of other material particularly by professional historians, different explanations and narratives may arise in the future. Whereas judges ruled out the conspiracy based on the evidence presented to them at particular trials through particular procedures, historians are less constrained. Analysing the same evidence, they might well conclude, and have done so already, that there had been some high-level conspiracy to commit genocide in Rwanda before it unfolded. It is not justice’s powerlessness to judge history. It is rather the illustration of the “problem that arises when relying on a trial judgement as an objective account of history.”<sup>1862</sup> There is an inherent mismatch between the restrictive standard of proof of ‘beyond reasonable doubt’ judges *must* apply to an already narrowly judicially straitjacketed historical event and the standard of proof of balance of probabilities or convergence of evidence that the historian *can* apply to a

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<sup>1861</sup> For instance: Straus, *The Order of Genocide*; Guichaoua, *From War to Genocide*.

<sup>1862</sup> See this argument by: Gaynor, ‘Uneasy Partners’, pp. 1271-1272.

temporally and geographically unrestricted scope of historical events, structures and agencies.<sup>1863</sup> New historiography depends on the critical reading of the sources, the court's records which are available through the court's online archives. This chapter has contributed specifically to a deeper understanding of the trial record, through an analysis of the UNICTR investigations, litigations at trial and close reading of its key judgements. A key limitation when it comes to relying on the court records is the fact that is built on the fallible foundation of witness testimony, of which almost 70 % was provided behind closed doors. A lot of information thus, is not publicly available for crucial historical research.

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<sup>1863</sup> *Idem.*