

Genocide in Rwanda: The search for justice 15 years on.

An overview of the horrific 100 days of violence, the events leading to them and the ongoing search for justice after 15 years.

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On the fifteenth anniversary of the plane attack killing former President Habyarimana which sparked one-hundred days of Genocide in Rwanda slaughtering over 800,000 Tutsis and moderate Hutus, David Taylor, editor at the Hague Justice Portal reflects on some of the important decisions, notable cases and remaining gaps in the ICTR's ongoing search for justice.

On 8 November 1994, seven months after the passenger plane carrying President Juvénal Habyarimana was shot out of the sky on the evening of April 6 1994 triggering Genocide in the little-known central African state of Rwanda, the United Nations Security Council adopted Resolution 955 (1994) establishing the International Criminal Tribunal for Rwanda (ICTR). The tribunal is mandated to prosecute “persons responsible for genocide and other serious violations of international humanitarian law”,¹ with its inaugural trial commencing on January 9 1997. According to Trial Chamber I, delivering its Judgment in this first case against a suspected *génocidaire*, “there is no doubt that considering their undeniable scale, their systematic nature and their atrociousness” the events of the 100 days subsequent to April 6, “were aimed at exterminating the group that was targeted.”²

Indeed, given the nature and extent of the violence between April and July 1994, it is unsurprising that the ICTR has been confronted with genocide charges in nearly every case before it. Within hours of the attack on the President’s plane roadblocks had sprung up throughout Kigali and the killings began; the Hutu Power radio station, RTLM, rife with conspiracy, goading listeners with anti-Tutsi propaganda. The killing of Rwandan Tutsis and moderate Hutus by Hutu extremists lasted well into July 1994, with estimates suggesting that

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¹ UN SC Resolution 955 (1994).

² Prosecutor v. Akayesu, Trial Chamber Judgment, ICTR-96-4-T, 2 September 1998, para. 118.

the individual killings, the large-scale massacres, and the other horrific acts perpetrated against innocent civilians claimed the lives of around 800,000 Rwandans. Perhaps even more bewildering than the number of people slaughtered was the nature of the ensuing violence. Not since the Second World War had the “banality of evil”³ been so manifest: neighbours killed neighbours, husbands killed wives, shepherds killed their flocks. Eyewitness testimony before the ICTR recounted:

“[...] heaps of bodies [...] on the roads, on the footpaths and in rivers and [...] many wounded persons [...] who had sustained wounds inflicted with machetes to the face, the neck, and also to the ankle, at the Achilles’ tendon, to prevent them from fleeing.”⁴

Despite numerous early warnings and prior intelligence of the imminence of an apocalyptic crisis in Rwanda, the warnings went unheeded, with the ‘international community’ and the United Nations in particular failing to act. The UN peacekeeping mission on the ground, UNAMIR, stood powerless as restrictions in its mandate from the UN reduced its troops to little more than bystanders to genocide.

Fifteen years on, the ICTR still seeks to prosecute the Genocide and bring its perpetrators to justice.

1. From Peace (Accords) to Genocide

The path to genocide in Rwanda can be traced back to German and successive Belgian colonial rule, with its roots in the introduction of policies of racial superiority favouring the minority Tutsi ethnic group. Based wholly on racist stereotypes and the contemporary eugenics movement of the time, the Europeans succeeded in polarising the otherwise harmonious relations between Hutus and Tutsis. The insistence on identity cards displaying each person’s ethnic background further reinforced and institutionalised the racial ‘distinction’, and became a significant factor facilitating the identification of persons to be slaughtered during the Genocide in 1994. The system was later abolished, but only after thousands of people had lost their lives, many of whom were butchered at roadblocks set up solely to identify Tutsi civilians through their identity cards.

The evolution of the Tutsi population from favour to fatal targets began in the 1950s during the decolonisation process in Africa. The growth in Tutsi awareness of their privileged status and their consequent desire for independence caused a shift in allegiance by the Belgians and the influential Catholic Church, who began to favour the Hutu majority, raising their political awareness. These shifts led to the formation of the first political parties in Rwanda in the late 1950s, organised according to ethnic rather than ideological divisions, which directly led to severe political violence in 1959. The spiral of bloody attacks that followed ended only with the establishment of an autonomous provisional Government following elections which

³ H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, New edition (1994).

⁴ *Prosecutor v. Akayesu*, Trial Chamber Judgment, ICTR-96-4-T, 2 September 1998, para. 115.

granted an overwhelming majority to Hutu parties. Independence was granted on 1 July 1962, with a Hutu President.

Over this period many hundreds of Tutsis, including the Tutsi monarchy, fled to neighbouring countries, in particular Uganda, from where they launched incursions into Rwanda. In 1963, around ten thousand Tutsi civilians in Rwanda were murdered in reprisal for such incursions. As yet more Tutsis fled the country, their land and jobs were redistributed to Hutus.

Following the official declaration of Rwanda as a one-party State in the 1970s and after years of systematic discrimination, the Tutsi opposition had become increasingly radicalised. On 1 October 1990, Tutsi exiles in Uganda launched a significant attack into Rwanda under the name of the Rwandan Patriotic Front (RPF). The RPF also had an organised political wing, the Rwandan Patriotic Army (RPA), as it confirmed its intention not only to launch incursions, but to eventually seek political representation in Rwanda. Faced with both internal and external international pressure, President Habyarimana was forced to the negotiating table. The negotiations led to the signing of the first Arusha Accords in 1992, which were followed by the signing of the final Arusha Accords in August 1993 ending the 1990 civil war. However, sustained attacks by the RPF in the year following the first Accords had led to renewed ethnic polarisation in Rwanda, whilst clear divisions began to emerge between pro-Arusha 'moderate' Hutus and the Hutu Power extremists vehemently opposed to the Accords and any suggestion of handing over political power.

The Arusha Accords signed in 1993 had provided for the establishment of a Transitional Government to include the RPF, as well as provisions for consolidating the opposing armies and the deployment of UNAMIR in Rwanda to monitor the Accords. Nevertheless, despite the agreed provisions, tensions across ethnic lines and within the Hutu political parties remained high, and the assassination of political leaders as well as Tutsi civilians continued. During the period from February to April 1994, UNAMIR commander, Major-General Dallaire sent his well-known 'Genocide fax' to the UN, which, like his earlier warnings, was ignored by the world body.

The radio station, RTLM, had by now intensified its propaganda, inciting the Hutu population to exterminate the Tutsi *inyenzi* ('cockroaches'). In the immediate aftermath of the attack on the President's plane, responsibility for which remains disputed, the genocidal killings began. Starting with moderate Hutus (ethnic Hutus, but opposed to the extremist regime), such as Prime Minister, Agathe Uwilingiyimana and President of the Constitutional Court, Joseph Kavaruganda, the *génocidaires* and their *Interahamwe* foot-soldiers put in motion a plan to create a political vacuum paving the way for the establishment of an Interim Government dominated by Hutu Power extremists. The plan then shifted to triggering the withdrawal of international forces from Rwanda, achieved by the execution of ten Belgian UN peacekeepers. The results were swift, and after Western countries evacuated their soldiers and expatriates, the path was clear for the extremists to begin the extermination of Tutsi civilians, led primarily by individuals including now-convicted *génocidaire*, Théoneste Bagosora.

The remaining UNAMIR soldiers in Rwanda were powerless to stop the resulting carnage, with the 100 days of slaughter only halted by RPF forces commanded by current Rwandan President, Paul Kagame.

2. The International Criminal Tribunal for Rwanda (ICTR)

On 8 November 1994, a little over seven months after the Genocide began, the guilt-ridden UN Security Council adopted Resolution 955 for the establishment of “an international tribunal for the prosecution of persons responsible for genocide and [...] violations of international humanitarian law”. The Tribunal, which sits in Arusha, Tanzania, was created by the Security Council using its powers under Chapter VII of the UN Charter. Until the prior establishment of a sister tribunal to prosecute crimes committed in the former Yugoslavia, such powers to institute *ad hoc* tribunals under Chapter VII had previously been unforeseen.

At the time of writing, the ICTR had completed the cases of 39 accused, with 7 cases on appeal, 23 accused on trial, 5 awaiting trial, and a further 13 still at large.

2.1. Significant (completed) cases

Twelve years after the first trial commenced in 1997, the Tribunal has prosecuted various significant cases both as legal proceedings in themselves and for the history of the Genocide.

From the outset, the policy of the Prosecutor has been to target those bearing the greatest responsibility for the Genocide, thus some of the most senior figures from Rwanda during April and July 1994 have appeared to answer for their alleged actions. The ICTR has tried a former Prime Minister, government ministers, local *bourgmestres*, as well as senior military commanders. Also of great significance is the contribution that the Tribunal has made through these cases to international criminal jurisprudence, especially the crime of ‘genocide’. Owing to the relative lack of jurisprudence in the fifty years following the signing of the 1948 Genocide Convention and the Nuremberg and Tokyo trials, as well as the relative paucity of cases charging genocide at the ICTY, the Rwanda Tribunal has been tasked with developing the law largely on its own. This has resulted in a significant *corpus* of both substantive and procedural jurisprudence concerning the international prosecution of genocide and crimes against humanity.

Some of the most important cases heard before the ICTR are briefly considered below:

2.1.1. Prime Minister, Jean Kambanda

Following the constitutional vacuum left after the assassination of many moderate Hutu politicians, the Hutu Power extremists that seized power quickly established an Interim Government, headed by Jean Kambanda. The engineering graduate and former banker was sworn into office on 8 April 1994, just two days after the death of President Habyarimana. In

this position, Kambanda exercised *de jure* and *de facto* authority and control over members of the Interim Government, senior civil servants, military officers and local government *préfets*. The ICTR found Kambanda criminally responsible by way of his direct participation in the commission of massacres and because of his failure to prevent or punish the perpetrators. Kambanda had distributed weapons, incited Hutus to commit massacres and supported RTLM radio propaganda, failing his duty to ensure the security of the Rwandan population during the Genocide.

In addition to being the first case heard before the ICTR, the case is significant for several reasons. Jean Kambanda became the first ever accused to plead guilty to genocide, with Trial Chamber I subsequently convicting him in September 1998 of six counts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, as well as murder and extermination (crimes against humanity).⁵ The decision marked the first condemnation of genocide as an international crime since the Genocide Convention. More significantly, in pleading guilty, Kambanda acknowledged the existence and careful organisation of the Genocide, establishing that the atrocities were state-sponsored policy, not merely collateral damage from the civil war. Moreover, the case has its place as a milestone in the history of international criminal law as the first successful conviction of a head of government for his direct participation in genocide, further establishing the lack of immunity for heads of state and government. The decision has had a direct legal impact on later cases concerning immunity, forming a precedent for the UK House of Lords ruling in 1998 on the extradition of Pinochet and the indictment of Slobodan Milošević by the ICTY in 1999.

On 19 October 2000, the Appeals Chamber in The Hague rejected Kambanda's appeal and confirmed his sentence to life imprisonment. Kambanda had claimed ineffective assistance of counsel, arguing that he wished to tell the truth and admit that he felt politically, but not criminally responsible, further insisting that he was not informed of the consequences of pleading guilty (imprisonment).

2.1.2. Jean-Paul Akayesu

As mayor of the Taba commune near Kigali, Jean-Paul Akayesu was responsible for maintaining law and public order, with control over the police and local gendarmes. More than 2,000 Tutsis were killed in his commune by the end of June 1994. After fleeing Rwanda following the advance of the RPF, Akayesu became the first indictee to be extradited to Arusha by an African state (Zambia). For his direct participation in acts of genocide and his responsibility as a superior, Akayesu was found guilty on 2 October 1998 of genocide, direct and public incitement to commit genocide, as well as extermination, murder, torture, rape and other inhumane acts as crimes against humanity.

The conviction and sentence of Akayesu to life imprisonment marks the first time that the 1948 Genocide Convention was actively enforced and its provisions interpreted by an international tribunal. In its decision, the ICTR served to entrench the *dolus specialis* (special

⁵ Prosecutor v. Kambanda, Trial Chamber Judgment, ICTR-97-23-S, 4 September 1998.

intent) that characterises the crime of genocide, largely through its pronouncement that ‘genocide’ does not require the *actual* extermination of the group in question. The decision also represents a landmark in the definition of ‘genocide’ with regard to rape. For the first time in international criminal law, the Trial Chamber considered rape to be a constitutive act of genocide when committed with the requisite *dolus specialis*. In interpreting the definition of ‘genocide’, the decision also establishes that “measures to prevent births” can include rape, expanding the understanding of such acts beyond the practice of sterilisation which informed the drafting process in 1948 after the Holocaust.

The legacy of the decision with regard to rape continues to influence the prosecution of international crimes today. Currently on trial at the ICTR in the ‘Butare Group’ case, Pauline Nyiramasuhuko not only became the first female indicted by the Tribunal, but is the first woman in the history of international criminal law to be indicted for charges of rape. Such cases have also played a part in ensuring that rape now attracts the condemnation it deserves. This can be seen by the declaration in June 2008 by the Security Council that rape constitutes a weapon of war, as well as the prominent place of rape in the charges against Jean-Pierre Bemba Gombo before the International Criminal Court (ICC) and those against President al-Bashir of Sudan in the recently-issued warrant of arrest for alleged crimes committed in Darfur.

2.1.3. *Ngeze, Nahimana and Barayagwiza: The “media trial”*

During the 100-day slaughter, Hassan Ngeze, Ferdinand Nahimana and Jean-Bosco Barayagwiza were senior figures in the Rwandan media. Ngeze was a journalist and editor-in-chief of the *Kangura* newspaper - a Hutu Power publication, the print equivalent of RTLM and famed for its ‘Hutu Ten Commandments’ - who also called for the extermination of Tutsis during interviews on RTLM. Nahimana was a historian and one of the founders of RTLM who directed the station to broadcast messages inciting the massacre of Tutsis. Finally, Barayagwiza was a member of the *comité d’initiative* for RTLM and like Ngeze, was a founding member of the *Coalition pour la défense de la République* (CDR). The trials of the three men were heard together in the so-called ‘media case’.

On 3 December 2003, the ICTR found that the three men had conspired in a plan to exterminate the Tutsi civilian population in Rwanda, the components of which included the broadcasting of messages of ethnic hatred, inciting violence, training militias, distributing weapons and the preparation of lists of civilians to be killed. Ngeze and Nahimana were each found guilty of seven counts including genocide and sentenced to life imprisonment, while Barayagwiza was found guilty of nine counts and sentenced to 35 years. On appeal, each of the accused had their sentences reduced and several convictions, including some of genocide, quashed, but the Appeals Chamber upheld the convictions of Ngeze and Nahimana for inciting genocide through the *Kangura* publication and RTLM, as well as Barayagwiza’s conviction for instigating the perpetration of genocide.

In spite of the reversals on appeal, the case addressed important principles not considered by a tribunal since Nuremberg. Evoking memories of the Streicher trial, the ‘media case’ involved contemporary prosecution of media hatemongering. The findings of fact by the

ICTR established the role that the media played in the Rwandan Genocide, which served to generate ethnic hatred through dehumanisation of the Tutsi population and led at least in part to the massacre of Tutsi civilians. According to the Trial Chamber, “if the downing of the [President’s] plane was the trigger, then RTLM, *Kangura* and *CDR* were the bullets in the gun.”⁶ Both the trial and appeals judgments also generated much debate concerning issues of freedom of the press and free speech.⁷

2.2. Land of a Thousand Hills; Land of a thousand perpetrators: The ongoing search for justice

On 28 August 2003, the United Nations Security Council adopted Resolution 1503 calling on the ICTR to complete all of its work in 2010 and formulate a completion strategy for this purpose. In its first outline of the Completion Strategy in October 2003, then President of the Tribunal, Erik Mose, unequivocally stated the impossibility of achieving the Security Council’s target of completing all trials by 2008. In Resolution 1824 (2008), the Security Council subsequently extended the Tribunal’s mandate, and in March 2009 the Tribunal’s Registrar was re-appointed for a four-year term. According to the current President of the ICTR, Dennis Byron, the existing workload ensures a “difficult phase”⁸ ahead for the Tribunal.

As the ICTR strives to complete its work and try the remaining suspects, the cases currently being heard, those awaiting trial, and those of the suspects still at large concern various matters extremely significant to the events of 1994, considered below:

2.2.1. The (un)holy church

The influence of the Catholic Church in Rwanda, like many African countries, is very important, particularly following the beginnings of the decolonisation process. As explained, in Rwanda this influence played a role in the ‘Hutu Revolution’ during the 1950s, and remains today as an important institution in the lives of many Rwandans.⁹ During the Genocide, many civilians forced from their homes sought refuge in the sanctuary of churches and parish communes across Rwanda. However, as the conviction of pastor Elizaphan Ntakirutimana for genocide in 2003 demonstrates, many refugees found something other than sanctity awaiting them at these (un)holy sites.

⁶ Prosecutor v. Nahimana, Barayagwiza and Ngeze, Trial Chamber Judgment, ICTR-99-52-T, 3 December 2003, para. 953.

⁷ See S. Kagan, *The “Media Case” before the Rwanda Tribunal: The Nahimana et al Appeal Judgement*, 3(1) HJJ-JJH 83 (2008).

⁸ Report on the Completion Strategy of the ICTR, annexed to a letter dated 21 November 2008 from the ICTR President to SC President (S/2008/726), para. 65.

⁹ Immediately after the Genocide a distinct increase was observed in the number of Rwandan Muslims, which has been attributed to various causal factors including the loss of faith in Christianity following the events of 1994. See for example A. Kubai, *Walking a Tightrope: Christians and Muslims in Post-Genocide Rwanda* 18 (2) Islam and Christian-Muslim Relations 219 (2007); M. Lacey, *Ten Years After Horror, Rwandans Turn to Islam*, *The New York Times*, 7 April 2004.

Elizaphan Ntakirutimana became the first member of the clergy to be convicted of genocide, with the conviction of Emmanuel Rukundo in February 2009 the most recent. Besides these cases, judgments are currently awaited against Tharcisse Renzaho and other suspects accused of genocide and additional crimes for their actions at churches in Rwanda in 1994.

The ongoing proceedings against Hormisdas Nsengimana (a verdict which is expected soon) has heard evidence of how the Catholic priest not only began gathering weapons for the purpose of killing Tutsi civilians as far back as 1990, but following the April 6 plane crash led extremists in the search for Tutsis to be killed, supervised roadblocks and personally killed a fellow priest. Based on similar facts, not least the discovery of thousands of corpses near his parish, pastor, Jean-Bosco Uwinkindi is wanted by the Tribunal. Perhaps the most illustrative and well-known example of the church becoming the site for atrocities in Rwanda however, is the Nyange Parish massacre. During this incident, for which so far only Athanase Seromba has been found to bear at least partial responsibility, more than 2,000 Tutsi refugees were slaughtered when the parish was attacked, burned to the ground, then bulldozed. Former businessman, Gaspard Kanyarukiga, is awaiting trial to answer for his alleged role in the massacre, while two accused, Grégoire Ndahimana and Fulgence Kayishema, remain fugitives of the Tribunal wanted for their actions at Nyange.

2.2.2. *The straw that broke the camel's back: The withdrawal of the West*

A significant event in the early stages of the Genocide was the carefully planned execution of ten Belgian UNAMIR peacekeepers on 7 April 1994 in the same sequence of events that led to the torture and assassination of Prime Minister Uwilingiyimana. Almost immediately the West evacuated their soldiers and expatriates, leaving not only a wholly inadequate UN force in Rwanda, but the space for over 800,000 civilians to be killed, in the knowledge that the West had no desire to intervene.

Currently ongoing at the ICTR are the trials of three accused in the joint 'Military II' case, Ndindiliyimana *et al.*, suspected of bearing responsibility for the deaths of the ten peacekeepers who were "horribly killed and mutilated by an unleashed horde"¹⁰ of killers. A memorial and shrine to the murdered soldiers now marks the exact place where they were killed in the capital, Kigali, though for many the delivery of justice is the most appropriate way to mark their memory. Accordingly, commanders of the Reconnaissance Battalion of the Rwandan Army, François-Xavier Nzuwonemeye and Innocent Sagahutu are on trial in part for their responsibility as superiors of the soldiers who committed the assassinations. Former Chief of staff of the *Gendarmerie nationale*, Augustin Ndindiliyimana is also alleged to bear responsibility for the acts committed by forces under his control in the assassinations, whilst Ndindiliyimana is also on trial accused of frustrating the early attempts of UNAMIR commander, Roméo Dallaire, to investigate weapons caches before the genocidal violence began. Yet another accused allegedly bearing responsibility for the deaths of the ten peacekeepers, Protais Mpiranya, remains at large.

¹⁰ Prosecutor v. Bizimungu, Ndindiliyimana, Nzuwonemeye and Sagahutu, Indictment, ICTR-00-56-I, 23 August 2004, para. 105.

2.2.3. Colonel Théoneste Bagosora

On 18 December 2008, Trial Chamber I of the ICTR convicted one of the chief masterminds of the Genocide, Théoneste Bagosora, of genocide and crimes against humanity and sentenced him to life imprisonment.¹¹ Bagosora had assumed the highest authority in the Rwandan Ministry of Defence following the death of President Habyarimana, and was judged responsible for, among other acts, the organised killing of civilians by *Interahamwe* militias. According to their indictments, several of the accused currently on trial have specific links to Bagosora and themselves bear responsibility as ‘masterminds’ of the Genocide.

The trial of former officer in the Rwandan Army and Director of the Judicial Affairs Division of the Rwandan Ministry of Defence, Ephrem Setako, began in August 2008. The former Lieutenant-Colonel is charged with being a principal planner and executor of the Genocide. Further, with explicit links to Bagosora, a verdict is expected in 2009 in the ‘Government II’ trial of four co-accused in Bizimungu *et al.*. Specifically, Casimir Bizimungu and Prosper Mugiraneza as ministers in the Interim Government during the Genocide are accused of conspiring with Bagosora in working out a plan to exterminate the Tutsi population, which included recourse to hatred and ethnic violence, the training and distribution of weapons to *Interahamwe* militias, as well as the preparation of lists of persons to be exterminated. Perhaps more importantly, in the Ndindiliyimana *et al.* trial, former Chief of staff in the Rwandan Army, Augustin Bizimungu, is accused of participating in the plan conceived alongside Bagosora, as well as overseeing grotesque atrocities committed by his subordinates, including the cutting of foetuses from their mothers during the Genocide. According to a Human Rights Watch report,¹² Bizimungu was promoted to his position by Théoneste Bagosora to replace another officer “deemed not rigorous enough in exterminating the Tutsi minority”.

2.2.4. A continuing “threat to international peace and security”

In Resolution 955 (1994) establishing the ICTR, the UN Security Council expressed concern that “the situation continues to constitute a threat to international peace and security”. Even today, 15 years after the Genocide, violent conflict in eastern Democratic Republic of Congo (DRC) and the instabilities of the Great Lakes region can largely be traced to the final days of the Genocide during which millions of Hutus fled the country faced with advancing RPF forces. Alongside innocent civilians, the mass exodus included many hundreds of *génocidaires* and *Interahamwe* militias fleeing over the border into Zaïre (now the DRC). The subsequent humanitarian policies implemented by international forces and the UN in many respects further exacerbated the problems by inadvertently providing protection for thousands of perpetrators of the Genocide. There were also strong accusations of crimes committed against Hutu civilians by the RPF. For these reasons, the major relief organisations eventually pulled out of Zaïre.

¹¹ Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, Trial Chamber Judgment, ICTR-98-41-T, 18 December 2008.

¹² Human Rights Watch, *Rwanda: Top Genocidaire Arrest an “Important Step”*, 14 August 2002, Available at <<http://www.hrw.org/en/news/2002/08/15/rwanda-top-genocidaire-arrest-important-step>>.

Following two previous invasions of its neighbour with the ostensible purpose of targeting the remaining perpetrators, Rwanda launched an operation in January 2009 alongside the government of the DRC to attack the Hutu rebels known as the *Forces démocratiques de libération du Rwanda* (FDLR). After fleeing Rwanda in July 1994, Augustin Bizimungu is alleged to have continued to command his Hutu troops, forming an army which was eventually integrated into the FDLR. Moreover, the trial of another suspect thought to have contributed to the violence in the DRC, Jean-Baptiste Gatete will soon commence before the ICTR, while another alleged collaborator with the FDLR, Callixte Nzabonimana awaits trial in Arusha following his arrest in Tanzania. Idelphonse Nizeyimana, a fugitive of the ICTR, is also suspected of being a current commander in the FDLR.

The International Criminal Court (ICC) has also become indirectly seized of the matter, with the indictment of Bosco Ntaganda, unsealed in April 2008. Ntaganda, an ethnic Tutsi from Rwanda who fought with the RPF in overthrowing the genocidal regime, is accused of conscripting child soldiers in the Ituri conflict in north-eastern DRC for which Thomas Lubanga Dyilo is currently on trial. After leaving Ituri, Ntaganda joined the forces of another former RPF soldier, Laurent Nkunda, in the rebel group, *Congrès national pour la défense du peuple* (CNDP), which claims to fight on behalf of Congolese Tutsis. However, after Ntaganda claimed he had ousted Nkunda in the CNDP leadership, forces under Ntaganda's control fought alongside the Congolese army in the joint military operations launched in January 2009 by the DRC and Rwanda to disarm the FDLR. In the course of the operations, Laurent Nkunda was also arrested by Rwandan forces and remains in their custody, though the Congolese Government in Kinshasa is pushing for his extradition to the DRC after issuing a warrant for his arrest in 2005 on war crimes charges. The matter is further complicated by accusations that Nkunda and his rebels were backed by Rwanda.

2.2.5. *The national jurisdiction of Rwanda*

The adoption in 1996 of the Rwandan 'Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990', and the abolition of the death penalty in Rwanda in July 2007, raised expectations that the national jurisdiction of Rwanda would not only concurrently prosecute suspected *génocidaires*, but ease the workload of the ICTR by receiving referrals from the UN Tribunal. The Prosecutor at the ICTR has also sought to concentrate on prosecuting the most senior accused by attempting to refer lower rank, intermediate officials to national jurisdictions, with the Tribunal's Rules of Procedure and Evidence amended by judges to allow for such referrals. As yet however, this plan to refer cases to national jurisdictions has faced legal obstacles.

The Prosecutor has so far made five requests for referral of cases to the Rwandan national jurisdiction, including the case of Idelphonse Hategekimana which recently commenced at the ICTR. As well as Hategekimana, the requests for referral of three accused awaiting trial, Gaspard Kanyarukiga, Yussuf Munyakazi and Jean-Baptiste Gatete, and one fugitive, Fulgence Kayishema, were all unanimously rejected by the ICTR citing fair trial concerns and risks that the accused may be sentenced to life imprisonment in isolation, in violation of their right not to be subjected to cruel, inhuman or degrading treatment. Despite claims that in

doing so the judges were threatening the Completion Strategy of the Tribunal, the decisions against referral were upheld on appeal.¹³

In the first case involving the referral of an accused to a national jurisdiction other than Rwanda, the ICTR denied the request of the Prosecutor to transfer the case of Michel Bagaragaza to Norway since Norwegian law contained no specific genocide provision. A second request to refer the case to the Netherlands was accepted in April 2007, but later revoked owing to concerns over the prosecution of genocide in the Dutch courts. The decision to revoke the referral came less than a month after the Hague District Court declared itself incompetent to prosecute genocide in the case of Joseph Mpambara, a Rwandan arrested in the Netherlands after applying for asylum, and convicted by the same court on 23 March 2009 for torture – but not genocide.¹⁴ Bagaragaza was thus transferred back to Arusha in May 2008.

2.3. The remaining gaps in the search for justice

In March 2009, UN Secretary-General, Ban Ki-Moon called for cooperation in the arrest of the remaining fugitives of the ICTR. The call reiterated the demand made by the UN Security Council in Resolution 1503 (2003) for cooperation from states including Kenya and the DRC in the arrest of the remaining 13 indictees still at large. Moreover, in the same month in 2009, the Prosecutor at the ICTR, Hassan Jallow, deplored Kenya as the “biggest obstacle”¹⁵ to the Tribunal’s work.

The comments of Mr Jallow demonstrate the frustration of the ICTR that one of its main suspects remains at large, suspected of residing in Nairobi, Kenya. Félicien Kabuga, believed to be the chief financier of the entire genocidal campaign in Rwanda, has a reward of several million US dollars on his head as part of the US State Department’s ‘Rewards for Justice’ campaign to bring wanted criminals and suspected terrorists to justice. Nevertheless, the wealthy businessman and former RTLM president, believed to be responsible for the importation of the infamous machetes used to devastating effect during the Genocide, continues to evade justice. Kabuga, whose assets were frozen by Kenya in 2008, is also believed to have acted as mentor to Augustin Bizimungu, facilitating his ascent to becoming one of the chief architects of the violence in 1994.

Another suspect who remains at large, Protais Mpiranya, is also accused of helping to finance the mass slaughter in Rwanda. Similar to Kabuga, reports in 2008 suggested that Mpiranya

¹³ Prosecutor v. Munyakazi, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11bis, ICTR-97-36-R11bis, 8 October 2008. Prosecutor v. Kanyarukiga, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11bis, ICTR-2002-78-R11bis, 30 October 2008. Prosecutor v. Hategekimana, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11bis, ICTR-00-55B-R11bis, 4 December 2008.

¹⁴ ‘Dutch Court finds Rwandan Militiaman guilty of torture’, Hague Justice Portal, 23 March 2009, <<http://www.haguejusticeportal.net/eCache/DEF/10/464>>.

¹⁵ Radio Netherlands Worldwide, *Rwanda tribunal steps up pressure to arrest genocide financier*, 10 March 2009, <<http://www.rnw.nl/internationaljustice/tribunals/ICTR/090310-kabuga>>.

was being sheltered in Zimbabwe with allegations that he had business links to President Robert Mugabe.

Finally, alongside Félicien Kabuga, Augustin Bizimana is one of the most wanted fugitives of the ICTR and the most senior figure still at large. Formerly the Minister of Defence in the Interim Government exercising authority over the Rwandan Armed Forces, Bizimana is accused of genocide, conspiracy to commit genocide, complicity in genocide, direct and public incitement to commit genocide, serious violations of Common Article 3 and Additional Protocol II, as well as murder, extermination, rape and persecution as crimes against humanity. Bizimana is also subject of a \$5 million bounty as part of the 'Rewards for Justice' campaign.

3. The legacy of the ICTR and the Genocide in Rwandan history: Recent developments

According to Resolution 955 (1994), the ICTR was established with three main priorities: addressing a threat to international peace and security; bringing to justice through prosecution persons responsible for genocide and other serious violations of international humanitarian law; and contributing to national reconciliation and the restoration and maintenance of peace.¹⁶ Judged according to these pre-determined objectives and in the light of recent developments concerning the ICTR, the legacy of the prosecution of crimes committed in Rwanda in 1994 can be assessed.

3.1. The Republic of Rwanda: A continuing threat to international peace and security?

The refugee crisis that enveloped neighbouring states to Rwanda in the latter days of the Genocide remains one of the largest outflows of a population ever witnessed. The effects of this mass exodus were most acutely felt in the North Kivu region of Zaïre, which, it has been demonstrated, was centrally organised by the collapsing Hutu Power regime, with the administrative and military structures of that regime remaining intact and simply transplanted into Zaïre.¹⁷ The effect of the advancing troops of the RPF on this outflow is of significance.

Accusations of attacks perpetrated against innocent Hutu civilians beyond the collateral damage 'expected'¹⁸ during an active conflict, as well as reports of the failure to distinguish civilians from militias, are just some of the crimes allegedly committed and which encouraged the flow of refugees. Perhaps more damningly, RPF forces are widely accused of having committed gross violations of human rights and international humanitarian law,

¹⁶ UN SC Resolution 955 (2004).

¹⁷ See for example R. Block, *Hutus plot to regain Rwanda*, *The Independent*, 4 August 1994.

¹⁸ Under the Additional Protocols to the 1949 Geneva Convention, civilians receive legal protection from indiscriminate and disproportionate attacks or from becoming the object of attacks, but attacks that could cause 'collateral damage' are not prohibited *per se* as long as the necessary precautions are observed.

including summary executions. Strong allegations supported by documented evidence continue to be made of systematic killings perpetrated by RPF forces in the refugee camps across the border in Zaïre. According to a confidential UN report leaked to the press in September 1994, between 25,000 and 45,000 persons were killed by the RPF in the period from April to August 1994 alone, including many thousands of refugees.¹⁹ In the absence of a full, open and independent investigation of these alleged abuses, the threat to international peace and security that they pose(d) remains unaddressed.²⁰

Rwanda's involvement in Zaïre/the DRC's affairs under Paul Kagame's leadership has continued to the present day in both overt and more subtle forms. The consequence has been the maintenance of an often explicit threat to peace and security in the DRC, which has prevailed in the east of the country for many of the fifteen years since the Genocide. As noted, with the support of Uganda, Rwanda backed an operation in 1996 to install Laurent Kabila as the new leader of Zaïre, despite originally denying any support to Kabila's Alliance of Democratic Forces for the Liberation of Zaïre (AFDL) rebels. The rebellion with Rwandan support followed the increased militarisation of refugee camps and exploitation of international aid by Hutu Power forces, enabling these forces to launch attacks into Rwanda. What became known as the 'First Congo War' ended in 1997 with Kabila as President of the newly-named Democratic Republic of the Congo. This devastating conflict claimed the lives of thousands of civilians who were used as strategic pawns in the Rwandan-backed rebellion.

Nevertheless, after relations with Kabila soured, Rwanda launched another invasion into the DRC in 1998, again with the support of Uganda. This time, in 'Africa's World War', eight African states became directly involved in the conflict, which officially ended in 2003.²¹ The conflict exploited genocidal ideology that existed in eastern DRC following the Genocide, but also the ethnic composition of the region, which bears strong similarities to Rwanda. Whilst Kabila appealed to Hutu extremists for support, the conflict eventually became one fought by proxy, with Rwanda supporting its proxy forces, the Rally for Congolese Democracy (RCD) and Uganda, Jean-Pierre Bemba Gombo's Movement for the Liberation of Congo (MLC). In-fighting and the desire to plunder the DRC's vast natural resources - diamonds, copper and coltan - eventually led to several armed breakaway groups. This complex and 'messy' conflict lasted five years and resulted in more deaths than any other conflict since WWII.²²

After proceedings were instituted by the DRC at the International Court of Justice (ICJ) in The Hague, the Court found in December 2005 that Uganda had "violated the principle of non-use of force in international relations and the principle of non-intervention", and had "violated its obligations under international human rights law and international humanitarian

¹⁹ Human Rights Watch, *Leave None to Tell the Story: Genocide in Rwanda*, Available at <<http://www.hrw.org/legacy/reports/1999/rwanda/rwanda0399.htm>>.

²⁰ It should be recalled that under Resolution 955 (1994) the ICTR is mandated to prosecute "[...] Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States [...]" (emphasis added).

²¹ Angola, Chad, Namibia and Zimbabwe supported the DRC against the forces of Rwanda, Uganda and Burundi.

²² International Rescue Committee, *Mortality in the Democratic Republic of Congo: Results from a Nationwide Survey*, Available at <http://www.theirc.org/resources/drc_mortality_iii_report_1.pdf>.

law”.²³ Uganda was directed to pay compensation to the DRC. Whilst the Court ruled that it had no jurisdiction to hear similar proceedings initiated against Rwanda, the Dissenting Opinion of Judge Koroma demonstrates the severity of the charges Rwanda would have faced had the Court been able to find a legal base to judge the case. Commenting on the allegations that its proxy forces committed ‘acts of genocide’ against Congolese civilians, Judge Koroma highlighted the duplicitous stance of Rwanda by stating:

“[...] it is neither morally right nor just for a State to shield itself from judicial scrutiny [...] in respect of acts alleged to have taken place in the territory of a *neighbouring* State when those acts constitute the very same conduct as that in response to which the State successfully urged the establishment of an international tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law.”²⁴

The influx of arms, existence of sought-after natural resources, as well as the promulgation of greater ethnic identification as a result of the violence, has fuelled two interrelated conflicts in eastern DRC which continue to destabilise the region. It follows that the after-effects of the Genocide and the interests of foreign governments have resulted in an almost complete absence of peace and security in the region. A UN report released in December 2008, and one of the first official condemnations of Rwanda’s role, presented “consistent and credible” testimonial evidence of the supplying of child soldiers, military equipment, army troops, as well as financial support for the CNDP rebels of Laurent Nkunda in the ‘Kivu conflict’ in eastern DRC.²⁵ The report found that Rwanda acted as a rear base and provided artillery support during Nkunda’s October 2008 offensive which grabbed news headlines. It also alleged that Rwanda had had direct dealings with Bosco Ntaganda, the rebel commander indicted by the ICC. A subsequent Security Council Resolution nonetheless stopped short of naming and shaming Rwanda, merely condemning the illicit flow of weapons and requesting the cooperation of neighbouring states.²⁶

Both testimony and the arguments of counsel in the trial of Thomas Lubanga before the International Criminal Court have further highlighted the role of Rwanda in the ‘Ituri conflict’ in the DRC. At the beginning of Lubanga’s trial, Defence counsel, Jean-Marie Biju-Duval said that the Court should resist the temptation to convict Lubanga as a ‘proxy’ for those - including Rwandan and Ugandan government officials - who should be prosecuted.²⁷ Testimony from former child soldiers also revealed that Lubanga’s Union of Congolese Patriots (UPC) received arms from Kigali when supplies from Uganda became unavailable.

²³ Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, 19 December 2005, 2005 ICJ General List No. 116, at 101, para. 345.

²⁴ Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, Dissenting Opinion of Judge Koroma, 3 February 2006, 2006 ICJ General List No. 126., 55, at 62, para. 24.

²⁵ S/2008/773. Final report of the Group of Experts on the Democratic Republic of the Congo, 12 December 2008.

²⁶ UN SC Resolution 1857 (2008).

²⁷ Prosecutor v. Thomas Lubanga Dyilo, Case. No. ICC-01/04-01/06, Transcript of Trial Hearing, 27 January 2009, p. 31.

In spite of the evidence which continues to mount against the RPF and Rwanda, its role in and culpability for the instability of the region remain largely ignored by the UN and the ‘international community’. Perhaps owing to lingering ‘Western’ guilt for failing to intervene to halt the Genocide in 1994 (a point continuously highlighted by the government), oversimplified endorsement of the RPF as the ‘good guys’ from 1994, or even owing to the sensitive subject matter, only of late has real scrutiny begun to be applied.²⁸ As historian and genocide scholar, Gérard Prunier noted in his testimony before the ICC in March 2009, “[f]or a long time, the international community has shown a tolerance – and that’s putting it mildly – a certain degree of tolerance towards Kampala and Kigali. For certain reasons there was guilt because of the genocide [...]”²⁹ Whilst the ICTR has to date only indicted Hutu suspects, and with the prospect of new indictments for RPF officials extremely remote given the Tribunal’s Completion Strategy, judicial scrutiny at the ICTR seems an unrealistic expectation. Yet, after the Pre-Trial Chamber at the ICC defined the ‘Ituri conflict’ as international in character and highlighted the role of Rwanda in the conflict, the possibility exists for the Prosecutor to further investigate Rwanda’s role. Regional relations and Rwanda’s non-ratification of the Rome Statute remain obvious hurdles to this course of action, though the Court certainly has options to exercise its jurisdiction in this regard.

3.2. Prosecutions: National shortcomings and Victor’s justice?

The growing sentiment that scrutiny of the RPF is acceptable and neither akin to revisionism nor denial of the Genocide has over recent years led to Rwanda’s shield from international reproach being slowly removed. In addition to the UN report of December 2008, in early 2009 the UN Human Rights Committee expressed its concern at reports of killings by the RPF both during and after the Genocide, urging Rwanda to investigate and prosecute such acts.³⁰

Moreover, prior to the ICTR Prosecutor’s appearance before the UN Security Council on 4 June 2009 to present the Tribunal’s progress towards its Completion Strategy, three separate letters were forwarded to urge investigation of such alleged crimes. The first, addressed to Paul Kagame from seven suspects whose trials are ongoing at the ICTR, called for an investigation as part of a wider process to combat the rewriting of Rwandan history.³¹ Another, signed by a list of scholars and human rights advocates and sent to UK, US and UN officials, deplored the absence of RPF indictments as a failure of the Tribunal to fulfil its mandate, setting a “dangerous precedent [which will] undermine efforts at achieving peace, security, and reconciliation in Rwanda and the Great Lakes region as a whole.”³² Finally, in a

²⁸ For example, in response to the UN report of December 2008 demonstrating Rwanda’s support for Nkunda’s rebels (as stated, in itself one of the first detailed reports into Kigali’s dealings) the Netherlands and Sweden announced that they would stop supplying donor aid to Rwanda.

²⁹ Prosecutor v. Thomas Lubanga Dyilo, Case. No. ICC-01/04-01/06, Transcript of Trial Hearing, 26 March 2009, p. 85.

³⁰ CCPR/C/RWA/CO/3. UN Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, 31 March 2009.

³¹ Available at <<http://africannewsanalysis.blogspot.com/2009/05/ictr-defendants-open-letter-to.html>>.

³² Available at <http://concernedafricascholars.org/wp-content/uploads/2009/06/advocacy-letter_final_added-signatures.pdf>.

letter sent to the ICTR Prosecutor, Hassan Jallow, Human Rights Watch warned that such failings would “seriously undermine the Tribunal’s legacy.”³³

That these violations have begun to attract the attention of the world’s conscience (and also Mr. Jallow’s, who informed the Security Council that the allegations against the RPF remain of concern to the Tribunal) dates back to a 1994 UNHCR report. The ‘Gersony Report’ as indicated earlier, documented widespread and systematic killings by the RPF of up to 45,000 people, but was never officially released, with its findings only leaked to the press. However, to avoid scrutiny of their actions, as well as to support the new government, the report was suppressed by both the UN and US, who eventually denied any notion of its existence.³⁴ Whilst this state of affairs existed for many subsequent years, the publication of the inquiry by a French Judge – the ‘Bruguière report’ - into the attack on President Habyarimana’s plane led to renewed accusations against the RPF. Issuing arrest warrants against nine of its officials and calling on the ICTR to investigate Kagame, the Bruguière report has also been supported by testimony before the Tribunal by Aloys Ruyenzi, former bodyguard to the Rwandan President, who further attested to civilian massacres by the RPF.³⁵ Rwanda’s response was to initiate its own damning investigation into France’s role in the Genocide, though not before a Spanish court issued warrants for 40 RPF officials alleging crimes perpetrated in Rwanda and the DRC from 1990 to 2000.³⁶

Resolution 955, like the law in general, makes no distinction between “persons responsible for serious violations of international humanitarian law”.³⁷ To avoid the label of ‘victor’s justice’ the Prosecutor at the ICTR has been urged to follow the example of the prosecutors at the ICTY and the hybrid Court for Sierra Leone, and prosecute the crimes committed by all sides, including the crimes of those long regarded as the ‘good guys’. Indeed, the evidence against the RPF continues to grow, which has not gone unnoticed in Rwanda. Last year a law was passed granting former presidents lifelong immunity from prosecution for international crimes. Further, whilst the case was largely condemned by observers as a political farce,³⁸ the Rwandan government began to bow to mounting pressure by trying four of its officials for the deaths of 13 clergymen in June 1994 in Kabgayi, Kigali.

³³ Human Rights Watch, *Letter to the Prosecutor of the International Criminal Tribunal for Rwanda Regarding the Prosecution of RPF Crimes*, 26 May 2009, Available at <<http://www.hrw.org/en/news/2009/05/26/letter-prosecutor-international-criminal-tribunal-rwanda-regarding-prosecution-rpf-c>>.

³⁴ Human Rights Watch, *Leave None to Tell the Story: Genocide in Rwanda*, Available at <<http://www.hrw.org/legacy/reports/1999/rwanda/rwanda0399.htm>>.

³⁵ In the *Bagosora et al.* case, the Prosecution argued that “[...] given the numerous competing theories for who was responsible, as well as the conflicting information [...]” concerning the attack on President Habyarimana’s plane, it is unlikely that a case could ever be brought to trial concerning this incident. See *Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, Trial Chamber Judgment, ICTR-98-41-T, 18 December 2008, para. 1993.

³⁶ International Forum for Truth and Justice in Africa of the Great Lakes Region, Press Release, 8 February 2008, Available at <http://www.veritasrwandaforum.org/material/press_release_080208_eng.pdf>.

³⁷ UN SC Resolution 955 (1994).

³⁸ See for example Human Rights Watch, *Rwanda: Tribunal Risks Supporting ‘Victor’s Justice’*, 1 June 2009, Available at <<http://www.hrw.org/fr/news/2009/06/01/rwanda-tribunal-risks-supporting-victor-s-justice>>.

3.2.1. *The ICTR and National Jurisdictions*

A particular criticism levelled at the Prosecutor of the ICTR nevertheless concerns the transfer of this *Kabgayi* RPF case to the national jurisdiction of Rwanda in the first place. Several national courts in the last year alone have refused to extradite suspects accused of genocide and other crimes to Rwanda, based on concerns over the fair administration of justice.

On 3 November 2008, Germany refused to extradite two genocide suspects, Callixte Mbarushimana and Onesphore Rwabukombe, on the basis of the *Munyakazi* Appeals decision taken by the ICTR.³⁹ In February 2009, Finland refused to extradite former pastor, Francois Bazaramba, again citing ICTR decisions to determine that it could not be established that he would receive a fair trial. Bazaramba's trial before a Finnish court began on 17 June 2009. Furthermore, on 8 April 2009, the High Court in London allowed an appeal by four suspects against extradition due to the risk of a "flagrant denial of justice" in Rwanda.⁴⁰ In their decision, Lord Justice Laws and Lord Justice Sullivan appeared to disagree with the ICTR Appeals Chamber in *Munyakazi*, which found that the Trial Chamber had erred in holding that Rwanda does not respect the independence of the judiciary. The two Lord Justices said that the risk of interference by the Rwandan government with the judiciary was a significant factor in allowing the appeal. Lord Gifford QC, appearing for Mr. Munyaneza, said the case revealed "an emerging international consensus that there is no fair trial in Rwanda".⁴¹

By contrast, in May 2009 the Supreme Court of Sweden, in ruling that it would not prevent the extradition of Sylvère Ahorugeze, maintained that despite some flaws, the domestic legal system in Rwanda continues to improve. However, with such decisions in the minority,⁴² it will be left to national courts to try those suspected of genocide living in their jurisdictions, such as the recent conviction of Désiré Munyaneza by the Quebec Superior Court. This too, however, remains a far from simple task. National courts often claim a lack of jurisdiction to prosecute international crimes committed by non-nationals on the territory of other states, or are unable to prosecute the most serious crimes, as well as suffering the added difficulties associated with trying to investigate and secure witness testimony. Such complications were experienced in the Netherlands in convicting Joseph Mpambara of torture as opposed to genocide.⁴³ While some states have used specific legislation for the prosecution of these

³⁹ This particular decision was controversial as Callixte Mbarushimana is acknowledged as being the Secretary-General of the FDLR rebels acting in the east of the DRC. It also led to strong Rwandan and international protests following the arrest of Rose Kabuye, a close aide to President Kagame, just six days later in Germany and her transfer to Paris according to the warrant issued for her by Judge Bruguière. Germany was accused of double-standards and the manipulation of international law.

⁴⁰ BBC News, *Rwanda accused win UK court case*, 8 April 2009, <http://news.bbc.co.uk/2/hi/uk_news/7989534.stm>.

⁴¹ At the time of writing, the latest refusal came from Switzerland which cited the prevailing situation in Rwanda regarding human rights as making the extradition "impossible". See Hirondelle News Agency, *Switzerland will not extradite Rwandan genocide suspect to Kigali*, 1 July 2009, <<http://www.hirondellenews.com/content/view/3505/332/>>.

⁴² On 16 July 2009, it was reported that Sweden had suspended the extradition of Sylvère Ahorugeze at the request of the European Court of Human Rights (ECHR).

⁴³ 'Dutch Court finds Rwandan Militiaman guilty of torture', Hague Justice Portal, 23 March 2009, <<http://www.haguejusticeportal.net/eCache/DEF/10/464>>.

crimes (Canada, for example, prosecuted Munyaneza under its Crimes Against Humanity and War Crimes Act in 2000) others such as the UK have laws on their books, but have thus far failed to test them. That such practice violates international obligations to extradite or prosecute (*aut dedere aut judicare*) individuals suspected of international crimes seems lost in debates over jurisdiction. In the UK this appears to mean that the denied extradition request of the four suspects will even be the end of the matter.⁴⁴

As for the legacy of the ICTR and the narrative of the Genocide that will be left behind after it finally closes its doors, the suggestion from the foregoing discussion is that as things stand the risk exists of victor's justice. It is also now inevitable that thousands of untried cases will be left behind both in Rwanda and the states to which many Rwandans fled after July 1994, with a severely criticised national legal system burdened for the foreseeable future with many of these cases. The UN proposal for a residual mechanism should therefore be eagerly awaited as it too will have a significant role to play in the prosecution of genocide and other violations of international humanitarian law from 1994.

3.3. National reconciliation and the maintenance of peace

Presenting his report to the UN Security Council on the Completion Strategy of the ICTR, the Tribunal's President, Judge Dennis Byron, stated the ICTR's continued commitment to ensuring a satisfactory legacy of the Tribunal for all Rwandans. Of greater note, Judge Byron asserted that the Tribunal had "established a judicially verified factual record of the events in Rwanda that will serve as a background for the remaining trials, as a resource for historians, and as a major contribution to the process of national reconciliation."⁴⁵

Considering some of the observations made above, it may be questioned whether this statement is completely accurate, particularly concerning the creation of a verified and accurate record of the events of 1994. Responsibility for the 'trigger' of the Genocide – the missile attack – remains an issue of strong contention with plausible theories for assigning blame to both Hutu extremists and the RPF. Moreover, the prevailing controversy over the perpetration of crimes by the RPF and the almost complete lack of credible investigations (including the actions of the RPF in the years preceding the Genocide) make the suggestion of a sound historical narrative somewhat questionable. Perhaps more serious for the ICTR however, are competing explanations of the nature of the Genocide.

Few genuinely deny the extent of the atrocities committed during the 100 days of slaughter in Rwanda, nor that these events were targeted to exterminate the Tutsi civilian population. However, perceived contradictions between the decisions rendered at the Tribunal have led to the questioning of events previously accepted as fact. It should be remembered that these

⁴⁴ The UK Secretary of State for Justice, Jack Straw, recently announced plans for new powers under national legislation to allow for the prosecution of UK residents and nationals alleged to have committed international crimes committed after 1 January 1991. Existing laws only allow for the prosecution of such crimes committed since 2001. The proposals nevertheless only cover UK nationals and residents, not persons in the UK on a short-term basis.

⁴⁵ Address by the President of the ICTR, Judge Dennis Byron to the United Nations Security Council, 4 June 2009, Available at <<http://69.94.11.53/ENGLISH/speeches/byron090604.htm>>.

decisions represent the application of law to the given facts before selected Judges. The idea that it is the task of courts and tribunals to create an accurate historical record of events is frequently criticised as being at odds with the purpose of the law. And yet, from Judge Byron's statement it appears that the Tribunal has in effect acknowledged this role.

In the case involving three alleged perpetrators, Edouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera, ongoing before the ICTR, the Appeals Chamber issued a decision on 16 June 2006 that established the Genocide as a fact. The judicial note issued by the Chamber established the Genocide between 6 April and 17 July 1994 as a matter of fact beyond dispute, thus removing the need to prove this in every subsequent case.⁴⁶ Moreover, as already noted, cases such as the *Kambanda* trial have confirmed the widely-accepted version of events. Through his guilty plea the former Prime Minister acknowledged that the Genocide had been a carefully planned, state-sponsored endeavour.

Nevertheless, there exists a sizeable minority of persons to whom this version of events during and prior to 1994 remains false, and who argue that the growing debate on the RPF's alleged crimes only substantiates their position. Accordingly, the decision by Trial Chamber I at the ICTR to acquit Théoneste Bagosora and three other high-ranking military commanders of conspiracy to commit genocide in the 'Military I' case, provided enough evidence to support claims that after 15 years "the official Rwanda genocide story has officially collapsed."⁴⁷ That the Tribunal was unable to find the highest military commanders and the alleged 'mastermind' of the Genocide guilty of conspiring in a pre-planned, systematic Genocide of the Tutsi population was thus presented as incontrovertible evidence undermining the narrative of events established prior to this 18 December 2008 decision. This is certainly a persuasive argument, but is nonetheless somewhat misleading.

In rendering its decision, the three-judge Trial Chamber presided by Judge Erik Mose consistently reiterated that their task had been to decide on the specific facts of the case and apply the law to those facts alone. In the view of the Chamber:

"The process of a criminal trial cannot depict the entire picture of what happened in Rwanda, even in a case of this magnitude. The Chamber's task is narrowed by exacting standards of proof and procedure as well as its focus on the four Accused and the specific evidence placed before it in this case."⁴⁸

The Judgement clearly states the Chamber's position that "the question under consideration is *not* whether there was a plan or conspiracy to commit genocide in Rwanda [...] it is whether the Prosecution has proven beyond reasonable doubt based on the evidence in this case that

⁴⁶ Prosecutor v. Karemera, Ndirumpatse and Nzirorera, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, ICTR-98-44-AR73(C), 16 June 2006, para. 35. The Appeals Chamber characterised the events as "a campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda's Tutsi population".

⁴⁷ K. Harmon Snow, *The Rwanda Genocide Fabrications: Human Right Watch, Alison Des Forges & Disinformation on Central Africa*, 6 April 2009, Available at <[http://allthingspass.com/uploads/pdf-267The%20Rwanda%20Genocide%20Fabrications%20\[2\].pdf](http://allthingspass.com/uploads/pdf-267The%20Rwanda%20Genocide%20Fabrications%20[2].pdf)>.

⁴⁸ Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, Trial Chamber Judgment, ICTR-98-41-T, 18 December 2008, para. 2112.

the four Accused committed the crime of conspiracy (emphasis added).⁴⁹ Unfortunately for the Prosecution, this was not the only possible inference based on the facts despite being “completely consistent with a plan to commit genocide”.⁵⁰

As concerning the historical record of events and the apparent collapse of the ‘genocide story’, the Chamber was clear: “[t]he evidence of this trial has reiterated that genocide, crimes against humanity and war crimes were perpetrated in Rwanda”.⁵¹ The Chamber furthermore dismissed as “without merit” suggestions that the Defence’s alternate explanations of events raised doubts as to the occurrence of a genocide, once again stating that “the genocide in Rwanda in 1994 is a fact of common knowledge which there is no reasonable basis to dispute.”⁵²

Whilst some will point out that the stance of the Chamber in its Judgement is somewhat contradictory – stressing its task as only applying the law to individual facts, then in the same breath providing a sweeping assertion of the events in Rwanda – this oversimplifies what is a difficult task beset with problems. The ICTR has been unable to discover who bears guilt for the ‘trigger’ of the Genocide, for which crimes the RPF should be held to account, the precise contours of the plan to exterminate Tutsis and what role the RPF had in instigating the killings before 1994. However, it should be commended for its authoritative statements that the widespread killing of an ethnic group in Rwanda with the intent to exterminate that group constituted genocide. Proceedings have furthermore documented the acts across Rwanda that this genocide was composed of, regardless of whether or not certain acts of certain individuals fall within strict legal definitions of crimes.

Finally, brief mention must be made of the Tribunal’s objectives for peace and reconciliation beyond the creation of a historical record. One such means through which to fulfil its mandate for the maintenance of peace is demonstrated by the ICTR’s sister Tribunal and the Special Court for Sierra Leone, both of which have actively supported the development of national legal systems in the former Yugoslavian states and Sierra Leone respectively. The SCSL has a carefully planned ‘Legacy Programme’ under which training is given to domestic legal personnel and law enforcement officers and norms related to the rule of law are promoted. With the aforementioned problems associated with the national legal system of Rwanda, it seems clear that a coherent policy to promote a strong and fair domestic legal system meeting international standards would have been beneficial not only to the maintenance of peace in Rwanda, but also to the ICTR. Case-load pressures associated with its Completion Strategy would have been eased had the Tribunal felt that it was in a position to transfer cases to Rwanda. Currently however, despite recent announcements by Kigali that it would be amending its genocide laws, the confused situation concerning solitary confinement in isolation (which violates both the Convention Against Torture and the International Covenant on Civil and Political Rights) in addition to other problems means that domestic proceedings in Rwanda are subject to heavy international criticism.

⁴⁹ *Id.* para. 2092.

⁵⁰ *Id.* para. 2110.

⁵¹ *Id.* para. 4.

⁵² *Id.* para. 1998.

Fifteen years after the Genocide, the International Criminal Tribunal for Rwanda has made some significant achievements. However, with thirteen accused still at large, seven cases going through appeals procedures and five suspects awaiting trial, on top of the ongoing trials of over twenty accused, the Tribunal still has some way to go in the search for justice for its victims and survivors. Given the current case-load, it remains to be seen whether the Tribunal will in fact meet its Completion Strategy, especially in the absence of referrals to the national jurisdiction of Rwanda. Nevertheless, UN Under-Secretary-General for Legal Affairs, Patricia O'Brien, recently fired a warning to the remaining fugitives of the ICTR, insisting that they "will not be left off the hook".⁵³ As the UN looks ahead to the Tribunal's closure, O'Brien also confirmed that a draft residual mechanism will soon be presented to the UN Security Council to take over the remaining ICTR cases.

Its legacy in the history of international justice following mass atrocities notwithstanding, it is clear that long after it closes its doors in Arusha the search for justice will continue until all of the remaining accused are tracked down, arrested and brought before a legitimate court to answer for their alleged crimes. Moreover, recent events concerning the prosecution of the thousands of remaining suspects for genocide and violations of international humanitarian law committed between 1 January 2004 and 31 December 2004 have inevitably raised questions regarding the legacy of the ICTR outside of the strictures of administering justice and questions pertaining to the narrative of the events of 1994 that the Tribunal will leave behind. It remains to be seen how history will ultimately judge the Tribunal and its wider effects in Rwanda, especially in light of its pre-determined objectives for international peace, the even-handed prosecution of perpetrators of international crimes and ultimately peace in Rwanda.

⁵³ Radio Netherlands Worldwide, *Rwandan genocide fugitives will not be left off the hook*, 31 March 2009, <<http://www.rnw.nl/internationaljustice/tribunals/ICTR/090331-rwanda-obrien>>.