

# THE PROSECUTION OF THE RWANDESE PATRIOTIC FRONT/ARMY (RPF/A) FOR CRIMES COMMITTED DURING AND AFTER THE RWANDA GENOCIDE

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**Abstract:** *The Prosecutor of the International Criminal Tribunal for Rwanda (ICTR) recently announced that the Rwanda authorities were in the process of arresting and indicting some elements of the RPF/A who are suspected to have committed war crimes during the 1994 genocide in Rwanda. The Rwanda authorities shortly thereafter announced that they had arrested some army men who are suspected to have engaged in perpetrating war crimes during the genocide. This paper explores the prospect of bringing the RPF/A elements to justice. Up to now, any suggestion that the RPF/A committed atrocities during and after the genocide is met with the full force of denials by the Rwandan authorities. The judicial institutions set up to redress the genocide have not dealt with any case involving RPF/A alleged crimes. The paper's conclusion is that to insist on the right of justice for all victims, is not to deny the genocide, nor does such insistence equate war crimes with genocide; it simply asserts that all victims of genocide, crimes against humanity and war crimes regardless of their affiliation, and regardless of the affiliation of the perpetrator, must have equal opportunity to seek redress for the wrongs done to them.*

**Key Words:** RPA/F; ICTR; Genocide; Prosecution; Completion Strategy; Genocidaires

## RUANDA YURTSEVER CEPHESİ/ORDUSU'NUN (RPF/A) RUANDA SOYKIRIMI SIRASINDA VE SONRASINDA İŞLEDİĞİ SUÇLAR NEDENİYLE KOVUŞTURULMASI

**Özet:** *Ruanda için Uluslararası Ceza Mahkemesi Savcısı, Ruandalı yetkililerin 1994 yılındaki soykırımda savaş suçu işlediğinden şüphelenilen Ruanda Yurtsever*

*Cephesi/Ordusu'nun (RPF/A) bazı elemanlarına yönelik iddianame hazırlama ve tutuklama süreci içinde olduklarını açıkladı. Kısa süre sonra Ruandalı yetkililer soykırım sırasında savaş suçu işlediğinden şüphelenilen bazı ordu mensuplarının tutuklandığını duyurdu. Bu makale RPF/A unsurlarının adalet önüne çıkarılması olasılığını incelemektedir. Bugüne kadar, soykırım sırasında ve sonrasında RPF/A tarafından mezalimler yapıldığına dair iddialar Ruanda yetkilileri tarafından kesin bir şekilde inkar edilmişti. Soykırımı doğrulamak amacıyla kurulan yargı kurumları RPF/A ile ilgili suç iddiaları ile ilgilenmemiştir. Bu çalışmada varılan sonuç, tüm kurbanlar için adalet istemenin, ne soykırımı inkar ne de savaş suçlarının soykırım ile eş tutulması anlamına geldiğini göstermektedir. Makalede savunulan nokta; kimin yaptığına, failin hangi tarafta olduğuna bakılmaksızın, tüm soykırım, insanlığa karşı suçlar ve savaş suçları kurbanlarının, kendilerine yapılanların kanıtlanması konusunda eşit fırsata sahip olmaları gerektiğidir.*

**Anahtar Kelimeler:** *Ruanda Yurtsever Cephesi/Ordusu, RPF/A, Ruanda için Uluslararası Ceza Mahkemesi, Soykırım, Adli Kovuşturma, Tamamlanma Stratejisi, Soykırımcılar*

## I. Introduction

While addressing the United Nations Security Council (UNSC) on the latest Completion Strategy for the International Criminal Tribunal for Rwanda (ICTR), the Prosecutor Hassan Jallow announced that some progress in the investigation of allegations against the members of the RPF has been made.<sup>1</sup> He announced that the ICTR in collaboration with the Rwandan authorities had been able to establish a prima facie case that on 5 June 1994, RPF soldiers killed some thirteen clergymen, including five Bishops and two other civilians at the Kabgayi Parish in Gitarama.<sup>2</sup> Whilst observing that some of the perpetrators of this crime are reported to have died while others are now serving within the Rwanda Army, he also averred that following inquiries, the Rwanda Prosecutor General had communicated his decision to shortly indict and prosecute

1 Hassan Jallow, "Prosecutor of the ICTR to the United Nations Security Council (UNSC)," (statement presented to the United Nations Security Council, June 4, 2008) at <http://69.94.53/ENGLISH/speeches/jallow080604.htm> (visited on June 17, 2008).

2 Hassan Jallow, "Prosecutor of the ICTR to the UNSC." cf. Amnesty International (AI), "Rwanda: Reports of Killings and Abductions by the Rwandese Patriotic Army (RPA), April-August 1994," (AI Index: AFR 47/16/94, October 1994) (reported this case as follows. Around 5 June 1994, four members of the RPA killed 13 Roman Catholic priests, including the Archbishop of Kigali, Vincent Nsengiyumva and three other bishops at Byimana a few kilometres south of Kabgayi Roman Catholic church near Gitarama. The RPF subsequently declared that the combatants had been assigned to the bishops as their bodyguards. On June 9, 1994, RPF leaders announced that one of the killers had been shot dead by fellow soldiers as he fled and that the other three had escaped).

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four serving senior military officers of the Rwandan Army with murder and complicity to murder, as war crimes in connection with this incident.<sup>3</sup> Towards the end of October 2008, two officers at the rank of captain (John Butera and Dieudonne Rukeba) were found guilty of this crime and sentenced to eight years in prison.<sup>4</sup> The other two (Brigadier Gumisiriza and Major Ukwishaka) were acquitted.

The prosecution of the RPF/A elements for crimes committed during the genocide has been very contentious in post-genocide Rwanda. The authorities in Kigali have been vehement in denying and resisting any attempt to infer that the RPF/A committed crimes in its drive to stop the genocide. In fact, one of the un-stated reasons why the former Prosecutor for the ICTR Carla del Ponte was removed from her position was her crusade to have RPF/A elements alleged to have committed crimes during the genocide to face prosecution.<sup>5</sup> In the past, any suggestion that RPF/A elements committed crimes during the genocide was met with the full force of Kigali denials. Since the end of the genocide, no official figures have been produced of the killings by the RPA before and after the genocide.<sup>6</sup> When the *Gacaca* jurisdictions<sup>7</sup> were instituted to prosecute genocide perpetrators and thereafter promote reconciliation in Rwanda, the suggestion that the jurisdictions also prosecute the RPA crimes was not accepted by the Rwandese authorities.

When confronted with questions about the RPA crimes during the genocide, the Kigali authorities have always claimed to have prosecuted RPA elements

- 3 Hassan Jallow, "Prosecutor of the ICTR to the UNSC." Subsequently the four were named as: Brigadier-General Wilson Gumisiriza, Major Wilson Ukwishaka, Captain John Butera and Retired Captain Dieudonne Rukeba. Butera and Rukeba pleaded guilty for the murders. *The New Times*, June 18, 2008. See story "RDF Officers before Court."
- 4 *BBC News*, "Rwandans jailed for priest deaths," October 24, 2008 at <http://ewsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/africa/7689871.stm> (visited on October 25, 2008).
- 5 See Marlise Simons, 'Rwanda is said to seek new Prosecutor for War Crimes Court,' *New York Times*, July 28, 2003; Rory Carroll, 'Genocide tribunal's ignoring Tutsi crimes,' *Guardian*, January 13, 2005.
- 6 The Kibeho camp incident clearly demonstrates this. The Kibeho Internally Displaced Peoples (IDPs) camp in Southern Rwanda was attacked in April 1995 by the RPA. The estimated number of people killed was given by the Rwanda government as 300. However, the Australian contingent in UNAMIR gave the figure of 8,000. Official UN figures put the dead initially at 4,000 a figure which was later revised to 2,000. See Howard Adelman and Astri Suhrke, "The International Response to Conflict and Genocide: Lessons from the Rwanda Experience," *Journal of Humanitarian Assistance*, (April 14, 1996) at <http://reliefweb.int/library/nordic/book2/pb021.html> (visited on October 14, 2008).
- 7 Organic Law No. 40/2001 of 26 January 2001 setting up <<*Gacaca* Jurisdiction>> and Organizing prosecutions for Offences constituting the crime of Genocide or Crimes against Humanity committed between October 1, 1990 and December 31, 1994 under which the *gacacas* were first introduced, they were known as "Jurisdictions". However, when this law was revised by Organic Law No. 16/2004 of 19 June 2004 Establishing the Organization, Competence and Functioning of *Gacaca* Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity Committed Between October 1, 1990 and December 31, 1994 [Official Gazette of the Republic of Rwanda, Special Official Journal No. 43 of 19 June 2004] they were renamed "Courts." In this paper we will use the new name of "Courts."

suspected of committing war crimes during the genocide. However, these prosecutions -besides not being open to the public-, ended with token sentences being handed down (see *infra*). In interviews as part of doctorate research I conducted in Rwanda with government officials in October-November 2004 and December 2005, I was informed that there is no such thing as the RPF/A committing war crimes during the genocide. Nevertheless, accusations have persisted from researchers such as Gerard Prunier and Alison des Forges among others, as to the culpability of the RPA.<sup>8</sup> This paper attempts to piece together from secondary sources the story of the allegations against the RPA. It explores the possibility of finally bringing the authors of human rights violations within the ranks of RPF/A to trial. From the outset it must be emphasized that this paper's aim is not to debate whether the RPA crimes were genocide, crimes against humanity or war crimes. The paper simply presents the argument that these crimes must thoroughly be investigated and their authors prosecuted, just like the alleged *genocidaires*.<sup>9</sup>

## II. Origins of Allegations Against the RPF/A: Some Findings

### A. Findings of Amnesty International

As early as October 1994, Amnesty International (AI) had already compiled a report detailing killings, massacres and abductions by the RPA.<sup>10</sup> In its report, AI had observed that “hundreds-possibly thousands-of unarmed civilians and captured armed opponents of the RPF, have been summarily executed or otherwise deliberately and arbitrarily killed, since countrywide massacres and other acts of violence flared up after the death of former President Habyarimana on 6 April 1994.”<sup>11</sup> It added, “many of the killings took place in a series of arbitrary reprisals mainly against groups of Hutu civilians, some of which occurred in some [instances] before 6 April [1994]. There were also deliberate and arbitrary killings as the RPA took control, [and] on uncovering evidence of genocide, took indiscriminate revenge on unarmed Hutu civilians.”<sup>12</sup> The report

8 See also Boniface Rutayisire, ‘Open Letter to IRC on RPF killings in 1994,’ Radio Katwe, (Brussels: August 12, 2008) at <http://www.radiokatwe.com/baruhakwadunianirpf080924.htm> (visited on October 15, 2008).

9 *Genocidaires* refers to all those persons who are suspected of having participated in the Rwanda genocide especially those who have been arrested and are being prosecuted for the crime of genocide by the International Criminal Tribunal for Rwanda (ICTR), the national courts in Rwanda and the *Gacaca* courts. It also includes those persons who participated in the genocide but who are yet to be arrested and charged with the crime of genocide.

10 AI, “Rwanda: Reports of Killings and Abductions by the Rwandese Patriotic Army (RPA).”

11 AI, “Rwanda: Reports of Killings and Abductions by the Rwandese Patriotic Army (RPA).”

12 AI, “Rwanda: Reports of Killings and Abductions by the Rwandese Patriotic Army (RPA).”

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concluded that “there were also deliberate executions carried out in the course of screening.”<sup>13</sup> A former Rwandan Minister of Interior [Seth Shendasonga] estimated that some 60,000 persons were killed by the RPA soldiers between April 1994 and August 1995.<sup>14</sup>

### B. Findings of Gerard Prunier<sup>15</sup>

According to Gerard Prunier, “the RPA carried out a large number of killings first, during the genocide itself and then later during the end of 1994 and even early into 1995, with a diminishing intensity.”<sup>16</sup> To him, there were three periods in the RPA killings: “first, a period of frequent and large [scale] killings, [which] seems to have started right at the beginning of the genocide in April 1994 and lasted up till around mid-1995 ...; second, a period of semi-respect of human rights between mid-1995 and early 1996; and third, a period of renewed killings (for quite different reasons) seems to have started around March 1996.”<sup>17</sup>

Prunier further contends that there are specific reasons for the RPA killings in all the three periods.<sup>18</sup> According to him, “during the first period, the RPA seems to have been content with letting its men clear a lot of “suspects” in a process of rough retribution for the genocide. During the second period, an effort seems to have been made to control the worst excesses. And during the third period, as cross-border raids from the camps in Kivu<sup>19</sup> became more frequent, the RPA started to kill civilians after failing to catch guerrillas during military sweeps ...”<sup>20</sup>

13 AI, “Rwanda: Reports of Killings and Abductions by the Rwandese Patriotic Army (RPA).”

14 Human Rights Watch (HRW), “Law and Reality: Progress in Judicial Reform in Rwanda,” (New York: July 2008), p. 89.

15 He is among one of the authors that have documented the atrocities committed by the RPF/A by giving the number(s) of people affected. He has been banned from the territory of Rwanda due to his efforts.

16 Gerard Prunier, *The Rwanda Crisis: History of a Genocide*, (Kampala: Fountain Publishers, 2001), p. 359. According to Prunier, “the number of people killed by the RPF in these massacres remains polemical. Some estimates have put the number as high as 100,000 while others advance a more conservative figure of 10,000.” Gerard Prunier, *The Rwanda Crisis: History of a Genocide*, p. 360. cf. Helena Cobban, “The Legacies of Collective Violence: The Rwandan Genocide and the Limits of Law,” *Boston Review: A Political and Literary Review*, (April/May 2002) (observing that “between 120,000 and 150,000 people were killed in anti-Hutu massacres committed by the government forces inside Rwanda since 1994; more than 200,000 Hutus disappeared in Eastern Democratic Republic of Congo (DRC) (then Zaire) during massacres carried out by the Rwandese army in 1996; and the Rwanda government is implicated in the disappearance of an additional 300,000 Hutus in the DRC in the months after its Congolese ally, Laurent Desire Kabila took over power there in May 1997”).

17 Gerard Prunier, *The Rwanda Crisis: History of a Genocide*, p. 361.

18 Gerard Prunier, *The Rwanda Crisis: History of a Genocide*, p. 361.

19 The provinces of North and South Kivu are found in Eastern DRC. After the RPF/A had ended the genocide in Rwanda, the suspected *genocidaires* ran to then Zaire. They established camps inside Zaire and started launching military raids into the territory of Rwanda. The RPF/A in turn launched counter-insurgency operation on the territory of the DRC.

20 Gerard Prunier, *The Rwanda Crisis: History of a Genocide*, p. 361.

### C. Findings of the United Nations High Commissioner for Refugees (UNHCR)

Sadako Ogata -the United Nations High Commissioner for Refugees (UNHCR)- commissioned Robert Gersony, to advise the organization as to whether it should encourage the refugees who had fled Rwanda in the wake of the genocide to return. In his report, Gersony stated that he had unearthed evidence showing that there had been “calculated, pre-planned, systematic atrocities and genocide against Hutus by the RPA whose methodology and scale (30,000 massacred) could only have been part of a plan implemented as a policy from the highest echelons of government.”<sup>21</sup> In his view, these were not individual cases of revenge and summary trials (*sic*) but a pre-planned [and] systematic genocide against the Hutus.<sup>22</sup> The Gersony Report was embargoed by the United Nations Secretary General (UNSG) out of sympathy for the newly formed interim RPF/A government.<sup>23</sup>

### D. Findings of the United Nations Independent Commission of Experts (CoE)

In his report of 31 May 1994 on Rwanda to the UNSC, Boutros Boutros Ghali had stated “[the RPF has] acknowledged that armed persons in civilian clothing have been killed by RPF personnel.”<sup>24</sup> Although evidence of genocide being committed in Rwanda was abundant, the UNSC decided to follow the step-by-step approach it had adopted in the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), and requested the UNSG to establish a Commission of Experts (CoE)<sup>25</sup> to provide him with evidence of serious violations of international humanitarian law and acts of genocide committed in Rwanda.<sup>26</sup>

21 UN, Outgoing Code Cable, *The Gersony Report Rwanda*, October 14, 1994. Exhibit No: AK 112, Case No: ICTR-98-41-T, November 16, 2006, p. 2. (hereinafter *The Gersony Report*) (On file with the author). cf. Alana Erin Tiemessen, “After Arusha: *Gacaca* Justice in Post-Genocide Rwanda,” *African Studies Quarterly*, vol. 8 (Fall 2004): p. 69 (observing that the RPF organized massacres of tens of thousands of civilians as it soldiers advanced in Rwanda with an estimated death toll of 25,000 to 45,000 from April through August of 1994)

22 UN, The Gersony Report Rwanda...

23 According to Filip Reyntjens, “Rwanda, Ten Years On: From Genocide to Dictatorship,” in *The Political Economy of the Great Lakes Region*, eds. Stefaan Marysse and Filip Reyntjens (Basingstoke: Palgrave Macmillan, 2005), p. 16 (the report was not published because “a strong feeling prevailed in the international community that some latitude needed to be given to [the RPF] regime [that was] facing the colossal task of reconstructing the country in human and material terms”).

24 United Nations Security Council (UNSC), “Report of the Secretary General on the Situation in Rwanda,” (May 31, 1994), para. 7.

25 Secretary General of the United Nations (SGUN), “Report of the SGUN pursuant to Paragraph 5 of the UNSC Resolution 955 (1994)” (February 13, 1995) S/1995/134, pp. 5-8.

26 UNSC, “Report of the Secretary General pursuant to Paragraph 5..., para. 2. See also Daphna Shraga and Ralph Zacklin, “The International Criminal Tribunal for Rwanda,” *European Journal of International Law*, vol. 7(4) (1996): pp. 502-3.

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The CoE was established under Resolution 935, “to examine and analyze information, investigate and provide the UNSG with its conclusions on the evidence of grave violations of international humanitarian law, including the evidence of possible acts of genocide in Rwanda.”<sup>27</sup> In its final report in October 1994, the CoE stated that “it had received information containing extensive evidence of systematic killings and persecution of Hutu individuals by the RPF army.”<sup>28</sup> The CoE added that the Government of Rwanda (GoR) has acknowledged that some 60 to 70 Hutus were killed by the RPF army soldiers in various parts of the country, although it described these killings as “isolated incidents.”<sup>29</sup> The CoE further posited that “there existed substantial grounds to conclude that mass assassinations, summary executions, breaches of international humanitarian law and crimes against humanity [have] also been perpetrated by Tutsi elements against Hutu individuals and that allegations, concerning these acts should be investigated further.”<sup>30</sup> It added that “while the massacres perpetrated by RPF were less systematic than those of the Rwandese armed forces and Hutu militia, certain crimes against humanity are alleged to have been carried out by RPF.”<sup>31</sup> In the aftermath of the genocide, the predominantly Hutu *genocidaire* government in exile had also submitted a list<sup>32</sup> of RPF atrocities to the CoE. The broad conclusion of the CoE was that “on the basis of ample evidence, individuals on both sides of the armed conflict in Rwanda in the period of 6 April to 15 July 1994 had perpetrated serious breaches of international humanitarian law and crimes against humanity.”<sup>33</sup>

The CoE considered the relative merits of municipal prosecutions-Rwandan courts-for these international crimes and found that “international prosecutions were preferable, [because they would ensure] independence, objectivity, impartiality, and the perception (both in Rwanda and abroad) that convictions [would] have been fairly reached.”<sup>34</sup> The CoE also noted that the gravity of the violations had extended beyond Rwanda, and therefore, “the development of international criminal law to better deter such crimes from being perpetrated in the

27 UNSC Res. 935 (1 July 1994), UN Doc S/RES/935, para. 1.

28 UNSC, “Preliminary Report of the Independent Commission of Experts established in accordance with the Security Council Resolution 935 (1994)” (October 4, 1994) S/1994/1125, para. 30.

29 UNSC, “Preliminary Report of the Independent Commission of Experts...”, para. 30.

30 UNSC, “Preliminary Report of the Independent Commission of Experts...”, para. 82.

31 UNSC, “Preliminary Report of the Independent Commission of Experts...”, para. 79.

32 For details see C. Scheltema and W. Van Der Wolf, *The International Tribunal for Rwanda: Facts, Cases and Documents*, (Nijmegen, Netherlands: Global Law Association, 1999), pp. 251-2.

33 UNSC, “Preliminary Report of the Independent Commission of Experts...”, para. 146.

34 Koula Papanicolas, *Genocide in Rwanda: Documentation of Two Massacres during April 1994, US Committee for Refugees Report*, (Washington: USCR, November 1994), p. 21.

future, not only in Rwanda but anywhere, would be best fostered by international prosecutions rather than by domestic courts.”<sup>35</sup>

In evidence submitted to the CoE, Kagame admitted the RPA’s personnel engagement in massacres. He averred that “the government [had] detained 70 RPF soldiers, including three [at the rank of] Major, [whom it] intended to try and punish for private acts of revenge exacted against Hutus.”<sup>36</sup> Nevertheless, despite the assurances, up to now government officials rarely, if ever, refer to RPF massacres in their speeches, and very few trials of those allegedly responsible have been held.<sup>37</sup>

## F. Findings of the Commission on Human Rights (CHR)

On 25 May 1994, the Commission on Human Rights (CHR) appointed Degni-Segui as Special Rapporteur to investigate at first hand the human rights situation in Rwanda and to receive relevant, credible information on the human rights situation there from governments, individuals and intergovernmental and non-governmental organizations.<sup>38</sup> In his report of 28 June 1994, the Special Rapporteur stated that “in the area controlled by the RPF, the cases of massacres reported are rather rare, indeed virtually non-existent, perhaps because little is known about them.”<sup>39</sup> Nevertheless he added, “what is certain, however, is that the RPF has been guilty of summary executions.”<sup>40</sup> The Special Rapporteur further averred that as far as the organs or authorities involved in the recent atrocities are concerned, some responsibility can be apportioned immediately to “RPF organs, particularly those in charge of its military activities.”<sup>41</sup> In another report on 12 August 1994, the Special Rapporteur said that “there are also reports of disappearances and abductions, as well as summary executions. The latter acts are according to persistent rumour, the work of the RPF. The members of the

35 Koula Papanicolas, *Genocide in Rwanda...*, p. 21.

36 Koula Papanicolas, *Genocide in Rwanda...*, p. 21. See also Philip Gourevitch, *We wish to Inform you the Tomorrow we will be Killed with our Families: Stories from Rwanda*, (London: Picador, 1998), p. 246 (noting that in conversations with Kagame, he had told him that more than one thousand RPA soldiers had been thrown in military jails for killings and indiscipline).

37 Timothy Longman and Theoneste Rutagengwa, “Memory, Identity and Community in Rwanda,” In *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, eds. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004), p. 167.

38 United Nations Economic and Social Council, Commission on Human Rights (UNESC-CHR), “Resolution E/CN. 4/S-3/1” (25 May 1994), para. 20.

39 UNESC-CHR, “Report on the situation of Human Rights in Rwanda submitted by Mr R. Degni-Segui, Special Rapporteur of the CHR, under paragraph 20 of Commission Resolution E/CN. 4/S-3/1 of 25 May 1994” (28 June 1994) E/CN. 4/1995/7, para. 22.

40 UNESC-CHR, “Report on the situation of Human Rights in Rwanda...”, para. 22.

41 UNESC-CHR, “Report on the situation of Human Rights in Rwanda...”, para. 63.



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government, who implicitly acknowledge the facts, do not attribute responsibility to the RPF. They do not, however, deny the fact that rogue elements of the RPF or the army may engage in such acts as reprisals.”<sup>42</sup>

In his report on 11 November 1994, the Special Rapporteur analyzed various cases of summary executions carried out by the RPA. He concluded that “RPA soldiers and civilians are indeed guilty of massacres of Hutu in various places in Rwanda ... Persons suspected of having taken part in the [genocide] have been executed either by the civilian population itself, by soldiers [of RPA] on at the civilian population’s request or on their own initiative.”<sup>43</sup> He added that, “concordant and reliable testimony describes nearly the same scenario. Men, children and elderly people have been accused of being traitors and massacred following so-called information meetings convened by RPA elements.”<sup>44</sup>

The RPF government never denied allegations against the RPA but gave two reasons for the latter’s behaviour. First, that the main reason for its soldiers carrying out massacres was private revenge. Secondly, that the RPF had hastily recruited juvenile delinquents during its drive to Kigali and even former militiamen, on what was not a very selective basis. Thus these were the persons responsible for the massacres. The question that remained un-answered was: Why wasn’t the leadership of the RPF exercising effective control on them?

### **G. Findings of the International Panel of Eminent Personalities**

The International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events (*hereinafter* “The Panel”) was created in 1998 by the Organization of African Unity (OAU) with a mandate *inter alia* to investigate the 1994 genocide in Rwanda and the surrounding events in the Great Lakes Region as part of efforts aimed at averting and preventing further widespread conflict in the region. The Panel -as part of its mandate- also looked at the allegations of human rights violations made against the RPA/F. It concluded that it had been persuaded by evidence that RPA human rights violations had

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42 UNESC-CHR, “Report on the situation of Human Rights in Rwanda submitted by Mr R. Degni-Segui, Special Rapporteur of the CHR, under paragraph 20 of Commission Resolution E/CN. 4/S-3/1 of 25 May 1994” (12 August 1994) E/CN. 4/1995/12, para. 9.

43 UNESC-CHR, “Report on the situation of Human Rights in Rwanda submitted by Mr R. Degni-Segui, Special Rapporteur of the CHR, under paragraph 20 of Commission Resolution E/CN. 4/S-3/1 of 25 May 1994” (11 November 1994) E/CN. 4/1995/70, paras. 39 and 40.

44 UNESC-CHR, “Report on the situation of Human Rights in Rwanda submitted ... (11 November 1994), para. 40.

taken place before, during and after the genocide.<sup>45</sup> The Panel added that “in its successful drive to win the war and halt the genocide, the RPF/A had killed many non-combatants. As it sought to establish its control over the local population, the RPF/A had killed civilians in numerous summary executions and in whole-scale massacres.”<sup>46</sup> It must be noted that the Panel never did independent research on the allegations against the RPF/A, but rather reviewed evidence already presented by individuals and organizations, which we have presented above.<sup>47</sup> In making its conclusions, the Panel conceded that anyone seeking the truth on the RPF/A human rights violations will find disturbingly contradictory data.<sup>48</sup> It added as a broad conclusion that “it is quite unrealistic to deny RPF responsibility for serious human rights abuses in the months during and after the genocide.”<sup>49</sup> From our exposition above, the contradiction in terms of the different findings by the different individuals and organizations is well established. Nevertheless, all the findings point to the fact that RPF/A elements committed crimes during the genocide.

#### H. Making Sense of all the Findings

Whilst all the above individuals and organizations make claims about the RPA crimes, there is no agreed figure of the number of people massacred by the RPA soldiers during and after the genocide. What generally is agreed is that RPF soldiers are guilty of killing civilians, often in large numbers, although exactly how many is in serious dispute.<sup>50</sup> The dispute over numbers will continue until research is done to establish the exact figure. This will not be possible unless the RPF/A authorities allow such studies to be undertaken. In this connection we need to quote the Panel which succinctly noted that “at the start of its campaign to capture power the RPF exhibited a recurrent pattern of behaviour, of, while professing a policy of openness and commitment to human rights, it at the same time hindered any investigation into abuses committed by its elements and made it impossible for any investigator to speak freely and privately with any potential witness(es).”<sup>51</sup> The Panel added that “even during the months towards the end of

45 African Union (AU), *Rwanda: The Preventable Genocide - The Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events*, (Addis Ababa: OAU, 2000), p. 257.

46 African Union (AU), *Rwanda: The Preventable Genocide...*, p. 258. According to the anonymous reviewer of this paper, apropos of non-combatants, “enemy combatants/fighters, if any, would also have to be considered in the same category of protected persons” (Communication on file with the author).

47 For details see AU, *Rwanda: The Preventable Genocide...*, pp. 258-261.

48 AU, *Rwanda: The Preventable Genocide...*, p. 258.

49 AU, *Rwanda: The Preventable Genocide...*, p. 261.

50 AU, *Rwanda: The Preventable Genocide...*, p. 257.

51 AU, *Rwanda: The Preventable Genocide...*, p. 257.

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and after the genocide, the RPF was remarkably successful in restricting access by foreigners, including journalists and human rights investigators, to certain parts of the country, a pattern it has followed today.”<sup>52</sup> In other words, the exact figure of how many people were killed by the RPF/A elements will never be known if the Rwandan government will have its way. What is nevertheless clear is that these crimes are crying out for justice in the various justice processes that have been instituted to deal with the issue of genocide in Rwanda.

### III. The ICTR and the Allegations Against the RPA

In the past, the ICTR has had run-ins with the government of Rwanda on its insistence that all war crimes committed from January to December 1994 must be investigated, as per its remit.<sup>53</sup> The second ICTR Chief Prosecutor, Louise Arbour observed in 1999 that “for the [tribunal] to be able to fulfil its mandate, every serious crime committed on both sides will have to be examined.”<sup>54</sup> At a press conference held at Arusha in December 2000, the new Prosecutor Carla del Ponte had promised that she was going to arrest some criminals in Kagame’s hierarchy before the end of 2001.<sup>55</sup> It must be noted that the ICTR Statute gives the Prosecutor authority to “prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda ...”<sup>56</sup> This competence clearly covers even those violations committed by the RPF/A. Subsequently in April 2002, Del Ponte had indicated that in order for the ICTR to render impartial and equitable justice to the Rwandan people, investigations were underway to indict by the end of the year (2002), members of the RPA who organized systematic massacres against the Rwandan people.<sup>57</sup> In fact, by the time she made this declaration, she had secretly launched “Special Investigations” into the 1994 activities of the mainly Tutsi RPA as it fought to overthrow both the Habyarimana and the *genocidal* government.<sup>58</sup> Although the RPF dominated government had prevented investigators from interviewing anyone inside Rwanda, she is believed to have had four cases ready to go.<sup>59</sup>

52 AU, *Rwanda: The Preventable Genocide...*, p. 257.

53 Eugenia Zorbas, “Reconciliation in Post-Genocide Rwanda,” *Africa. Journal of Legal Studies*, vol. 1 (Spring 2004): p. 34.

54 Cited in Luc Cote, “Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law,” *Journal of International Criminal Justice*, vol. 3 (March 2005): p. 176.

55 Jacques Niyezimana, *Ce que Kagame prepare pour le TPIR*, Juin 28, 2002 (On file with the author).

56 Statute of the International Criminal Tribunal for Rwanda (ICTR), art. 1.

57 Jacques Niyezimana, *Ce que Kagame prepare pour le TPIR*.

58 Steven Edwards, ‘Del Ponte says UN caved to Rwandan Pressure,’ *National Post*, September 17, 2003.

59 Steven Edwards, ‘Del Ponte says UN caved to Rwandan Pressure ...

As soon as Del Ponte announced the opening of her investigations, the government's hostility towards the ICTR broke into the open.<sup>60</sup> President Kagame issued a statement in which he stated his often repeated mantra that:

[a]ny crimes committed by individuals within the RPA were investigated and punished. They [the ICTR] know that very well. [...] How then does the ICTR attempt to place the RPA, who actually put an end to the genocide, at the same level as the *genocidaires*, the very perpetrators of the genocide? [...] They [the international community] ran away from responsibility and left people to be killed in the thousands. [...] So what moral authority do they have?<sup>61</sup>

In another instance of defending the RPA, Kagame asked rhetorically, "shouldn't we be trying those people for allowing genocide to take place in Rwanda, when they had full responsibility to prevent that, let alone stop it? If people stood by watching genocide take place, why can't they be tried?"<sup>62</sup> He concluded by noting that "those of the UN who are saying that [the RPF should be tried for war crimes and crimes against humanity] are [the] ones who allowed the genocide to take place in Rwanda."<sup>63</sup> Again in another interview to a French Magazine in February 2005, Kagame was asked why he had consistently refused to have members of his army and party investigated by the ICTR. His response was that:

the Arusha Tribunal prosecutes genocide crimes, and our war in 1994 was devised to liberate the country from the *genocidaires*. There is therefore no common measure, possible comparison, or any parallel to be drawn between us and them. At Nuremberg in 1945, it is the Nazi's who were judged and not those who had defeated them [...], there is no offence that has been committed by our men which has not been punished, sometimes very severely; yesterday, today or tomorrow.<sup>64</sup> (Translation from French by the author).

60 In fact it has been observed that it was one of the reasons why the government advocated her removal from the employment of the tribunal. See Marlise Simons, 'Rwanda is said to seek new Prosecutor for War Crimes Court,' *New York Times*, July 28, 2003; Rory Carroll, 'Genocide tribunal's ignoring Tutsi crimes,' *Guardian*, January 13, 2005.

61 Cited in Eugenia Zorbas, "Reconciliation in Post-Genocide Rwanda," p. 34.

62 Cited in Eugenia Zorbas, "Reconciliation in Post-Genocide Rwanda," p. 34.

63 Cited in Eugenia Zorbas, "Reconciliation in Post-Genocide Rwanda," p. 34.

64 *Jeune Afrique/L'Intelligent*, no. 2302, February 20th-26th, 2005, p. 42. The Federation International de Droits de L'Homme (FIDH), "Rapport de Situation- Entre Illusion et Desillusions: Les Victimes devant le Tribunal Penal International pour le Rwanda (TPIR)," No. 343, Octobre 2002, p. 17 (has observed that "President Kagame confirmed that the RPA has already severely punished those responsible for crimes. It quoted him as

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Of course, President Kagame is right. It is the RPA which stopped the genocide when the international community was looking on. It could be construed that the alleged crimes of the RPA were an unfortunate but necessary acts perpetrated in the pursuit of a just war to stop one of the 20<sup>th</sup> Century's most terrible crimes. Here parallels can be drawn for example, with the lack of desire to prosecute the Allied elements responsible for bombing the German towns of Dresden and Hamburg during the Second World War. The argument for the lack of desire to prosecute was that the bombing was a necessary evil carried out to defeat the Nazi regime.

In an interview with Johnstone Busingye, one time Permanent Secretary in the Ministry of Justice,<sup>65</sup> he intimated to me that the government of Rwanda had never refused to allow the tribunal to investigate suspected RPA personnel. Rather what it had refused was for the suspect RPA officers "to be mixed with the *genocidaires* in Arusha."<sup>66</sup> According to him, Del Ponte had to be replaced as Prosecutor of the ICTR because "she was a stooge of the French. She tried to promote the latter's theory of "double genocide" by insisting that the perpetrators of genocide and the RPA suspects were equal." To him, this was totally unacceptable, although he added that "the government [of Rwanda] was ready to hand over indicted RPA suspects to a third country for prosecution." He told me that this position had been communicated to the current Prosecutor of the tribunal, although he was yet to respond.

According to statistics and documents from the Office of the Prosecutor (OTP) of the Military Court Martial, between 1996 and 2000, eight cases involving 49 RPA men were prosecuted for the offences of murder, non-assistance to persons in danger and looting.<sup>67</sup> A further four cases involving 30 soldiers were

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saying that the Military Court Martial had seriously investigated and found some of our soldiers guilty. The guilty soldiers had been sentenced and executed. He added that it is a very grave error to want to make a parallel between the crimes committed by the RPA elements and the crime of genocide. Our forces fought to prevent the *genocidaires* from killing the innocent people"). (Translation from French by the author). cf. Dan Saxon, "Exporting Justice: Perceptions of the ICTY among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia," *Journal of Human Rights*, vol. 4 (2005): pp. 563-4 (noting that as regards the ICTY, many Bosnian Muslims could not understand, and still cannot understand, how their soldiers and officers could be accused of war crimes, because they believe that their nation was the victim of genocide perpetrated by Serb and Croat forces. This perspective is also common among the Kosovo Albanian community, which, for similar reasons, reacted negatively to the first indictments of Kosovo Liberation army (KLA) soldiers).

65 He is currently the President of the High Court of Rwanda.

66 Personal Interview Kigali, November 30, 2005.

67 FIDH, "Rapport de Situation- Entre Illusion et Desillusions ...," p. 17. The breakdown was as follows: 1996, two cases for crimes of murder and non-assistance, involving three soldiers were prosecuted; 1997, two cases for crimes of murder of civilians, involving ten soldiers were prosecuted; 1998, two cases for crimes of murder of civilians, involving twenty-five soldiers were prosecuted; and 2000, eight cases for crimes of murder and looting, involving eleven soldiers were prosecuted. See also Human Rights Watch, "Law and Reality," p. 90 (noting that in government documents listing RPA prosecutions, the crimes charged are called "crimes of revenge" or "human rights violations", and not war crimes or crimes against humanity).

investigated,<sup>68</sup> with 29 senior officers being prosecuted between 1995 and 2002.<sup>69</sup> Of these, six cases involved the violations of human rights, six for criminal negligence, and one for manslaughter. Only one case of Major Nyirahakizimana involved the crime of genocide.<sup>70</sup> The rest of the officers were prosecuted for various offences such as: theft, corruption, fraud, embezzlement and traffic accidents. Nevertheless, it has been noted that apart for Major Bigabiro who was prosecuted for offences committed during the 1994 genocide, all the other prosecutions have been for crimes that were committed after 1994, hence falling outside the *rationae temporis* of the ICTR.<sup>71</sup> To some, this record is reminiscent of the domestic trials of German war criminals at Leipzig after WWI, where those who were found guilty were given ridiculously light sentences, and then set free soon afterwards.<sup>72</sup> To Filip Reyntjens, the token prosecutions go a long way to show that in post-genocide Rwanda, “organized massacres of civilians are never recognized as the responsibility of the commanding officers.”<sup>73</sup> To-date, no RPA suspect has been brought to account by the ICTR for genocide or war related crimes.

In a 26 July 2002 letter to the President of the UNSC, the government of Rwanda argued that “the ICTR is politically motivated to bring legal action against members of the RPA, and in its view this is not the way to bring stability and national reconciliation in Rwanda.”<sup>74</sup> According to some, the main reason why the government was against the investigation of RPA activities is, “the risk that such investigations would un-earth the fact that the RPA crimes were not individual acts of vengeance or error, but crimes which were organized and authorized by the high command of the RPA.”<sup>75</sup> Such investigations, it is opined will put the current Rwandan authorities in great difficulty. Nevertheless, the continued failure to conduct the investigation, has led some to re-name the TPIR (the French acronym of the ICTR), the TPIH-*Le Tribunal Penal International pour les Hutus*.<sup>76</sup>

68 FIDH, “Rapport de Situation- Entre Illusion et Desillusions,” p. 17.

69 FIDH, “Rapport de Situation- Entre Illusion et Desillusions ...,” p. 17. cf. HRW, “Law and Reality ...,” p. 90 (noting that after 1998, Rwanda military courts prosecuted no soldiers accused of crimes allegedly committed in 1994).

70 Statistics of Human Rights Abuses by RPA Soldiers. He was convicted and demoted. (On file with the author).

71 FIDH, “Rapport de Situation- Entre Illusion et Desillusions ...,” p. 18.

72 Kingsley Chiedu Moghalu, *Rwanda's Genocide: The Politics of Global Justice*, (New York: Palgrave Macmillan, 2005), p. 143. See also Ann Tusa and John Tusa, *The Nuremberg Trial*, (London: McMillan, 1983) (generally noting that when several of the convicted escaped from prison, public congratulations were offered to the prison warders).

73 Filip Reyntjens, “Rwanda, Ten Years On ...,” p. 38.

74 FIDH, “Rapport de Situation- Entre Illusion et Desillusions ...,” p. 17.

75 FIDH, “Rapport de Situation- Entre Illusion et Desillusions ...,” p. 18.

76 Eugenia Zorbas, “Reconciliation in Post-Genocide Rwanda,” p. 34.

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### IV. Selective Prosecutions by the ICTR

Jean-Marie Kamatali has observed that “Rwandans will judge the ICTR’s achievements not only on how it has prosecuted the members of the defeated Hutu government, but also on how well it prosecuted the victors of the 1994 war, who also committed war crimes and crimes against humanity.”<sup>77</sup> Impartiality is a core dimension of international criminal justice, yet one in which international criminal tribunals continue to be tested.<sup>78</sup> While conducting prosecutions for mass atrocity, Edward Newman has cautioned that “there should be a non-selective, balanced and independent prosecution policy.”<sup>79</sup> According to Larry May, “selective prosecution is only justified-if it is at all-when the selection of cases is based on administrative issues rather than the characteristics of the victims or perpetrators.”<sup>80</sup> Apropos of the ICTR, the Prosecutor is given the sole responsibility to investigate and prosecute offences covered by the Statute.<sup>81</sup> So far, the Prosecutor has acknowledged that “prosecutorial activity has tended to concentrate on the genocide-with the result that the accused persons have tended to be Hutu,”<sup>82</sup> a policy that has come under challenge from some defendants and observers. Timothy Kalyegira, a columnist with the Ugandan newspaper *The Daily Monitor* has wondered: “In every single world news report on the arrest of suspects in the 1994 Rwandan genocide, it is almost always a Hutu that is arrested. Never a Tutsi.”<sup>83</sup> Kalyegira asks: “might the international criminal justice never stop to ask whether the Tutsi might have taken part in the genocide either initiated or as part of RPF reprisals?”<sup>84</sup> For the defendants, they have alleged that the policy of selective prosecution is biased, discriminatory and being improperly exercised, and have thus, requested the tribunal to stay proceedings or intervene in some other judicial way, to put it to an end. While dismissing their allegations, the tribunal has held that in challenging the prosecutorial discretion based on selective prosecution, the applicant must establish: that his own

77 Jean-Marie Kamatali, “From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans,” *New England Journal of International and Comparative Law*, vol. 12 (2005) available in LEXIS-NEXIS Library.

78 Kingsley Chiedu Moghalu, “Image and Reality of War Crimes Justice: External Perceptions of the ICTR,” *The Fletcher Forum of World Affairs*, vol. 26 (2002): p. 38.

79 Edward Newman, “Transitional Justice: The Impact of Trans-national Norms and the UN,” in *Recovering from Conflict: Reconciliation, Peace and Development*, eds. Edward Newman and Albrecht Schnabel (London: Frank Cass, 2002), p. 44.

80 Larry May, *Crimes against Humanity: A Normative Account*, (Cambridge: Cambridge University Press, 2005), p. 212.

81 Article 5.

82 Hassan Jallow, “Prosecutorial Discretion and International Criminal Justice,” *Journal of International Criminal*, vol. 3 (March 2005): p. 156.

83 *Daily Monitor*, July 19, 2008. See story, “Can the ICC deliver true Justice across the world?”

84 *Daily Monitor*, July 19, 2008.

prosecution was for improper motives; and, second, that those similarly situated persons were not so prosecuted.<sup>85</sup> I cite the case law here.

In *Ntarikutimana*, the tribunal declared, while citing the decision of the ICTY's Appeal Chamber in *Delalic*<sup>86</sup> that "where an appellant alleged selective prosecution, he or she must demonstrate that the Prosecutor improperly exercised her prosecutorial discretion in relation to the appellant himself or herself. [...] The accused must show that the Prosecutor's decision to prosecute them or to continue their prosecution was based on impermissible motives, such as ethnicity or political affiliation, and that she failed to prosecute similarly situated suspects of different ethnicity or political affiliation."<sup>87</sup> In *Ndindilimana*,<sup>88</sup> the defence had submitted that there existed prosecutorial abuse of process and non-compliance with the Statute and Rules of the Tribunal in the prosecution's selective and discriminatory policy of not prosecuting the RPF, and instead prosecuting only Hutus. The defence had alleged that the prosecution had done this for "political rather than evidentiary reasons." Further, it had contended that the OTP had "a culture of impunity towards the RPF." In its ruling the tribunal held that "[...] consistent with the Tribunal's jurisprudence, the Prosecution has broad discretion in relation to the [...] preparation of indictments. The breadth of discretion of the Prosecutor, and the fact of [his] statutory independence, imply a presumption that the prosecutorial functions [...] are exercised regularly."<sup>89</sup> However, despite the Tribunal's assertions of the independent powers of the Prosecutor to bring indictments and jurisprudence, it has failed to demonstrate that its justice "is not part of 'victors' justice".<sup>90</sup> Other than Georges Henri Yvon Joseph Ruggiu,<sup>91</sup> a Belgian national, all the other defendants at Arusha have been Hutu.

## V. The ICTR's Completion Strategy and the Allegations Against the RPA

Under the guidelines issued by the UNSC in 2003, the ICTR should have completed all pending investigations by the end of 2004, all trial activities at first

85 Hassan Jallow, "Prosecutorial Discretion ...," p. 160.

86 *Prosecutor v. Delalic et al.* (The Celebici case) (Appeals Chamber Judgement) IT-96-21-A (20 February 2001).

87 *Prosecutor v. Ntarikutimana & Ntarikutimana* (Trial Chamber) ICTR-96-10 & ICTR-96-17-T (21 February 2001), paras. 870-887.

88 See Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council, *Ndindilimana* (Trial Chamber) ICTR-2000-56-I (26 March 2004), para. 2.

89 *Ndindilimana* (Trial Chamber) ICTR-2000-56-I (26 March 2004), para. 22.

90 Jean-Marie Kamatali, "The Challenge of Linking International Criminal Justice and National Reconciliation: The Case of the ICTR," *Leiden Journal of International Law*, vol. 16 (March 2003): p. 120.

91 ICTR 97-32-I, Indictment (1998) and Judgement and Sentence (2000).



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instance by the end of 2008, and all its work in 2010.<sup>92</sup> This is what has been called the “Completion Strategy.”<sup>93</sup> It must be recalled that the tribunal “was never intended to be a permanent institution.”<sup>94</sup> The Completion Strategy as formulated, “is composed of three interlocking components.”<sup>95</sup> These are: first, completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work (including appeals) in 2010; second, concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTR’s jurisdiction; and third, transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions,<sup>96</sup> as appropriate, as well as strengthening of the capacity of such jurisdictions.<sup>97</sup>

Mundis has pointed out that “despite its merits, the Completion Strategy has

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92 UNSC Res. 1503 (28 August 2003) S/RES/1503 (2003); UNSC Res. 1534 (26 March 2004) S/RES/1534 (2004). See also UNSC Res. 1878 (7 July 2009) S/RES/1878 (2009).

93 Larry Johnson, “Closing an International Criminal Tribunal while maintaining International Human Rights Standards and Excluding Impunity,” *American Journal of International Law*, vol. 99 (Jan. 2005): p. 159. See also A. Mundis, “The Judicial Effects of the ‘Completion Strategies’ on the *Ad hoc* International Criminal Tribunals,” *American Journal of International Law*, vol. 99 (Jan. 2005): pp. 142-158. The complete list of the reporting sequence of the Completion Strategy can be found at <http://www.icttr.org/default.htm> (visited on 27 July 2009).

94 Larry Johnson, “Closing an International Criminal Tribunal ...”, p. 159.

95 Larry Johnson, “Closing an International Criminal Tribunal ...”, p. 159.

96 This would be in accordance with Rule 11 *bis* of RPE which states: (A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a state: i) in whose territory the crime was committed; or ii) in which the accused was arrested; or iii) having jurisdiction and being willing and adequately prepared to accept such a case so that those authorities should forthwith refer the case to the appropriate court for trial within that state; (B) The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where the accused is in the custody of the Tribunal, the accused, the opportunity to be heard; (C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the Courts of the state concerned and that the death penalty will not be imposed or carried out; (D) Where an order is issued pursuant to the Rule: (i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned; (ii) the Trial Chamber may order that protective measures for certain witnesses or victims remain in force; (iii) the Prosecutor shall provide the authorities concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment; (iv) the Prosecutor may send observers to monitor the proceedings in the courts of the State concerned on his or her behalf. (E) The Trial Chamber may issue a warrant of arrest for the accused, which shall specify the state to which he is to be transferred for trial. Larry Johnson, “Closing an International Criminal Tribunal ...”, p. 169 (has pointed out that “the rule provides for the Tribunal to refer a case to the authorities of the state, not directly to a domestic court. The domestic authorities are then “forthwith” to refer the case to an “appropriate court” for trial within that state. The states that are eligible include: a state in whose territory the crime was committed; a state in which the accused was arrested; and, a state having jurisdiction and being willing and adequately prepared to accept such a case”).

97 Larry Johnson, “Closing an International Criminal Tribunal ...”, pp. 170-171 (observing that “the tribunal has drawn up a tentative checklist of criteria that a trial chamber might examine, to ascertain if a state is adequately prepared to receive a case under Rule 11 *bis* and to satisfy itself that the accused will receive a fair trial. The checklist includes measures such as: that the accused answer in the national courts for all the crimes specified in the indictments brought by the Prosecutor and confirmed by the judges of the Tribunal; that the national courts respect the protective measures ordered by the Tribunal for the victims and witnesses; and that the national trials are conducted in accordance with the international norms for the protection of human rights, among others”).

brought forth some un-intended and even unfortunate consequences.”<sup>98</sup> According to him, “it has raised very serious issues of justice, among which, possibly is the fact that no RPA element(s) might be brought to account by the tribunal, notwithstanding its acknowledgement that it has taken account of its mandate to investigate reports of violations by the [same].”<sup>99</sup> Also, the closure of all investigations means that the prosecution has to limit the number of its indictments so that the tribunal can meet the Completion Strategy timetable.<sup>100</sup> According to Hassan Jallow, the RPF waged a “war of liberation” against the governments of Habyarimana and that which presided over the genocide.<sup>101</sup> Based on this therefore, it is highly unlikely that it will bring any RPA suspect to account before ending its operations. According to Luc Reydam, “instead of openly and thoroughly addressing the issue, the Prosecutor tiptoes around it in rather general terms and has evidenced a rather somewhat disturbing partiality by calling the RPA offensive ‘a war of liberation’”<sup>102</sup> Luc Cote has summarized the situation thus:

[a]s hard as one can try to explain the lack of eagerness on the part of the Prosecutor to initiate investigations about crimes committed by members of the RPF, no explanation will seem satisfactory in the eyes of the vanquished [Hutu]. Beyond the appearance of bias, [this] situation also challenges the image of the independence of the Prosecutor.<sup>103</sup>

98 Mundis, “The Judicial Effects ...”, p 147. Mundis’s discussion generally centres on the ICTY. But however, he also pointed out among others, that “the tribunals (ICTY and ICTR) in their quest to meet the deadlines set by the Completion Strategies, must ensure that the rights of the accused to a fair and expeditious trial must be respected throughout the tribunals’ remaining life spans, notwithstanding any eventual pressure to stress the latter at the expense of the former; and, that since the completion strategies rely very heavily on the referral of cases to national courts, the International Tribunals must work closely with the international community and local authorities to see that these local courts have the resources necessary to ensure that the rights of the accused are respected.” *id.*, p. 155. cf. Larry Johnson, “Closing an International Criminal Tribunal Johnson ...”, pp. 159-160 (arguing that “the Security Council has not decided definitively [by the establishment of the Completion Strategies], when the Tribunal[s] will close. The suggested dates in the Completion Strategies are “target dates” or goals, [and] not definitive decisions on when certain activities of the [Tribunals] must cease. [...] The council did not decide that the Tribunal [s] must complete all activities in 2010, but that [they] should do so”).

99 Completion Strategy of the ICTR, June 1, 2006, S/2006/358, para. 35.

100 Carla del Ponte, “Prosecuting the Individuals bearing the Highest Level of Responsibility,” *Journal of International Criminal Justice*, vol. 2 (June 2004): p. 518.

101 Hassan Jallow, “Prosecutorial Discretion ...”, cf. Luc Reydam has argued that this is a startling description of the strife in Rwanda by someone who ought to avoid any semblance of partiality.

102 Luc Reydam, “The ICTR Ten Years on: Back to the Nuremberg Paradigm?” *Journal of International Criminal Justice*, vol. 3 (Sept. 2005): p. 986.

103 Luc Cote, “Reflections on the Exercise ...”, p. 177. cf. Anonymous reviewer of this paper (observing that one must separate *jus ad bellum* and *jus in bello* issues. Qualification of an armed conflict as a liberation conflict does not grant any party any immunity to commit war crimes, crimes against humanity, or genocide. Therefore, this kind of terminology, legally, has no limiting effect on criminal investigations or prosecutions. The selectivism in the functioning of ad hoc international criminal tribunals is resulting from their limited nature. Therefore, the real question relates to whether prosecutorial strategies are based on reasonable policies and criteria. In brief, selectivism is inherent in feasibility of other courses of action).

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### VI. Prosecutions in Rwanda-The *Gacaca* Courts and RPA “Crimes”

*Gacaca* Courts have continued to suffer from the charge of “victors’ justice” due to their failure to address the issue of RPA “crimes”. When the *gacaca* courts were first introduced in 2001, the law provided for the courts to prosecute war crimes, which would have covered the crimes committed by the RPA, but when the law was revised in 2004, that provision was removed.<sup>104</sup> Since then, there has been a systematic campaign to the effect that the RPA crimes are not to be entertained in the *gacaca* process.

Whilst the Hutu population, which bore the brunt of the RPA crimes, and some international human rights groups, have continuously argued that these crimes must be punished, President Kagame and other government officials have insisted that “*gacaca* is not the forum for hearing cases involving RPA soldiers who committed war crimes or crimes against humanity in the aftermath of the genocide, crimes, which occasioned ... tens of thousands to 100,000 [Hutu] civilian casualties.”<sup>105</sup> This is notwithstanding the fact that the *gacaca* law provided for the courts to deal with war crimes and crimes against humanity cases. The government’s argument is that the crimes alleged to have been committed by the RPA elements in retaliation and revenge, are not genocide offences under the *gacaca* law.<sup>106</sup> It is claimed that such abuses were carried out by renegade troops in violation of RPF policy and, as such, have no moral equivalence to the genocide.<sup>107</sup> While inaugurating the *gacaca* courts on 18 June 2002, Kagame stated that “there should be no amalgamation between genocide [crimes], and crimes committed during or after [the genocide]. Isolated individuals committed acts of vengeance. Every time they are (*sic*) known about, they were punished severely.”<sup>108</sup> However, the perception of RPA impunity continues to fester as punishments meted out to rogue RPA elements continue to be shrouded in secrecy.

The failure of the courts to prosecute the RPA (read Tutsi) offences portrays the process in the eyes of the Hutus as a farce. Human Rights Watch (HRW) in a

104 HRW, “Law and Reality ...,” p. 90.

105 Lyn Graybill, “Pardon, Punishment, and Amnesia: Three African Post-Conflict Methods,” *Third World Quarterly*, vol. 25 (2004): p. 1124.

106 Legally this is the correct position. cf. Constance Morrill, “Show Business and ‘Law-fare’ in Rwanda: Twelve Years after the Genocide,” *Dissent* (Summer 2006) available online at <http://dissentmagazine.org/article/?article=651> (visited on 1 May 2006) (observing that *gacaca* jurisdictions are disproportionately biased toward the prosecution of genocide perpetrators (as opposed to perpetrators of other crimes against humanity, such as war crimes).

107 Longman and Rutagengwa, “Memory, Identity and Community in Rwanda ...,” p. 166.

108 R.M. Borland, *The Gacaca Tribunals and Rwanda after Genocide: Effective Restorative Community Justice or Further Abuse of Human Rights?* available online at [http://american.edu/sis/students/sword/current\\_Issue/essay1.pdf](http://american.edu/sis/students/sword/current_Issue/essay1.pdf) (visited on 25 May 2006).

document released in November 2002 noted that there was low participation in the process due to the fact that:

the government [had] refused to allow the *gacaca* courts to deal with crimes allegedly committed by the RPF, the Tutsi-led rebel military army that ultimately toppled the Hutu government and ended the genocide. As a result, many Hutus say they feel the trials are not addressing the whole story of what happened.<sup>109</sup>

According to the human rights organisation African Rights, even among those who accept the need to prosecute genocide suspects ... there is a belief that this is merely treating one side of a wider problem.<sup>110</sup> During their training, many of the *gacaca* judges expressed surprise that they would not be hearing such cases and questioned why the genocide should be treated separately, when those crimes took place during the period covered by the genocide law.<sup>111</sup>

There is little doubt that the limitation on the *gacaca* law erodes the commitment of some judges to their assignments. For example, some have reached the conclusion that *gacaca* is an example of the needs of the survivors being privileged above others.<sup>112</sup> Whilst some judges are of the view that the remit of the law should be expanded to cover RPA crimes, when it was last revised in June 2004, this proposal was not considered. The situation is exacerbated by the fact that even in the memorials that have been erected all over Rwanda in remembrance of the genocide victims, there is not a single site commemorating the Hutu victims of RPF massacres.<sup>113</sup> Anyone, who criticizes the government for its human rights abuses or for its perceived record of exclusion, is accused of sowing divisionism and is brutally silenced.<sup>114</sup> This has prompted some to opine that “by referring to the crimes of the Tutsi as ‘crimes of war’ and the crimes of the Hutu as ‘crimes of genocide,’ the government has established a moral high ground for all Tutsis.”<sup>115</sup> However, they do also conclude that “without the equal

109 *Ibid.*

110 African Rights, *Gacaca: A Shared Responsibility*, (Kigali: Africa Rights, January 2003), p. 24.

111 African Rights, *Gacaca ...*, 24.

112 African Rights, *Gacaca ...*, 24.

113 Longman and Rutagengwa, “Memory, Identity and Community in Rwanda ...” p. 166.

114 For an excellent exposition on this see The International Foundation for the Protection of Human Rights Defenders, *Disappearances, Arrests, Threats, Intimidation and Co-optation of Human Rights Defenders 2001-2004*, (Dublin: Front Line, 2005). See also Jennie Burnet, “Gender Balance and the Meanings of Women in Governance in Post-Genocide Rwanda,” *African Affairs* vol. 107(428) (July 2008): p. 371 (observing that when human rights observers present evidence of serious human rights violations, such as extrajudicial executions or ‘disappearances’, diplomats often respond with an attitude of ‘at least, it’s not genocide’ ...”).

115 Allison Corey and Sandra F. Joireman, “Retributive Justice: The *Gacaca* Courts in Rwanda,” *African Affairs* vol. 103(410) (Jan. 2004): p. 86.

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application of the process to both Hutu and Tutsi, it will be interpreted more as revenge than as reconciliation.”<sup>116</sup>

### VII. The “Genocidal Ideology” (Divisionism/Sectarianism) Law

Since coming to power, the RPF government has sought to eradicate what it calls “sectarianism” and “divisionism.”<sup>117</sup> In 2002, a law criminalizing sectarianism was enacted stating that the crime of sectarianism was a punishable offence. The crime of sectarianism is committed “by any oral or any act of division that [can] generate conflicts among the population or cause disputes.”<sup>118</sup> The 2003 Rwanda Constitution commits the Rwandan people to fight the genocidal ideology, and in particular specifies that “revisionism, negations (denial) and the minimization of genocide,”<sup>119</sup> are punishable offences under the law. Under the 2002 law, persons convicted of the offence of sectarianism are liable to imprisonment for up to 5 years and loss of civil rights.

According to the RPF, there is an established “objective truth” about the 1994 Rwanda genocide. Included in this “truth” is the fact that although some RPA soldiers may have killed civilians, these crimes were an unfortunate result of warfare or were occasional acts of revenge and have been punished.<sup>120</sup> Any insinuation(s) to the contrary is deemed to imply divisionism and genocidal ideology, which the Rwanda Parliament has dealt with in four commissions. The first commission set up in 2003 interpreted the offence of genocidal ideology to include “... speaking of crimes by the RPA soldiers as if they were genocide.”<sup>121</sup> The Second Commission in its June 2004 also included in its definition of genocidal ideology “... speaking of RPA war crimes.”<sup>122</sup> The Third Commission again included in its definition of genocidal ideology any reference(s) to “unpunished RPF crimes.”<sup>123</sup> As a result of the findings of these commissions,

116 Allison Corey and Sandra Joireman, “Retributive Justice ...,” p. 86.

117 This could possibly be explained by the fact that the Museveni government in Uganda has crusaded against sectarianism and even included a provision in the 1995 constitution prohibiting it. So the RPF government is merely copying. See Article 21, Constitution of Uganda 1995 (as amended in 2005).

118 Article 3, Law no. 47/2001.

119 Article 13.

120 National Unity and Reconciliation Commission (NURC), *Manuel pour les Camps de Solidarite et autre Formations*, (Kigali, October 2006) see especially pp. 81, 83, 154 and 162.

121 Republique Rwandaise, Assemblée Nationale, *Rapport de la Commission Parlementaire de Controle mise en place le 27 Decembre 2002 pour enquerer sur le problemes du MDR*, accepted by the National Transitional Assembly, (Kigali, 14 April 2003), p. 19.

122 See generally Republique Rwandaise, Assemblée Nationale, *Rapport de la Commission Parlementaire ad hoc creee en date du 20 Janvier 2004 par le Parlement, Chambre de Depute, chargee d'examiner les tueries perpetrees dans le Province de Gikongoro, l'ideologie genocidaire et ceux qui la propagent partout au Rwanda*, accepted by the National Assembly, (Kigali, 30 June 2004).

123 Rwanda Senate, Rwanda, *Genocide Ideology and Strategies for its Eradication*, 2006, p. 18.

government officials denounced hundreds of people and dozens of Rwandan and international organizations accusing them of possessing genocide ideology.<sup>124</sup>

The Rwandan courts in the judicial year of 2007-8 were inundated with cases concerning genocide ideology. Deputy Prosecutor General Alphonse Hitiyaremye is quoted as saying that in this period the courts initiated 1,304 prosecutions involving genocide ideology, including acts of violence such as murder, damage to property, discrimination and other undefined threats.<sup>125</sup> A further 243 persons were charged with the crimes of negationism and revisionism, of whom 8 were convicted and sentenced to life in prison, 2 sentenced to more than 20 years in prison, 36 sentenced to between 10 and 20 years in prison, 96 drew sentences of between 5 and 10 years in prison, and 91 sentenced to less than five years in prison.<sup>126</sup> Out of the 243 persons charged, 102 were acquitted. One prosecution that needs to be pointed out concerned a one Celestin Sindikubwabo who challenged the official “truth” about the RPF crimes.<sup>127</sup> At a *gacaca* trial in October 2006, Sindikubwabo had posited that the defendant had fled to Burundi because he had seen RPA soldiers killing local people. The defendant was acquitted, but Sindikubwabo was arrested. In May 2007 he was convicted and sentenced to 20 years in prison for “gross marginalization of the genocide.”<sup>128</sup>

In June 2008, the Rwandan Parliament adopted a new law criminalizing genocide ideology. The crime of genocide ideology is defined as “any manifested behaviour characterized by evidence aimed at depriving a person or group of person of common interest of humanity like in the following manner: a) threatening, intimidations, degrading through defamatory speeches, documents or actions which aimed at propounding wickedness or inciting to hatred; b) marginalize, laugh at one’s misfortune, defame, mock, boast, despise, degrade, create confusion aimed at negating the genocide which occurred, stirring up ill-feelings, taking revenge, altering testimony or evidence of the genocide that occurred; and, killing, planning to kill or attempting to kill someone following the genocide ideology.”<sup>129</sup> It must be stated that this criteria

124 HRW, “Law and Reality ...,” p. 39. It must be noted that many of these groups and organizations were selected by state security agents or identified through accusations at public meetings. See also IRIN In-Depth, *Justice for a Lawless World: Rights and Reconciliation in a New Era of International Law* (Part I), July 2006, p. 37 (noting that criticising the *gacaca* process, or even the regime in Rwanda, can have serious consequences. Several NGOs were forced to move out of Rwanda as the government accused them of having genocidal ideology). (Internal quotation marks omitted).

125 HRW, “Law and Reality ...,” p. 40.

126 See Foundation Hirondelle, *Rwandan Official proposes Rehabilitation of Persons convicted for Genocide Ideology*, 30 May 2008.

127 Cited in HRW, “Law and Reality ...,” p. 41.

128 See Court of Higher Instance, Huye, No. RP 0015/07/TGI/HYE RPGR 40832/S2/06/MR/KJ, *Prosecutor v. Celestin Sindikubwabo*, 24/4/07.

129 HRW, “Law and Reality ...,” p. 41.

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is really wide and as Human Rights Watch has observed is “imprecise and confusing.”<sup>130</sup>

The punishments proposed under the 2008 law are harsh.<sup>131</sup> For first time offenders, on conviction they would be sentenced to between 10 and 25 years in prison and a fine of 200,000 to 1 million Rwandan francs, with the penalties doubled and even increased to life imprisonment for recidivists. Persons occupying or who have occupied leadership positions in the government, private sector, NGOs or the church may be sentenced from 15 to 25 years in prison with a fine of 2 to 5 million Rwandan francs. Political parties<sup>132</sup> and NGOs may be dissolved and fined 5 to 10 million francs. Children are held criminally responsible at the age of 12 and may be sent away to a rehabilitation centre for a year, and parents, guardians, teachers and headmasters may be punished by 15 to 25 years in prison. Children between the ages of 12 and 18 will receive one half penalty meted out to adults.

### **VIII. RPA Arrests, the French and Belgian Investigations**

The announcement by the ICTR Prosecutor of the investigation of some RPA elements was welcomed, even if it happened fourteen years after the event. However, the arrest of these elements has elicited doubts as to whether the accused will “really” be prosecuted. This is in spite of the assurances given by the Prosecutor that the Tribunal will be monitoring the trial, and should it find the prosecutions a sham then it (ICTR) will take action. These assurances have not assuaged the doubting Thomases, however. According to press reports, the current Archbishop of Kigali Thadee Ntihinyurwa who is a Hutu has doubted whether his murdered colleagues will actually receive justice. He suspects that the Rwandan authorities will interfere with the prosecution. He is reported to have observed that “justice can only be rendered by foreigners not Rwandans that are most likely to be compromised by the establishment.”<sup>133</sup>

Consistent with the argument we have advanced in this paper is the view that the Rwandan population continues to be divided about the genocide, and the

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130 HRW, “Law and Reality ...,” p. 41.

131 See Article 4-13.

132 The Democratic Republican Movement (MDR) political party was destroyed by accusations that it was a vehicle for promoting genocide ideology and divisionism. See generally *Republique Rwandaise, Assemblée Nationale, Rapport de la Commission Perlementaire de controle mise en place le 27 Decembre 2002 pour enquerer sur les problems du MDR*, accepted by the National Transitional Assembly, 14 April 2003.

133 *Hirondelle News Agency* (Lausanne), June 16, 2008. See story, “Catholic head wants RPF soldiers trial outside the country.”

prosecutions that have been carried out so far. Reacting to the Archbishop, President Kagame is reported to have retorted that “the Catholic Church failed the people of Rwanda in 1994”, and that “he was surprised that opposition [to the prosecution of the suspects in Rwanda] was coming from someone who in the past, had been subject to investigations into his personal role in the genocide.”<sup>134</sup>

President Kagame himself has been investigated for crimes committed during the genocide. In 2006, French Judge Jean-Louis Bruguière issued a warrant of arrest for Kagame and nine other top RPF/A leaders for genocide related crimes. Specifically Kagame was charged with ordering the shooting down of Habyarimana’s plane in April 1994, an event that sparked off the genocide.<sup>135</sup> The UN started investigation into the shooting down of the plane in 1997. According to one of the UN investigators, information was gathered pointing to the culpability of President Kagame but the then Prosecutor of the ICTR Louise Arbor decided to abruptly halt the investigation.<sup>136</sup> This was after the investigators had collected information from four “credible” witnesses, and written a memorandum as to the people responsible for bringing down the plane. When Del Ponte who succeeded Justice Arbor was asked about the investigation into the shooting down of the plane she reiterated that “[the ICTR] only had jurisdiction over cases concerning crimes against humanity, such as genocide, and not murders as such.”<sup>137</sup> This is not withstanding the fact that the UN investigators cited above had been tasked with *inter alia* “identifying the person(s) responsible for the fatal rocket attack on 6 April 1994 killing President Habyarimana and all others on board.”<sup>138</sup> When the UN investigation was halted, Judge Bruguière picked up the issue.

Judge Bruguière’s investigation looked *inter alia* into the source(s) of the missiles that brought down the plane and the people who could have possibly been involved. Incidentally, one person who was mentioned in connection with the missiles is President Museveni of Uganda.<sup>139</sup> However, when the judge issued his

134 *Hirondelle News Agency* (Lausanne), June 20, 2008. See story, “President Kagame attacks Catholic head over remarks on RPF trial.”

135 BBC, ‘Rwanda gives ex-leaders immunity’, July 17, 2008 at <http://news.bbc.co.uk/2/hi/africa/7511094.stm> (visited on July 17, 2008).

136 Nick McKenzie, *Uncovering Rwanda’s Secrets*, February 10, 2007 at <http://www.theage.com.au/articles/2007/02/09/1170524298439.html> (visited on October 1, 2008). See also ICTR, Affidavit of Michael Andrew Hourigan, 27 November 2007 at [http://www.theage.com.au/ed\\_docs/statement%20...](http://www.theage.com.au/ed_docs/statement%20...) (visited on October 1, 2008).

137 Bjorn Willum, ICTR Prosecutor rejects allegations of Kagame arrest warrant, Rwanda Newline, October 30-November 5, 2000 at <http://willum.com/articles/rwanda30oct2000/indexright.htm> (visited on October 1, 2008).

138 ICTR, “Affidavit of Michael Andrew Hourigan...”

139 Bjorn Willum, “ICTR Prosecutor rejects allegations of Kagame arrest warrant ...”



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warrants, Museveni was not indicted. It appears thus that the judge was biased. President Kagame and one time Prosecutor General of Rwanda have maintained that it is actually France which is culpable in the shooting down of Habyarimana's plane. President Kagame is quoted to have posited in connection with Judge Bruguière's investigation that "the judge should rather look to where he is (meaning France)".<sup>140</sup> On his part, Gahima posited that "the allegations against the RPF are suspicious since the French were [at Kanombe airport] when the plane was downed".<sup>141</sup> Thus accusations and counter-accusations have characterized this investigation. Both the UN and Judge Bruguière have not helped matters as the former has clearly demonstrated that it is not interested in finding out who did this heinous act, while the latter has clearly manifested bias in indicting President Kagame.

On 6 February 2008, Judge Fernando Abreu Merelles of Spain issued warrants of arrest for 40 top RPF/A leaders<sup>142</sup> including Kagame, for genocide, war crimes and crimes against humanity offences committed prior to, during and after the 1994 genocide. The Rwandan authorities reacted to Judge Merelles' warrants by threatening to prosecute him for genocidal ideology.<sup>143</sup> Both judges' Merelles and Bruguière accusations were received with fury in Kigali. Apropos of Judge Bruguière's accusations, Rwanda reacted by severing its diplomatic relations with France. It also invited the International Court of Justice (ICJ) to adjudge France to have violated international law with regard to diplomatic immunity as well as the sovereignty of Rwanda.<sup>144</sup> France is yet to respond to a request by the ICJ to accept the jurisdiction of the court to hear the case. The Rwandan authorities argued that neither of the judges had carried out any investigations in Rwanda, interviewed the alleged suspects, or involved the Rwandan justice system in the process as is usually required by law and principles of natural justice.<sup>145</sup> Indeed, throughout their investigations, both judges never set foot in Rwanda or gave an opportunity to

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140 Bjorn Willum, "ICTR Prosecutor rejects allegations of Kagame arrest warrant ..."

141 Bjorn Willum, "ICTR Prosecutor rejects allegations of Kagame arrest warrant ..."

142 Some of the indicted persons have actually challenged their arrest warrants in France and Belgium courts. These include: Rose Kabuye (Head of State Protocol), Brigadier-General Sam Kaka (Former MP), Major Jacob Tumwine, Lt. General Charles Kayonga and Brigadier-General Jack Nziza. *The New Times* (Kigali), July 2, 2008; *Focus Media* (Kigali), July 7, 2008.

143 HRW, "Law and Reality ..." p. 93.

144 ICJ, The Republic of Rwanda applies to the International Court of Justice in a dispute with France, *Press Release 2007/11* at <http://www.icj-cij.org/common/print.php?pr=1909&pt=1&l=6&p2=1> (visited on October 25, 2008).

145 *Daily Nation*, July 18, 2008. See story, "Africa must challenge abuse of international jurisdiction.' Some to the grounds that the Rwanda government has advanced to reject the indictments include *inter alia* that: both judges used same witnesses most of whom have since died, and this was done in a way that finding the truth will not be easy; and both judges have claimed that there was double genocide in Rwanda.

the suspects to present their side of the story. Although Judge Merelles has averred that throughout his investigation he had tried without success to obtain cooperation from Rwandan authorities.<sup>146</sup>

In addition to severing relations with France, President Kagame reacted to Bruguière's indictments by setting up an Independent National Commission to probe the role of France in the 1994 Genocide in Rwanda. The Commission headed by Jean de Dieu Mucyo, was tasked with gathering the facts on the involvement of France and other key players in the genocide. The Commission's Report has now been made public and it calls for further investigation and possible prosecution of selected individuals in France, including the former President Francois Mitterand.<sup>147</sup> But as a way to water down the French and Spanish indictments, President Kagame attended the Eleventh African Union (AU) Summit held in Sharm El Sheik Egypt in which he called on all the African leaders to condemn the "European" indictments.<sup>148</sup> Prior to that, the Minister of Justice of Rwanda had described the warrants as "racist and negationist" and had asked the African Union Ministers of Justice to condemn what he characterized as "a neo-colonial attempt to reassert control over African states by a judicial *coup d'etat*."<sup>149</sup> The AU Commission came out with a report on the abuse of the Principle of Universal Jurisdiction.<sup>150</sup> In its decision on the matter, the Summit of the AU noted *inter alia* that "the abuse and misuse of the principle of universal jurisdiction by judges from non African States against African leaders, *particularly Rwanda* (emphasis added) is a clear violation of the sovereignty and territorial integrity of these states."<sup>151</sup> The AU thus unanimously resolved that "the warrants (against President Kagame and senior officials in his government) shall not be executed in [any] member state."<sup>152</sup>

146 HRW, "Law and Reality ...," p. 92.

147 See Republique du Rwanda, *Commission Nationale Independente Chargee de Ressembler les Prevues Montrant L'implication de L'etat Francais dans le Genocide Perpetre au Rwanda en 1994*, (Kigali, November 15, 2007) (On file with the author).

148 *The New Times* (Kigali), July 2, 2008. See story, "Foreign Indictments now a continental issue-Minister."

149 HRW, "Law and Reality ...," p. 93.

150 Report of the Commission on the Abuse of the Principle of Universal Jurisdiction Pursuant to the Recommendation of the Ministers of Justice/Attorneys General in Addis Ababa, Ethiopia, April 18, 2008.

151 AU, *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, " (2008) Doc. Assembly/AU/14 (XI), para. 5 (ii).

152 AU, "Decision on the Report of the Commission on the Abuse ...," para. (iv).

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**X. Conclusion**

The investigation and prosecution of the RPA crimes during and after the genocide continues to be a sensitive and controversial issue. There is no systematic official investigation that has been carried out to establish the extent of the RPA's culpability. Whatever allegations have been made against the RPA have been based on un-official sources. There is therefore a need for the Rwanda government to institute or to allow to be instituted, a commission to investigate these allegations. The investigation will establish the facts and impute responsibility on those who are responsible for these crimes. This will go a long way to show that the current RPF led government is not practicing victor's justice. Token prosecutions of RPF/A elements will not promote justice and reconciliation, which Rwanda badly needs.

The announcement that some arrests have been made in Rwanda, and prosecution will follow for crimes perpetrated by the then rebel forces of RPF/A, has gone a long way to demonstrate that the post-genocide justice in Rwanda is impartial. The failure of the *Gacaca* courts, the ICTR and National Genocide Trials (NGTs) to look into the allegations against the RPF/A has tainted the reputations of these processes/institutions. Whilst the alleged crimes of the RPF/A may not reach the threshold of genocide, this should not absolve these processes'/institutions' of their responsibility to look into them. Specifically for the ICTR, as HRW has observed, "it should complete its mandate by also prosecuting RPA soldiers accused of war crimes and crimes against humanity [because the alleged crimes] fall within its jurisdiction *rationae temporis* and *rationae materiae*."<sup>153</sup>

Finally, if we may echo what HRW has said, to insist on the right of justice for all victims, is not to deny the genocide, nor does such insistence equate war crimes with genocide; it simply asserts that all victims of genocide, crimes against humanity and war crimes regardless of their affiliation, and regardless of the affiliation of the perpetrator, must have equal opportunity to seek redress for the wrongs done to them.

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153 HRW, "Law and Reality ...," p. 94.

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