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# THE FAILURE OF JUSTICE IMPOSED BY THE UN SECURITY COUNCIL.

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## Abstract

*Having been created on November 08, 1994, the ICTR closed its doors on December 31, 2015. The President of the Security Council, while praising the merits of this international criminal court, international organizations and scientific leaders deplore the "failure" of the Tribunal to judge the crimes committed by all parties to the conflict in Rwanda in 1994, its inability to organize fair and equitable trials and its inability to prevent the justice of the ICTR from being phagocytosed by the victors and the major powers members of the Security Council. In terms of the organization of trials, the ICTR has prosecuted only one party to the conflict, has enshrined the impunity of one party to the conflict, has excelled in trampling unreservedly on the principle of the presumption of innocence, and has placed exclusive control of the evidence in the hands of the Government of Kigali and the Prosecutor. In view of the performance of this Tribunal, justice is trampled on, crushed, and rather put at the service of the Winner in the Rwandan conflict that opposes the Tutsis to the Hutus. The Jean Kambanda and Jean-Bosco Barayagwiza cases illustrate this dangerous drift.*

***Keywords:*** Security Council resolution, Tutsi genocide, Rwandan genocide, International Criminal Tribunal for Rwanda, phagocytic justice, failure of international criminal justice, international crimes, international trials, presumption of innocence, habeas corpus.

## Introduction:

Having been created on November 8, 1994, the ICTR closed its doors on December 31, 2015. The President of the Security Council, Ms. Samantha Power, issued a press release in which she "*announces, on behalf of the Members of the Security Council, the closure, on 31 December 2015, of the International Criminal Tribunal for Rwanda (ICTR) established by Council resolution 955 (1994) of 8 November 1994 (SC- SAMANTHA POWER, 2015).* It welcomes *"the important contribution made by the ICTR to the process of national reconciliation and the restoration of peace and security, as well as to the fight against impunity and the development of international criminal justice, in particular with regard to the crime of genocide (SC- SAMANTHA POWER, 2015)."* It then announces that "*the establishment, by resolution 1966 (2010), of the International Mechanism to carry out the residual functions of the criminal tribunals was essential to prevent the remaining fugitives from justice after the closure of the ICTR, and calls on all states to cooperate with the International Mechanism to carry out the residual functions of the criminal tribunals and the Government of Rwanda to arrest and bring to justice the eight remaining fugitives indicted by the ICTR" (SC- SAMANTHA POWER, 2015).*, and calls on *"States to investigate, arrest, prosecute or extradite, in accordance with their international obligations in this regard, any other fugitives accused of genocide residing in their territory. Finally, it reaffirms the Security Council's full commitment to justice and the fight against impunity" (SC- SAMANTHA POWER, 2015).*

This press release caused a great deal of concern with regard to the actual record of the ICTR. Even before the announcement of its closure, urgent appeals were made to the Security Council, deploring, in particular, *the "failure" of the tribunal to judge the crimes committed by all the parties to the conflict in Rwanda in 1994 (ICTR/AMNESTY, 2006).* HWR was even more explicit in stating that "*the greatest failure of the ICTR was its refusal to prosecute war crimes and crimes against humanity committed in 1994 by the Rwandan Patriotic Front (RPF)* [...]. *While the ICTR had a clear mandate to try these crimes, no case concerning the RPF has been prosecuted before*



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*the ICTR (HWR, 2015)*. Jean-Marc SOREL makes a rather poignant remark in these terms: *"Let us not forget what constituted the starting point: this justice is the reflection of an initial failure: that of not having prevented the acts for which the guilty are today sought and judged. And yet, not to act in matters of genocide or crimes against humanity is already to participate in them (SOREL J.M., 2011).* And the funny thing is that the transformation of international justice into ethnic justice was the legal consecration of the work of the Security Council when it openly attacked Ms. Carla Del Ponte, Prosecutor of the ICTR, who wanted to start bringing the RPF party to justice. Wasn't she cleverly excluded from the ICTR, and therefore from the RPF file, by the amendment of article 15 of the ICTR Statute? (HARTMAN F., 255-256; ONANA C., 312, 315-316, 322); REYNTJENS F., 2005)

Several other authors and researchers, in speaking of the ICTR's record, have described it in several ways. In addition to the failure that we have just highlighted, some have described it as mixed (LAPIDI P., 2015; GUICHAOUA A., 2002; SOREL J.M., 2011), looking here and there for justifications, claiming that it was too early to formulate a valid opinion because it was necessary to go through the running-in period (GETTA J.P.; CISSE C., 1996; DUPAQUIEUR P., 1996). Finally, the former President of the ICTR, Laiti Kama, of Senegalese origin, describes "the ICTR's record as quite satisfactory" (CISSE C., 1996, 269-278). And he continued: "Can and should we be satisfied with such an assessment because of the seriousness of the interests involved? Is the ICTR fulfilling its mandate? Should it be revised? (CISSE C., 1996, 269-278)

It is, therefore, appropriate to note, through the above opinions, the disappointment with which the international community learned of the closure of the ICTR. In 2017, a doctoral thesis in International Law concluded that, based on its analysis, *"the partial execution of the ICTR's mandate constitutes a failure on the part of the international community to resolve the Rwandan crisis and manage its consequences at the regional level (NDAYISABA E., 2017, 463-464).*

Proceeding more analytically, it should be noted that the UN has been unable to organize fair and equitable trials (1), and that the justice of the ICTR has been phagocyted by the victors and the major powers that are members of the Security Council.

## 1. The UN's inability to organize fair and equitable trials.

The ICTR Statute imposes on the ICTR Trial Chamber the responsibility to ensure that the trial "is fair" (art. 19.1) and that the accused "shall be given a fair hearing" (20.2). But the reality is quite different. The ICTR has prosecuted only one party to the conflict (1.1), has enshrined the impunity of one party to the conflict (1.2), has trampled on the principle of the presumption of innocence (1.3), and finally has placed the exclusive control of the evidence in the hands of the Government of Kigali and the Prosecutor (1.4)

### 1.1. Prosecution of a single party to the conflict

The serious violations of international law that took place in Rwanda were primarily caused by the war of invasion initiated on October 1, 1990, by the RPF with the active assistance of Uganda under President Museveni, and then resumed with intensity around April 6, 1994. It is known that in this conflict, there were mainly two sides. On the one hand, there was the Rwandan Patriotic Army and the National Resistance Army, composed mainly of Tutsis, and on the other hand, there was the Rwandan government controlled by the Hutu majority. From there, to contradict the opinion of the judges of Chamber I who, in the judgment of Jean-Paul Akayesu, affirmed that the armed conflict between the two belligerent parties and the massacres that took place in Rwanda in 1994 were two fundamentally different phenomena (JUG. AKAYEZU J.P., §118).

The trials underway at the ICTR have only involved Hutu leaders from the government side, while those from the other side of the conflict, the RPA/NRA, have not been bothered at all. The indictments and the history of events (BARAYAGWIZA J.B., ICTR-97-19-I) adopted by the Prosecutor and endorsed as such, without debate, by the Judges, reflect only the analysis and opinion favorable to the RPA/NRA and its supporters or accomplices (JUG. AKAYEZU J.., § 78-115). It is obvious that the trials are based on partial and biased considerations of the events. Under these conditions, it is impossible to speak of fair and equitable trials.

One would have thought that the ICTR would stick strictly to its official mission of bringing to justice all those responsible for serious crimes within its jurisdiction. But the machine seized up from the start when the Prosecutor was prevented or refrained from conducting proper investigations on all parties to the conflict and all the ins and outs of the Rwandan tragedy of 1994, for political rather than legal reasons. It should have carried out exhaustive investigations into the crimes committed by the RPF and its supporters, including the assassination of President Habyarimana, as recommended by United Nations experts. Indeed, at the end of its investigations, the Commission of Experts *"considered that there were serious reasons to conclude that Tutsi elements had also engaged in massacres, summary executions, violations of international humanitarian law and crimes against humanity against Hutus and that allegations concerning these acts should be investigated further (FINAL REPORT OF EXPERT,* 1994, § 95). The Commission itself was unable to carry out these investigations despite the instruction of the UN Secretary-General to do so*(FINAL REPORT OF EXPERT*, 1994, § 95). The Commission then recommended, in its final report, "*that the investigation into the violations of international humanitarian law and human rights law attributed to the Rwandan Patriotic Front be continued by the Prosecutor. Accordingly, the Commission transmitted all documents in its possession to the Secretary-General (FINAL REPORT OF EXPERT*, 1994, § 196).

It is important to note that the Security Council adopted the Commission's report including this recommendation. The Prosecutor was therefore obliged to comply with it and to punish the crimes committed against the Hutus by the other party to the conflict, the RPF, and its accomplices. However, it is clear that the Prosecutor's strategy, more than 5 years after the effective establishment of the Tribunal, remains the indictment of only those Hutus close to the government side. Although Judge Kama recognized as early as 1998 when he was President of the Tribunal that "*crimes committed against Hutus must not go unpunished (LE TEMPS, 18/09/1998)* ", no Chamber has ever addressed this issue. On the contrary, in its judgment of June 1, 2001, in the Akayesu



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case, the Appeals Chamber rejected the idea of the ICTR's impartiality put forward by the Defense because the perpetrators of crimes against Hutus were not being prosecuted, in particular, on the grounds that the prosecution was the responsibility of the Prosecutor (JUG. AKAYEZU J.P., §94-97). If the Prosecutor is biased, is it not the entire Tribunal that bears responsibility? At the time, President Kama expressed the hope that the Prosecutor's strategy would evolve "*so that there is a balance in the repression of crimes committed by the belligerents. For him, "All parties, including the RPF, who committed crimes against humanity should and must be prosecuted. It is a simple question of fairness. The credibility of international justice is at stake (LE TEMPS, 18/09/1998).*

Three years after this statement by the President of the ICTR, only the Hutus were still being charged. No member of the RPF or any of its supporters has yet been prosecuted by the ICTR, despite the thunderous statements of Ms. Carla Del Ponte, ICTR Prosecutor. She even said that arrests would be made soon. However, in a press conference held in April 2001, following her meeting with Mr. Paul Kagame, she returned to the simple possibility of conducting investigations against RPF soldiers (PRESSE RELEASE ICTR/INFO, 2001). None of this had taken place several months after the Prosecutor's initial statements about investigating RPF soldiers and arresting some of them. On the contrary, four Hutus were arrested even before exhaustive investigations were conducted. These were Monsignor Samuel Musabyimana, Anglican Bishop of Shyogwe, arrested in a bizarre way in Nairobi on April 26, 2000, and transferred the same day to Arusha without the knowledge of the Kenyan judicial authorities; Simeon Nshamihigo, Investigator in the Samuel Imanishimwe case, who was arrested on May 19, 2001, within the walls of the Tribunal, at the instigation of and with the active participation of Mr. Martin Ngoga, "Representative of Rwanda". Martin Ngoga, "Representative of Rwanda" at the ICTR; Sylvestre Gacumbitsi, former Bourgmestre of the Commune Rusumo, as well as Jean Mpambara, former Bourgmestre of the Commune Rukara, both arrested on June 20, 2001, in a refugee camp where they had been under the protection of the Tanzanian government since 1994. Another Hutu, a UN official, named Callixte Mbarushimana, was arrested in Kosovo on April 11, 2001, on the basis of a slanderous denunciation. But he was arbitrarily detained for several weeks and his honor was irreparably damaged. While the Hutus were relentlessly pursued and arrested without serious investigation, no Tutsi or RPF member was even singled out, while several known criminals, including Paul Kagame himself, continued to commit the most heinous crimes with impunity, especially against the Hutu population in Rwanda and the Democratic Republic of Congo.

## 1.2. One party to the conflict enjoys impunity

One of the official missions of the International Criminal Tribunal for Rwanda was to bring to justice those responsible for the crimes committed in Rwanda in 1994 and to fight against impunity. Indeed, the Statute of the ICTR stipulates, in its first article, that it *"shall have the power to try persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States between 1 January and 31 December 1994, in accordance with the provisions of this Statute*".

As part of this mission, the Tribunal must not only take punitive action against those guilty of crimes under its jurisdiction, but it must also take action to fight impunity. From the analysis of Resolution 955 establishing the International Criminal Tribunal for Rwanda (ICTR), it is clear that for the Security Council, the fight against impunity implies, among other things, the following actions: "*to put an end to the crimes*"; and "*to take effective measures to ensure that those responsible are brought to justice".*

The serious violations of international humanitarian law in Rwanda were committed as a result of three successive dramatic events: *First*, the war started on October 1, 1990, by the Ugandan Army allied with the RPA; *second*, the resumption of the war by the RPF and the inter-ethnic massacres that followed the assassination of President Juvénal Habyarimana; and *third*, the massacres perpetrated by the RPA during the various wars waged against Zaire/Congo, in 1996/1997, and then from 1998 to the present.

To stop these crimes, it was necessary to identify and eliminate the factors that caused them. In other words, the ICTR had to stop the war and prevent and stop the massacres. If at the time of the creation of the ICTR, in November 1994, the war taken over by the RPF in Rwanda was over - at that time, we were not thinking of the wars in Zaire/Congo - the same could not be said of the ethnic massacres that have continued even after the RPF took power (July 1994) until today.

Furthermore, the ICTR had an obligation to ensure that those responsible for the crimes were brought to justice. To avoid tolerating or condoning impunity, all those responsible for the crimes had to appear before the ICTR Judges. This means that no one "allegedly responsible" for serious violations of international humanitarian law in Rwanda should escape justice. In other words, no restrictions should prevent the Tribunal from fulfilling its function of fighting impunity. This is especially true since, according to the Special Rapporteur, René Degni Segui, and the UN Experts, to whom Resolution 955 refers, impunity was one of the factors that contributed to the serious violations of international humanitarian law in Rwanda.

It is clear that impunity cannot be fought effectively without bringing to justice, in all fairness, all those who were involved in the Rwandan tragedy. In their allegations - to be proven, of course - the Special Rapporteur and the United Nations experts point to certain groups of these suspected persons. These are *the Rwandan government and some of its organs, in particular, the Rwandan Armed Forces (FAR); the leaders of certain political parties; the "militias" of certain political parties; the leaders of certain media; certain individuals to be identified on the government side; the political and military leaders of the RPF; and the RPF army and its organs.*

In addition to these categories of people mentioned in René Degni Segui's preliminary report (Doc.E/CN.4/1995/7, 1994), numerous other reports, including those of Amnesty International and UN agencies such as the UNHCR (Gersony Report and ICTR Investigator Hourigan), suggest that the following categories should be added: *RPF militias and their infiltrators; RPF accomplices; and media officials belonging to the RPF or media that are RPF accomplices.*



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It is regrettable, however, that the categories of persons belonging to or close to the RPF, one of the parties to the Rwandan conflict, enjoy impunity because of a certain immunity that the Tribunal's Prosecutor seems to have illegally granted them. In fact, from the creation of the Tribunal until the date of its closure, the ICTR Prosecutor refrained from prosecuting individuals belonging to or close to the RPF - the majority of whom are Tutsi - even though they are facing serious charges of crimes of genocide and crimes against humanity. This reflects a deliberate desire to apply discriminatory justice resulting in unfair trials against Hutu elites who are collectively presumed guilty.

By their last visit to Kigali and their meeting and discussion with the highest authorities of the Kigali regime, including President Paul Kagame, the Judges sanctioned this impunity. They reassured the RPF leaders who control this regime that the Judges intend to preserve the relations between the Tribunal and the Rwandan Government that had been tarnished by the release of Jean-Bosco Barayagwiza on November 3, 2000. The price of good relations is, without a doubt, not only the continued detention and subsequent conviction of this accused but also the guaranteed impunity for the leaders of Kigali accused of serious violations of international humanitarian law falling within the jurisdiction of the ICTR. However, in an interview given to the Swiss newspaper, "Le Temps", in 1998, Judge Laïty Kama, President of the ICTR, declared that "*All parties, including the RPF, who have committed crimes against humanity must be prosecuted. It is a simple question of fairness (LE TEMPS, 18/09/1918)".* Since 1999, Ms. Navanethem Pillay has been President of the ICTR and Ms. Carla Del Ponte has replaced Ms. Louise Arbour as ICTR Prosecutor, but to this day the impunity of the RPF and its leaders remains unchanged.

The ICTR promotes impunity and injustice in other forms as blatant, including the concealment of reports or information implicating the RPF and its accomplices. Thus, the UN Secretary-General has embargoed the Gersony report which accuses the RPF leaders of having committed systematic massacres against ethnic Hutu populations targeted as such, particularly in the eastern part of Rwanda, during the first months of the 1994 war. He also concealed the report of Mr. Michael Hourigan, Investigator of the Office of the Prosecutor. This report accuses the RPF of having planned and executed the attack on President Habyarimana's plane (NATIONAL POST, 1-2/03/2000). For its part, the Tribunal seems to have adopted this policy of concealing information of interest to the Defense. For example, the President of the Tribunal placed an embargo (NAVANETHEM P. 2000) on the report of Mr. Michael Hourigan as soon as she received it from the Secretary General of the United Nations, even though Counsel for the Defense had wanted it to be made public and made freely available to the accused. This report can only be obtained following requests that the Chamber may or may not satisfy[1]. Furthermore, the Tribunal has refused to respond positively to the international community's demand for an exhaustive investigation into the assassination of President Habyarimana, an assassination considered by all as the element that triggered the Rwandan tragedy. Some judges even tend to agree with the Prosecutor's thesis that there is no link between this assassination and the political and ethnic massacres that directly followed it (Decision PROSECUTOR v KABILIGI G., ICTR 97-34-I). The Prosecutor goes so far as to state that this case does not fall within the jurisdiction of the Tribunal (AFP, 2000).

## 1.3. A party to the trial is automatically presumed guilty

The Statute of the Tribunal recognizes the principle of presumption of innocence. Article 20.3 states that "every accused person shall be presumed innocent until proven guilty in accordance with the provisions of this Statute". This principle is binding on all, and particularly on the organs of the Tribunal. However, it appears that the Prosecutor and the Judges of the ICTR consider the Hutu defendants as criminals before their trial, as it appears in the reports of the Special Rapporteur René Degni Segui and in those of the United Nations Experts who claim to have gathered irrefutable evidence on this subject.

In his preliminary report, the Special Rapporteur clearly accuses the ruling Hutus of genocide, *"representatives of a formerly dominated ethnic group who use all means and mainly the elimination of the opposing group..." (*Doc. E/CN.4/1995). The United Nations experts are even more explicit. According to them, "*overwhelming evidence shows that the extermination of the Tutsis by the Hutus was prepared months in advance. The massacres were perpetrated primarily by Hutu elements, in a concerted, planned, systematic, and methodical manner and were motivated by ethnic hatred (*Doc. S/1994/1405, § 58). *«While* acknowledging that Tutsis also perpetrated crimes against humanity against Hutus, the Special Rapporteur (Doc. S/1994/1405, § 21-23) and the Experts (Doc. S/1994/1405, § 95-98) downplay these crimes or admit that they have no evidence on this subject.

Continuing in the same vein, without needing to complete the obviously partial and biased investigations of the Special Rapporteur and the Experts, the Prosecutor decided to indict persons belonging to the Hutu ethnic group only. One of the senior officials of the Office of the Prosecutor, Advocate General Yacob Haile Mariam, made an unequivocal statement on this matter during a hearing at the Tribunal. According to him, the Tribunal "*will vigorously and consistently pursue the Hutu extremists... (PROCUREUR v. KANYABASHI J.*, ICTR-96-15-T)". He goes on to say, *"if these extremists were prosecuted and tried effectively and punished, then we could pave the way for reconciliation between other Hutus and other Tutsis so that they can live in peace. [...]. "We are simply pursuing and will relentlessly pursue the Hutu extremists who are responsible for the genocide. **And it is after this that the majority of Hutus will be exempt from this fault and will be able to live in peace with their Tutsi neighbors** (PROCUREUR v. KANYABASHI J.*, ICTR-96-15-T)" (*Emphasis added).* No judge has deigned to contradict him on this subject. This allows us to say that the Judges are also convinced that the Hutus, in general, are guilty of having committed massacres qualified by them as genocide against the Tutsis. The proof is that they have never wanted to examine the question of why only one party to the conflict is being prosecuted and which is, moreover, considered to be automatically guilty.

[1] Some of the accused have been granted access to this document following requests (Aloys Ntabakuze, Gratien Kabiligi, Ignace Bagilishema, Hassan Ngeze and Jean-Bosco Barayagwiza). But they must use it only in their own defense.



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The Prosecution took advantage of this commonality of views with the Judges to the detriment of the accused to impose on the Chambers the presumption of guilt instead of the presumption of innocence. It is in this context that the scandalous statements made on this subject by Ms. Carla Del Ponte herself during the hearing of February 22, 2000, in the case of Jean-Bosco Barayagwiza are situated. In fact, she repeatedly hammered her words into the ground to proclaim the guilt of Jean-Bosco Barayagwiza, curiously without any objection from the Judges. Here is a sample of his statements:

- "This accused who is co-responsible, who is co-author of the death of more than 800,000 people in Rwanda. And the evidence is there, "***unequivocal***": ***he is guilty (BARAYAGWIZA J.B. v. PROCUREUR,*** ICTR-97-19-AR72,).
- I will never stop repeating it: ***Barayagwiza is guilty (BARAYAGWIZA J.B. v. PROCUREUR,*** ICTR-97-19-AR72).
- We said: "***Barayagwiza is guilty of genocide, of crimes against humanity***". We said, it is proven. It is genocide, it is the most serious crime known to humanity. We know that the penalty for genocide is life imprisonment, life imprisonment. How can we forget that? ***(BARAYAGWIZA J.B. v. PROCUREUR,*** ICTR-97-19-AR72)

In reality, therefore, the Judges share the same opinion as the Prosecutor, especially since they are basing their decisions on his allegations, which have not yet been the subject of any adversarial debate, in order to take decisions that call into question the fundamental rights of the accused. This is the case in particular with the judgment of March 31, 2000, in the case of Jean-Bosco Barayagwiza v. the Prosecutor. Indeed, in taking the decision to revise the judgment of 3 November 1999 and to reverse the release of Jean-Bosco Barayagwiza, the Chamber took into account the pressure exerted on it by the Prosecutor and by the Rwandan government, which claimed to represent the "victims" of Jean-Bosco Barayagwiza. To admit that there are indeed "victims" for whom Barayagwiza is responsible is to acknowledge his guilt before the trial or at least to presume it. This is contrary to the principle of presumption of innocence.

It is essential to note that some judges do not hesitate to publicly insinuate that the accused are criminals by using terms such as "*big fish*", "*major criminals*", "*most important leaders*". But such a characterization comes from the Statute of the ICTR, which stipulates that "*The International Tribunal for Rwanda is empowered to try* ***persons allegedly responsible for serious violations of international humanitarian law****.. (STATUT TPIR)* ». This means that, by its very nature, in its essence, this Tribunal violates the principle of presumption of innocence. This makes it unfit to conduct fair and equitable trials..

## 1.4. Evidence is under the exclusive control of the Kigali regime and the Office of the Prosecutor

The evidence for the trials at the ICTR, whether for the Prosecution or the Defense, is available in Rwanda. Indeed, it is there that the serious human rights violations took place. It is in Rwanda that the majority of the witnesses to the tragedy that took place in 1994 and the victims of that tragedy are to be found. It goes without saying that as soon as it took power, the RPF rushed to collect all available evidence in the offices of state institutions and companies, in the buildings of private companies, in public or private homes, and in the places where the alleged crimes were committed. All the evidence thus collected was placed under the strict control of the security services of the new regime under the supervision of the leaders of the RPF and the Rwandan Patriotic Army.

The leaders of the current regime in Kigali have been heavily involved in the large-scale massacres that have taken place in this country from 1990 to date, peaking between 1994 and 1998. They are therefore interested in using this evidence in the ICTR trials. It is obvious that they are collaborating with the Prosecutor to use the information in their possession to create evidence against their political opponents, in this case, those who are under indictment and who appear or are due to appear before the ICTR. On the other hand, they are doing everything to prevent the Prosecutor's investigators from accessing evidence that could indict them themselves or that could exonerate their "enemies. On the other hand, since the acquittal of Ignace Bagilishema in the first instance, the Prosecutor has understood that the easy access of the Defense Teams to evidence could put him in difficulty because of the fragility of his allegations and his evidence. He therefore devised a series of maneuvers designed to prevent the Defense from accessing potential witnesses or documentary evidence in Rwanda. First, the Prosecutor asked the authorities in Kigali not to give facilities to the Defense Teams by suggesting that they are not entitled to the same privileges as the Prosecutor's agents, since, according to the Prosecutor, they are not part of the Tribunal's agents but should be considered as private agents at the service of Defence Counsel (REQUETE EN EXTREME URGENCE ICTR-98-42-T, ICTR-97-29-T, ICTR-96-15-T). In a second step, the Prosecutor devised the tactic of filing motions before the Chambers against the Defense Teams on trial, accusing them of harassment of Prosecution witnesses and requesting stricter control over their movements in Rwanda[2]. In a third stage, the Government of Kigali came to the rescue of the Prosecutor to accuse the Defense Counsel of persecuting Prosecution witnesses in their cross-examinations. Kigali, through the Minister of Justice, Jean de Dieu Mucyo, threatened to return the favor to the Defense. He insinuated that the Rwandan government would no longer provide the Defense with assistance and facilities to access exculpatory evidence within Rwanda (AGENCE HIRONDELLE, DEPECHE, 2001; Case ICTR-98-42-T). In reality, no such facilities or assistance have ever been provided to the Defense. Many Defense Counsels have been rebuffed in this regard. Only the defense teams in Musema and Bagilishema, who were the first to conduct investigations

[2] In the so-called "Butare Group" trial, the Prosecutor alleged that members of the defense teams of Joseph Kanyabashi and Sylvain Nsabimana on mission in Rwanda had undertaken to intimidate the Prosecutor's witnesses. On June 14, 2001, the Prosecutor filed a motion for contempt of the Tribunal (art. 77). According to the Kanyabashi and Nsabimana defense, these allegations were based on false information. See "Prosecutor's Motion for Extreme Urgency to Investigate Contempt of the Tribunal" (Case ICTR-98-42-T) and the subsequent responses of the various Defense Teams in the attached trial.



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inside Rwanda, were able to collect crucial exculpatory evidence. At Musema, this evidence has weakened the Prosecutor's position on several counts. In the case of Bagilishema, the evidence collected in Rwanda was decisive for his acquittal. These two teams were able to surprise the vigilance of the authorities, who had not yet developed a strategy with the ICTR Prosecutor of refusing to cooperate with the defense.

Cooperation with the Prosecutor has been good since the Barayagwiza case was settled according to the requirements of the regime in Kigali. The Prosecutor no longer has difficulties in collecting evidence and finding witnesses for the Prosecution. The Government of Kigali is always quick to make available to him the documents at his disposal as well as the witnesses. It does not even hesitate to fabricate evidence, particularly through the intermediary of Tutsi extremist organizations such as IBUKA, as we have noted above. As for the Defense, it has enormous difficulties in accessing useful documents and in finding people in Rwanda who would agree to testify for the accused at the ICTR. Pastor Elizaphan Ntakirutimana's lawyer, Mr. Ramsey Clark, former U.S. Attorney General and Secretary of Justice, drew the attention of the ICTR judges to this serious issue which, in his opinion, makes the ICTR trials unfair. In a pathetic intervention, during the examination of his client's motion for the Tribunal's incompetence, Mr. Ramsey Clark showed how the inequality of arms is flagrant between the Prosecutor who can obtain all the evidence controlled by Kigali while the Defense cannot access it (TRANSCRIPT, ICTR-96-10-I, ICTR-96-17-I)

The system of law used by the Tribunal privileges testimony as the primary source for demonstrating guilt or innocence. Normally, this system favors the party that has sufficient human and financial resources to afford the best possible witnesses, whether direct or expert witnesses.

Direct witnesses are mainly recruited from Rwanda. A few come from abroad, in particular from Hutu refugee communities scattered around the world. As noted above, the Prosecutor has no difficulty finding witnesses in Rwanda, especially since most are provided by the Rwandan government or by "victims' advocacy" organizations. On the other hand, the defendants are all refugees, driven out of their countries by the RPF power in Kigali and are all on the list of people sentenced to death before the trial. They cannot therefore benefit from any facility to obtain witnesses in Rwanda. Furthermore, all of them fear for their safety if they were to agree to testify in Arusha. Even the refugees, although they are outside of Rwanda, are reluctant to come to Arusha. They fear not only for their own safety, but also for the safety of their relatives or loved ones who were rescued and forcibly returned to Rwanda in 1996-1997. They are also afraid of losing their asylum permits, if they have any, or of not having any, if they do not have any yet. In addition, most of them do not have travel documents. Neither the Tribunal nor the International Committee of the Red Cross, which is dealing with the issue of asylum and travel documents for potential defense witnesses, has made any useful representations to the host countries. The United Nations High Commissioner for Refugees (UNHCR), for its part, is not very favorable to Hutu refugees. According to refugee testimonies, it contributed to the forced return of refugees from Zaire (UMUTESI B., 2000), Tanzania, Benin, Congo-Brazzaville, Burundi and Gabon in 1996-1997, and was indirectly responsible for the summary execution of some of them upon their arrival in Rwanda. In addition, the UNHCR has always adopted a negative attitude on the issue of granting asylum to Hutu refugees. Therefore, this organization cannot help potential defense witnesses find asylum permits and travel documents. In Benin, the UNHCR grants or arranges for documents to be granted to one part of the family, while withholding documents from the other part of the family.

The Prosecution also has a clear advantage over the Defence in terms of the availability of financial means and incentives that are essential to make it possible and easier to gain access to witnesses and documentary elements that are under the control of the regime in Kigali. The Prosecutor has enormous financial means at his disposal. In addition, as noted above, the Registry is using its special budget to assist the Prosecution by funding incentives to convince potential witnesses to come to Arusha to testify against the accused. For its part, the Rwandan government uses a whole arsenal of incentives and coercive measures to make Prosecution witnesses available to the Prosecutor. For example, since the Barayagwiza case was settled according to Kigali's wishes, the RPF government has felt that the Prosecutor deserved a reward. Facilities were put in place to convince, through promises or pressure, Hutu prisoners to come and testify against their fellow prisoners in Arusha. Since then, a large proportion of the Prosecutor's witnesses have been Hutus extracted from the Rwandan prisons or recruited from among former members of the Rwandan Armed Forces (FAR)[3]. For the most part, they are forced to come and testify for the Prosecution to save their heads. Some are also attracted by the financial rewards that are promised or even given to them in advance. Although the credibility of such witnesses is questionable, the Prosecutor finds their testimony to be, on the surface, more acceptable than the fabricated evidence of Tutsi witnesses before Judges who are very sympathetic to the Prosecution's cause. Moreover, witnesses willing to appear before the International Tribunal are becoming increasingly rare because of the fragility of the Prosecution's evidence, which is forced to resort to circumstantial evidence, rumors and even fabricated false testimony.

[3] Prior to the Barayagwiza case, prisoner witnesses appeared only in the Musema (3) and Bagilishema (3) trials. The use of such witnesses is currently part of the Prosecutor's strategy of desperation for voluntary, non-fabricated witnesses. The use of prisoner witnesses is expected to reach a record high in the "Butare case" where 28 out of 100 witnesses that the Prosecutor intends to call in this trial will be detainees on trial or already sentenced to death or heavy prison terms. In the "Cyangugu case," the Prosecutor has already called eight prisoners out of 39 direct witnesses. In the Kajelijeli case, the Prosecutor plans to call 4 witnesses who are prisoners. In the so-called "Media Trial," three prisoner witnesses have already appeared under the pseudonyms AHA, LAG and AHI. Witness AEN has declared himself a member of the RPF's Internal Brigades, which were created in 1990, but especially in 1992-1993. Also in this Media case, it is interesting to note that Witness DM, who had just been released, testified instead in favor of the accused Hassan Ngeze, whom he was supposed to charge on behalf of the Prosecutor.



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The advantage of the Prosecution over the Defense lies finally in the choice of expert witnesses. While the accused are limited by the Registry's budgetary allocations, the Prosecutor has a large budget and often benefits from the assistance of UN member states, sponsors of this Tribunal. He can therefore recruit the best expert witnesses. Finally, it is important to note that the Prosecutor does not hesitate to take advantage of the possibility for States, organizations or even private individuals to come and intervene as Amicus Curiae. Since the accused at the ICTR are all members of the demonized Hutu ethnic group, they can hardly benefit from such testimony. Moreover, the political and geostrategic stakes are such in the Rwandan case that no country, no organization, no private individual can afford or be authorized to intervene before this Tribunal against these stakes. The example of Cameroon is quite telling in this regard. This country should have intervened in the case of Jean-Bosco Barayagwiza as Amicus Curiae to demonstrate that neither the President of the Republic, His Excellency Paul Biya, nor the Government of Cameroon, have any responsibility for the delay in his transfer to Arusha. The Chamber did not even deign to examine the merits of Jean-Bosco Barayagwiza's request in this regard, nor did it take into consideration the interests of justice.

With such control of the evidence by the regime in Kigali and by the Prosecution, the accused at the ICTR cannot benefit from fair trials, especially since the judges seem to be perfectly happy with this situation, the injustice of which seems too obvious.

## 2. The Justice System is being phagocytosed

The official mission of the International Criminal Tribunal for Rwanda remains to render fair justice aimed at punishing the guilty, freeing the innocent, fighting impunity and contributing to reconciliation among Rwandans. However, we can see from the performance of this Tribunal that the opposite is true: justice is trampled on, crushed, and rather put at the service of the Winner in the Rwandan conflict between the Tutsis and the Hutus. The Jean Kambanda and Jean-Bosco Barayagwiza cases illustrate this dangerous drift, which those in charge do not seem ready to put an end to, despite the many cries of alarm from the ICTR defendants to the Security Council, the Secretary General of the United Nations, the governing bodies and the Judges of this Tribunal (LETTER OCTOBER 18, 1999; LETTER MARCH 8, 2000; LETTER JUNE 12, 2000).

The ICTR gives the image of a machine for sentencing Hutus to sentences that are heavy enough to keep them out of power. This would allow the RPF military-ethnic regime based on the Tutsi minority to remain in place and consolidate without the need to share power with the Hutu majority.

### 2.1. The bias of the Judges revealed

From August 29 to 31, 2000, the President of the ICTR, Ms. Navanethel Pillay, along with four other judges of the Tribunal, visited Rwanda during which they met with the highest Rwandan authorities, including Mr. Paul Kagame, President, as well as Gérard Gahima, Attorney General. The President of the ICTR said in a press conference that the visit was intended to strengthen relations between the government of Kigali and the Tribunal, which had been tarnished by the decision to release Jean-Bosco Barayagwiza. It follows that the delegation of the President of the ICTR had to give assurances to the regime in Kigali that the case was over so that relations would return to normal. Given that the visit took place only a few days before the date set for the start of the trial of Jean-Bosco Barayagwiza, namely September 18, 2000, and at the time when the Appeals Chamber was examining the request for review and/or reconsideration presented by the Defense, it is easy to understand that Mr. Kagame obtained guarantees that Jean-Bosco Barayagwiza would no longer be released, before agreeing to the normalization of the situation. It is important to note that Judge Eric Mose, Vice-President of the Tribunal and member of Chamber I in charge of the trial of Jean-Bosco Barayagwiza, also participated in the visit and in the discussions with the authorities in Kigali.

The defense of Jean-Bosco Barayagwiza asked the two judges, Navanethem Pillay and Eric Mose, to withdraw, but they refused. The two judges decided to continue the trial of Jean-Bosco Barayagwiza. The appeal filed by the defense of Jean-Bosco Barayagwiza on this issue was dismissed without consideration of the merits on the grounds that it did not fall within the scope of issues that could be appealed *in limine litis* pursuant to Rule 72 of the Rules of Procedure and Evidence. However, in its decision dated December 12, 2000, the three-judge panel of the ICTR Appeals Chamber regretted that the two judges concerned by the challenge had not involved the third judge or referred the case to the Bureau, in accordance with Rule 15 of the Rules of Procedure and Evidence.

Despite the legitimate suspicion against the two Judges and a previous challenge against Ms. Navanethem Pillay, which was the subject of a notice of appeal dated 19 December 1999 but not yet considered by the Appeals Chamber[4], and notwithstanding other complaints by the Accused and his defense[5], the Judges of Chamber I decided to commence the trial on 23 October 2000. On October 23, 2000, the accused filed a declaration with annexes, in which he explained the reasons for his refusal to participate in what he called a parody of justice. He ordered his counsel, Carmelle Marcheseault and David Danielson, not to represent him. It was after a long procedure that the Judges agreed to let them leave the court, on February 6, 2001, after having forced them to file a motion of withdrawal and obliged the accused to revoke their mandates. The two counsels said that they had an obligation to respect their client's instructions. Moreover, they added, even if they had to comply with the Chamber's decision to defend their client without his consent, they could not properly carry out their defence mission without his cooperation.

Despite the refusal of the accused to be present or represented at this trial, a refusal illustrated by the recusal of the Counsel in whom he still had confidence and who had just

[4] This motion and another on the lack of jurisdiction of Chamber I had been rendered null and void by the judgment of 3 November 1999 releasing Jean-Bosco Barayagwiza and dismissing the indictment confirmed against him. The reinstatement of this indictment implies the reinstatement of all the proceedings initiated by the Defense. The defense for Jean-Bosco Barayagwiza has since continued to consider that these motions are still pending.

[5] The Defence has filed a statement of the accused to which is annexed the letter to the Secretary General of the United Nations dated 1 October 2000 and its annexes



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collaborated with him for a whole year, the Judges of Chamber I decided to assign him a new Counsel and a Co-Counsel, supposedly in the "interest of justice". The latter know nothing about the case and cannot benefit from the collaboration of the accused, who does not want to be an accomplice in a parody of justice against him. What kind of justice can there be in a criminal trial with serious charges, in which the accused does not participate and in which he is judged by two out of three Judges who are challenged by him? What kind of justice can be expected from judges who forcibly order the defense of the interests of the accused by counsel whom he rejects and with whom he refuses to collaborate in any way? What defense can such Counsel provide to the accused without knowing his defense strategy or having the facts of the case and the position of the accused in relation to the specific allegations of the Prosecutor? How can the Judges claim that such Counsel represent the interests of the accused when they do not know what his real interests are? Such a trial only confirms the accused's complaints about the inability of this Tribunal to provide him with a fair trial.

Jean-Bosco Barayagwiza continues to believe that he has the right to be tried by an independent and impartial tribunal with judges who are more neutral and less committed to the anti-Hutu dictatorial regime in Kigali. He is ready to prove his innocence before any court in a country governed by the rule of law that is willing to guarantee him a fair and equitable trial in accordance with all the rules of law and procedure.

## 2.2. The integrity and credibility of the Tribunal are in question

When the ICTR was set up irregularly, it was clear that the mission assigned to it by the Security Council would not be carried out properly. The prelude to the questioning of the integrity of the ICTR was strongly and fundamentally affected by two cases: first, that of Jean Kambanda and then that of Jean-Bosco Barayagwiza.

### 2.2.1. The Jean Kambanda Affair

Jean Kambanda was the Prime Minister of the interim government set up on April 9, 1994, three days after the assassination of President Juvénal Habyarimana. All observers are unanimous in recognizing that it was this assassination that triggered the inter-ethnic massacres that the pro-RPF current reduced to a "Tutsi genocide planned by the Hutus. Logically, Kambanda's government, formed after the massacres began, could not have planned these massacres before its existence. However, Jean Kambanda admitted, in his confession of May 1, 1998, that his government planned and executed this "Tutsi genocide planned by the Hutus" and admitted implausible details on the preparation and implementation of the 1994 ethnic massacres. He was convicted on the basis of such a confession, which many observers wonder whether it was not extorted to hide the reality of the Rwandan tragedy, which Jean Kambanda could have shed light on through testimony given in a public and adversarial trial. Expressing his "questions and concerns" on the subject, Mr. Alain De Brouwer noted that Jean Kambanda "*is condemned without the need for a trial and on the sole basis of a confession, because he was unable to comply with the appropriate procedures, nor to assert his rights in a timely manner ... Public opinion will therefore remain hungry with its substantive questions not addressed!*"[6] . In their report, the OAU Eminent Persons regretted that *"One of the great disappointments of this trial is that the opportunity was missed to have him disclose all that he knew about the events that took place before and during the genocide" (GIEP, 2000, §18, 31).* The International Crisis Group (ICG) does not hesitate to question the significance of Jean Kambanda's confession. After having examined the documents of the proceedings and the writings of the accused, which "*question the role of his lawyer and the latter's links with Deputy Prosecutor Bernard Muna,"* the ICG asserts that Jean Kambanda "*is not a planner of the genocide, and his trial cannot have the value of an example that has been ascribed to him" (ICG, 2001).*

Either Kambanda was not in his right mind when he agreed to make such a confession, or he was pushed to admit it by an irresistible force. Jean Kambanda explains this in a long Memorandum signed in The Hague on October 19, 1999. This document, entitled ***"The circumstances surrounding my arrest on July 18, 1997 in Nairobi, Kenya, my detention in Tanzania, my transfer to the Netherlands and my appeal trial***", was, according to him, "*to serve as a basis for the brief that I am to submit on December 8, 1999 to the Judges of the Appeals Chamber by virtue of the order fixing the time limits for filing of September 29, 1999"*. This document details the psychological environment and the deplorable conditions surrounding the interrogation of the accused, which formed the basis of the *"Agreement between the Office of the Prosecutor and Jean Kambanda for the purpose of an admission of guilt*". Jean Kambanda reveals that throughout his detention, during the period before his conviction, that is, from July 18, 1997 to September 4, 1999, he was kept in isolation, under the "supervision" of Mr. Pierre Duclos (Mr. Pierre Duclos, a former member of the Sûreté du Québec (Canada), *was at home facing charges of fabricating evidence against suspect)* and Marcel Dessaulniers, subjected to moral pressure and blackmail so that he would accept the conditions of his "collaboration" with the Prosecutor. He was also promised protection and financial assistance to his family, which was often not kept or not kept. But this assistance was conditional on his agreeing to submit to interrogations in the absence of a lawyer and agreeing to whatever the prosecutor proposed to admit.

During these interrogations, he was asked to admit his guilt and that of his government in the planning and execution of the "Tutsi genocide". *I had to start by acknowledging my responsibility and that of my government in the genocide and the massacres before talking about other responsibilities, in particular that of the RPF*," he wrote. The safety of his family and his transfer to Canada, as promised, were linked to a confession written in the way the Prosecutor wanted. His illusions of being able to *"bring the ICTR to question its own responsibility and partiality in the face of the Rwandan tragedy and in what I call the denial of justice to a certain fringe of the Rwandan people*", began to go up in smoke during his prolonged stay (from August 27, 1997 to April 30, 1998) in solitary confinement in Dodoma. *"It was during this*

[6] Письмо от 12 января 2001 года от г-на Алена де Брувера, бывшего политического советника Христианско-демократического интернационала (CDI), адресованное г-же Карле дель Понте, прокурору МУТР.



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*period that I finally understood that the purpose of my isolation on the part of the Prosecutor's Office was not to receive my testimony as had been agreed from the outset, as they kept making me believe, but to use me to justify the logic of condemning without a real trial any person who had a relationship at any level with the interim government,"* he admits in his memoir. His disillusionment was complete when the prosecutor rejected the text of the statement he had intended to make at his initial appearance on May 1, 1998, during which he had been persuaded to make a confession of guilt. Instead of the text he had prepared himself, he was presented for approval a text prepared, without his knowledge, by the prosecutor. Kambanda writes the following about this: *"Mr. Othman gave me instead a new text that they had written themselves and in which appeared only my real or supposed responsibility, and that of the interim government that I headed to the absolute exclusion of the responsibility of other actors in the Rwandan drama and in particular that of the government currently in place in Kigali".* This text served as the basis for the indictment against Jean Kambanda despite the fact that he had already been implicated.

During all his tribulations, Jean Kambanda was led, on the basis of promises, pressure and blackmail, not to imperatively demand the presence of a lawyer, which he had already requested in his letter of 27 July 1998. No response was given to his request for the commission of Mr. Johan Scheers, whom the Registry said had been sanctioned and was therefore ineligible as Defense Counsel for an accused person at the ICTR. It was only a few days before the initial appearance that he was informed of the choice of Mr. Oliver Michael Inglis, proposed by Mr. Muna himself, Deputy Prosecutor, in place of Johan Scheers. Mr. Inglis' sole mission was to take the accused to court and ensure his admission of guilt in the words of the Prosecutor. He never had the time nor did he want to discuss the substance of the case with the accused Jean Kambanda, whom he accuses of incompetence and of being the agent of the Prosecutor. In collusion with the Prosecutor, Mr. Inglis managed to give a semblance of legality and credibility to Jean Kambanda's confession made on May 1, 1998. He took upon himself the grave responsibility of having his client sentenced to life imprisonment on September 4, 1999, without even knowing what his share of responsibility in the Rwandan tragedy was. Mr. Muna, who knew everything, hid the truth from the Tribunal. The latter "*did everything possible to ensure that no one other than him, including my lawyer, or more precisely the lawyer he himself had given me, Mr. Inglis, knew what my exact role in the Rwandan tragedy had been,*" complains Jean Kambanda in his brief. Inglis' sponsors were not satisfied with his mission to accompany the accused to a life sentence. They ordered him, through sensitive pressure and even explicit threats, to prevent Jean Kambanda from appealing on the merits of the case. Indeed, the latter contested the terms of the confession that had been imposed on him. On September 7, 1998, Mr. Inglis filed an appeal on behalf of Jean Kambanda against the latter's will and without his knowledge. When Jean Kambanda became aware of the appeal made without his knowledge by Mr. Inglis, he made the following observation: *"Rather than going into the merits of the case, he was satisfied with the form only, by attacking only the verdict on the sentence. Thus, he had succeeded in breaking my strategy which consists in demanding a trial in due form involving all the procedures and this including the hearing of the witnesses as well for the prosecution as for the defense".* Since the time limit for submitting his own appeal had expired, Jean Kambanda's new lawyer, the Dutchman Tjarda Eduard van der Spoel, produced a detailed memorandum based on the document produced by the accused himself on 19 October 1999.

But Jean Kambanda did not get the trial he wanted. The Appeals Chamber, in its decision of October 19, 2000, unanimously rejected his appeal and confirmed the judgment of September 4, 1999, as well as his life sentence. He will therefore not benefit, at the ICTR, from the justice that he wished for *"the real one, based on proven facts, and not on emotions or having as its sole basis media slogans or others or being done under pressure from anyone, in particular from the government of Kigali whose highest officials should, on the contrary, themselves be held accountable for their actions during the incriminated period..."*. It is true that he has a great personal responsibility in this denial of justice, the ins and outs of which he did not want to denounce in time. He has accepted for too long to do the business of the Prosecutor against the interests of *"a fringe of the people"* of which he claims to be a member, naively believing that he was getting away with it. When he realized that he had made a fool's bargain, it was, unfortunately, already too late! Nevertheless, this does not absolve the ICTR Judges of the grave responsibility they have taken on in denying him a proper trial when they cannot allege that they did not understand, like any reasonable man, the Prosecutor's maneuvers clearly directed against the proper administration of justice and the triumph of the truth about the Rwandan drama. As a result, the Jean Kambanda case was the first to fully reveal, to anyone who wants to know, the true nature of the ICTR: "the court for the vanquished, the justice of the Victor.

### 2.2.2. The Barayagwiza Case

The Barayagwiza case is another illustration of the ICTR's abandonment of the mission officially assigned to it by the Security Council in favor of the hidden mission that its powerful sponsors and the Rwandan government always thought it would accomplish. The unjust fate of Jean-Bosco Barayagwiza is part of the "real mission" of the International Criminal Tribunal for Rwanda that has little to do with the administration of good justice. The Barayagwiza case is not unique, as evidenced by the denial of justice in the Jean Kambanda case mentioned above, it is only the most egregious. It is in itself a denial of justice for the Arusha defendants.

#### A. Violations of Jean-Bosco Barayagwiza's rights before the transfer from Cameroon to Arusha

Jean-Bosco Barayagwiza was arrested in Cameroon, along with ten of his compatriots, on March 27, 1996, on the basis of an extradition request from the RPF government. The ICTR Prosecutor took the opportunity of the detention of the 12 Rwandans (the 12th had been arrested on March 9) to ask the Cameroonian authorities, in a handwritten letter dated April 15, 1994, confirmed on April 17, 1994, not to proceed with their extradition until the International Tribunal had ruled on the case of each of them. At the same time, he requested their detention under Article 40 of the ICTR's Rules of Procedure and Evidence, which provides for the arrest of a suspect as an emergency measure.

On May 16, 1996, the Prosecutor informed the Cameroonian authorities that he was going to pursue his case against only four of the twelve people (Bagosora Théoneste, Nahimana Ferdinand, Nsengiyumva Anatole and Ntagerura André). He indicted them in July/August 1996 and obtained their



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transfer from Cameroon to the United Nations Detention Centre in Arusha on January 23, 1997. In the meantime, he had explicitly dropped his charges against the eight remaining detainees, including Jean-Bosco Barayagwiza, in a letter dated October 15, 1996. Following this dismissal, on January 17, 1997, the Cameroon Court of Appeal resumed the extradition case that had been suspended *sine die* on May 31, 1996, while waiting for the ICTR to decide on the case of the eight Rwandans who were still being held in detention at the request of the ICTR, but without being charged. The Cameroonian authorities refused to honor Rwanda's extradition request for procedural reasons as well as for lack of serious suspicion against the persons whose extradition was sought. The RPF authorities were unable to provide solid evidence to support the serious charges against the individuals. The Court of Appeal of Centre, Cameroon concluded that the extradition request was politically motivated and could, if granted, lead to serious consequences for the lives of the individuals concerned. It therefore decided, on 21 February 1997, to reject Kigali's request and ordered the immediate release of the persons still detained, including Jean-Bosco Barayagwiza.

Ignoring the ruling of the Cameroon Court of Appeal, the ICTR Prosecutor reversed his decision with respect to Jean-Bosco Barayagwiza and opposed his release. He asked, by telephone (call from Mr. Luc Coté of the Office of the Prosecutor in Kigali), the Cameroonian authorities to maintain him in detention, as well as Mr. Laurent Semanza, while waiting, once again, for the ICTR to decide their fate. The two people have been detained since February 21, 1997, without a formal indictment, until November 11, 1997, the date of notification of the indictments! They have written several letters to the President of the Tribunal and the Prosecutor about their illegal and arbitrary detention and the flagrant violation of their fundamental rights. No response has been received. ICTR officials have even refused to respond to their request for the appointment of defense counsel. They referred their cases to the Cameroonian authorities, who informed them that they could do nothing until the ICTR made a decision in either direction. Jean-Bosco Barayagwiza was therefore kept in detention, without being informed of the charges that the ICTR brought against him, for 11 months (from April 15, 1996 to February 21, 1997), and then for approximately 9 months (from February 21 to November 11, 1997), i.e., a total of approximately 20 months of illegal detention in violation of articles 3 and 9 (Universal Declaration of Human Rights); article 9, 1 & 2 and article 14, 3.1 (International Covenant on Civil and Political Rights); article 20, 4,a (Statute of the ICTR).

**B. Violations after the transfer to Arusha**

The violations of Jean-Bosco Barayagwiza's fundamental rights did not cease after his transfer to Arusha on November 19, 1997. On the contrary. Not only was his application challenging his arrest (by telephone) and his long detention without indictment (*Habeas Corpus*)[7] ignored by the Tribunal and even unilaterally withdrawn from the list without the knowledge of the Defense, but he was also denied the right to make his initial appearance without delay. He did not appear for the first time before the judge until February 23, 1998, 3 months after his transfer, even though he was challenging the legality of his arrest and detention. This constitutes a violation of the Universal Declaration of Human Rights (8, 10), of the International Covenant on Civil and Political Rights (9. 2, 3 and 4; 14. 3,i and iii) as well as of the Statute (Art. 20. 4, a, c) and the Rules of Procedure and Evidence (Art. 62) of the Tribunal. The other request for extreme urgency presented on this subject, on February 23, 1998, after the unilateral striking off of the Habeas Corpus list, was also ignored for a long time. It was not heard by a Chamber of the Tribunal until September 11, 1998, and was rejected by the decision of November 17, 1998. It was this decision that would later cause the storm and crisis within the ICTR.

**C. Release and Continued Detention**

Following Jean-Bosco Barayagwiza's appeal against the decision of the Trial Chamber, the ICTR Appeals Chamber, having recognized the systematic violations of his fundamental rights, decided on November 3, 1999, to order his immediate release and to dismiss the indictment against him. Unfortunately, the Appeals Chamber, otherwise composed[8], decided on March 31, 2000, to reverse the decision of November 3, 1999, following enormous pressure from Ms. Carla Del Ponte, Prosecutor of the ICTR, on the formal instruction of the government of Kigali. Indeed, the Prosecutor brandished the threat of the Rwandan government to definitively stop cooperating with the ICTR in order to blackmail the judges of the Appeals Chamber. If Jean-Bosco Barayagwiza is not kept in detention and tried by the ICTR or transferred to Rwanda and tried there, the Tribunal will have no choice but to close down," she hammered on February 22, 2000, during the Appeals Chamber hearing devoted to the examination of her request for a review of the November 3, 1999 ruling. The Rwandan Prosecutor General, Mr. Gérard Gahima, was authorized to present the demands of the Kigali regime in person at this hearing.

Objective observers believe that, given the intolerable interference of the Government of Kigali and its allies, the Appeals Chamber should have rejected the Prosecutor's application presented under these conditions and reaffirmed the validity of the judgment of November 3, 1999, especially since the facts on which the application was based did not meet the requirements of the Statute and the Rules. They did not meet the criteria of "new facts" as defined by Article 25 of the Statute and Article 120 of the Rules. This would have preserved the integrity of the Tribunal and the impartiality of its Judges. It should be recalled that the Judges of the Appeals Chamber had themselves insisted on the integrity and

[7] Latin for "that you have the body." In the US system, federal courts can use the writ of habeas corpus to determine if a state's detention of a prisoner is valid. A writ of habeas corpus is used to bring a prisoner or other detainee (e.g. institutionalized mental patient) before the court to determine if the person's imprisonment or detention is lawful. A *habeas* petition proceeds as a civil action against the State agent (usually a warden) who holds the defendant in custody. It can also be used to examine any extradition processes used, the amount of bail, and the jurisdiction of the court. *See, e.g. Knowles v. Mirzayance* 556 U.S._(2009), *Felker v. Turpin* 518 US 1051 (1996) and *McCleskey v. Zant* 499 US 467 (1991).

[8] Two new judges were recently appointed, including the President of the Chamber. French Judge Claude Jorda replaced American Judge Kirk MacDonald as President of the Chamber, while Italian Judge Fausto Pocar replaced Chinese Judge Wang Tieya.



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independence of the Tribunal, which they considered to be at issue in the case under consideration (§ 112 of the judgment of 3 November 1999). The apparently indignant statement of Judge Nieto Navia (supported by his colleague, Judge Lal Chand Vohrah) in his separate opinion during the adoption of the judgment of March 31, 2000, is a clear manifestation of the intolerable interference of the government of Kigali in the Barayagwiza case. In spite of all this, the Appeals Chamber, yielding to Kigali's blackmail reinforced by pressure from the Prosecutor, was forced to bend the Statute and the Rules and even the facts in order to be able to revise the decision of November 3, 1999.

Thus, Jean-Bosco Barayagwiza was released for the second time on November 3, 1999, but was arbitrarily kept in detention for a second time, based on political rather than judicial considerations. The Appeals Chamber even rejected his request for a review and/or reconsideration of the March 31, 2000 ruling. It refused to examine the evidence presented by his counsel, Carmelle Marchessault, on the "new facts" that she had just discovered, after a thorough investigation in Cameroon. These facts revealed that the documents provided by the Prosecutor, on which the Appeals Chamber had based its decision to annul the release of Jean-Bosco Barayagwiza, were false or falsified or obtained under fraudulent conditions[9]. This is a clear denial of the right of appeal guaranteed by the International Covenant on Civil and Political Rights (2.3, a) as well as by the Statute (Art. 25) and the ICTR Rules (Art. 120 and 121).

**D. Unlawful and Unfeasible Reparation**

The violation of Jean-Bosco Barayagwiza's rights reached the height of injustice when, in order to satisfy the demands of the RPF government, the Appeals Chamber Judges proposed a reparation not provided for by the norms governing the ICTR instead of releasing the accused. In fact, they provided for financial compensation if Jean-Bosco Barayagwiza was found innocent, and a reduction of the sentence if he was found guilty. However, neither the Statute nor the ICTR Rules provide for such reparations, contrary to the requirements of the International Covenant on Civil and Political Rights (9. 5).

As the Tribunal's texts do not provide for the reduction of the award as a remedy, no Chamber is obliged to apply it. Such a remedy is therefore random. It depends on the subjective appreciation of the Judges according to their interpretation of the existing norms on the matter. However, the Judges of Trial Chamber I are automatically committed to the will of the regime in Kigali, which has already put Jean-Bosco Barayagwiza on the list of those sentenced to death, whose sentence cannot be less than life imprisonment.

[9] The Yaoundé (Cameroon) Court of First Instance, in an order dated January 17, 2001, recognized that the document reproducing the minutes of the Cameroon Court of Appeal, which the ICTR Prosecutor used before the Appeals Chamber in the Barayagwiza case, did not conform to the original. Similarly, the Buea Court of First Instance, in a decision dated February 15, 2001, considered as null and void the report made by Mr. Mballe for the ICTR Prosecutor and used against Semanza and Barayagwiza before the ICTR Appeals Chamber.

Concerning financial reparations, it should be noted that it was only on September 26, 2000 - that is, six months after the relevant ruling of March 31, 2000 - that the President of the ICTR wrote to the Secretary General of the United Nations to ask him to refer to the Security Council the proposal to amend the Statute of the ICTR in order to provide for financial reparations, particularly in the case of violations of the rights of a suspect or an accused! The President of the Appeals Chamber, Judge Claude Jorda, made the same request. This means that the Appeals Chamber rendered the March 31, 2000 decision without a legal basis, with the sole objective of satisfying the will of the government in Kigali.

**E. Violation of the founding texts of the Tribunal**

Careful observers of the ICTR's activities believe that by their decision of March 31, 2000, the judges of the Appeals Chamber gave the impression that they were yielding to blackmail by the Kigali regime. The Barayagwiza case has given the ICTR's detractors the opportunity to question the independence and integrity of this Tribunal. In fact, the March 31, 2000 decision was more in the interest of politics than in the interest of justice, which had been widely echoed in the November 3, 1999 decision. The Appeals Chamber apparently succumbed to political pressure from the government of Rwanda, relayed by the ICTR Prosecutor. Yet the latter is supposed to be independent in accordance with the Tribunal's Statute. *"He shall not seek or receive instructions from any government or from any other source"* (article 15.2 of the Statute). But when, on November 28, 1999, Ms. Carla Del Ponte stated that *"a meeting with the Rwandan authorities would be appropriate to allow her to explain her strategy"*, it is clear that she wanted to receive direct instructions from the Rwandan government contrary to her statutory obligations. The independence of the judges was also put to the test as a result of injunctions and pressure from the United Nations Secretariat.

The events that followed the decision to release Jean-Bosco Barayagwiza do not allow one to believe in the independence of the Tribunal, as the Appeals Chamber states (§ 34 of the judgment of March 31, 2000), but without much conviction, since later on (§ 69) it recognizes that the Tribunal cannot turn away from reality. Even if this reality is not defined, it is clear that it is the threats not to cooperate with the Tribunal made by the Representative of the Rwandan Government during the hearing of February 22, 2000, threats that were strongly relayed by the ICTR Prosecutor. In order to prevent these threats from being carried out, and following pressure from the United States, international organizations and influential personalities who support the ethnic-military regime in Kigali, the Appeals Chamber resorted to a legal pirouette by proposing an interpretation of article 120 that is contrary to its normal meaning. This interpretation is seen by international law scholars as a disguised amendment of Article 120 (§ 65) which was interpreted in such a way that the diligence required by this article of the Rules is considered "non-peremptory". Such an interpretation was necessary to allow the judges to qualify as "new facts", facts that were known to the Prosecutor or could have been known if he had exercised the necessary diligence. The English version of the Rules, which speaks of "due diligence", does not allow for such an interpretation. It contains the meaning of unequivocal obligation. For a better understanding, we reproduce below the French and English texts of article 120 and § 65 of the judgment of March 31, 2000.



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**Article 120: Demande en révision**

*S'il est découvert un fait nouveau qui n'était pas connu de la partie intéressée lors de la procédure devant une Chambre ou dont la découverte n'avait pu intervenir* ***malgré toutes les diligences effectuées*** *(souligné par nous), la défense ou, dans l'année suivant le prononcé du jugement définitif, le Procureur peut soumettre à la même Chambre, dès lors qu'elle peut être reconstituée ou, à défaut, à la Chambre appropriée du Tribunal, une demande en révision du jugement.*

**Rule 120: Request for Review**

*Where a new fact has been discovered which was not known for the moving party at the time of the proceedings before the Chamber, and could not have been discovered* ***through the exercise of due diligence*** *(emphasis added), the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to the Chamber, if it can be reconstituted or, failing that, to the appropriate Chamber of the Tribunal for review of the judgement.*

**§ 65 (judgment of 31 March 2000)**

***"In the very exceptional circumstances of this case, and in the face of a possible miscarriage of justice*** *(emphasis added), the Chamber interprets the condition laid down in article 120 of the Rules, that the fact be unknown to the interested party at the time of the proceedings before the Chamber or that it not be discovered despite all the diligence exercised,* ***as being of a non-peremptory nature*** *(emphasis added). In adopting this position, the Chamber takes into account the fact that the Statute itself has not pronounced on this point.*

In fact, it is clear that the rule has been adjusted to the specific case of Jean-Bosco Barayagwiza, whereas normally a law, especially a criminal one, is not made for individual cases but for general application.

According to analysts, the Appeals Chamber used the notion of "exceptional circumstances" (§ 65) to justify its erroneous interpretation of the Statute and Rules of the Tribunal. Furthermore, the judges endorsed the Prosecutor's opinion, supported by the UN Secretariat, regarding the rights of the victims of the accused. For this reason, they exempted the Prosecutor from the requirement of diligence under article 120, in order to avoid a possible miscarriage of justice (§ 65) and to avoid distracting from the reality (§ 69). The accused was therefore presumed guilty of the charges against him. How else could one imagine that there were "victims" of crimes not yet proven before the Tribunal? The principle of presumption of innocence, guaranteed by the Statute of the Tribunal, was ignored. And yet, this principle was reaffirmed in § 34 of the Judgment of 31 March 2000!

Furthermore, the Chamber made erroneous or overly broad interpretations of certain facts in order to reduce the Prosecutor's responsibility for the violation of the Appellant's fundamental rights. For example, the Chamber states that it is clear from the hearing of 3 May 1996 at the Cameroon Court of Appeal on the extradition request from Rwanda that *"the Appellant was aware of the crimes for which he was wanted by the Prosecutor"*, thus reducing the period of violation from 11 months to 18 days (§ 54 and §55). It is essential to note that on this date of May 3, 1996, the Appellant was not wanted by the Prosecutor. No charges, even provisional ones, had been formulated against him. There was only a request from the Prosecutor to the Cameroonian authorities to take Jean-Bosco Barayagwiza into custody, pursuant to article 40 of the ICTR Rules of Procedure and Evidence. The only existing charges, to date, have come from the Government of Kigali. It is clear that the Prosecutor could not attribute the charges to Rwanda, even though there seemed to be fairly close coordination between them in their actions against Hutu leaders who had fled abroad. Moreover, this would not have served the Prosecutor's cause either, since the allegations contained in Rwanda's international warrant against Jean-Bosco Barayagwiza and his fellow citizens arrested at the same time as him were so vague that the Cameroonian judicial authorities asked, in vain, for much more concrete and precise elements of the accusation. The lack of such information is one of the reasons why Cameroon considered the Rwandan government's accusations to be politically motivated and rejected its extradition request. Moreover, the ICTR Prosecutor had told the Cameroonian judicial authorities, in his handwritten note of April 15, 1996, confirmed by his letter of April 17, 1996, that investigations were underway to establish the responsibilities of the persons concerned in the commission of *"serious crimes against international humanitarian law and crimes falling within the jurisdiction of the Tribunal"*. It is in any case clear that such wording does not indicate the real nature of the crimes for which the Appellant was sought in such a way as to allow him to contest the validity of his arrest.

But in fact, what right of the accused is being violated? The right in question is that the Appellant was not informed, for more than 18 months, of the charges against him, so that he could prepare his defense and, in particular, challenge his arrest and detention, in accordance with the Universal Declaration of Human Rights (9), the International Covenant on Civil and Political Rights (9, 1-4) and the Statute of the ICTR (article 20.4.a). It is important to note that this information, which would have taken place on May 3, 1996, should not concern the period after February 21, 1997, during which there was also a considerable delay in the notification of the charges against the appellant. The ICTR Appeals Chamber ignored the arbitrary arrest of Jean-Bosco Barayagwiza by telephone (?) on February 21, 1997, the very day of his release by the Cameroon Court of Appeal, as well as his illegal detention without a proper indictment. It limited itself to asserting that the delay in the transfer was attributable to Cameroon, leaving aside the failure of the Prosecutor to produce the indictment in a timely manner.

Regarding the delays in the initial appearance of Jean-Bosco Barayagwiza, the Chamber based its decision on an inaccurate fact. Indeed, in § 60, it is stated that the Defence did not contest the idea that Mr Nyaberi, counsel for the accused, had given his consent to the date of 3 February 1998 for the initial appearance, thus reducing the responsibility of the Tribunal. However, the Appellant's Co-Counsel, Mr. David Danielson, explained at some length during the hearing of February 22, 2000, that Mr. Nyaberi had never voluntarily consented to any date. Several dates were imposed on him. He had to submit to the availability of the Judges and to the schedule made by the Registry (AFFAIRE BARAYAGWIZA J. B. v; PROCUREUR, , ICTR-97-



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19-AR72). Moreover, the Defense had returned to the issue in its response of February 28, 2000 to the documents filed late by the Prosecutor (§78 and §79). The irrefutable arguments of the Defence, which were confirmed by the explanations provided by the Registry that the initial appearance of Jean-Bosco Barayagwiza could not be held within a reasonable time because the Judges were in recess, were dismissed without foundation.

The same Appeals Chamber, which invoked *"the very exceptional circumstances of this case"* in order to admit the Prosecutor's request to review the judgment of November 3, 2000, did not hesitate to reject, without examining it on the merits the application submitted by the defence of Jean-Bosco Barayagwiza on 18 July 2000, which sought to prove, by means of "new facts", that the documents presented by the Prosecutor and on which the judgment of 31 March 2000 terminating his release had been based were false, falsified or obtained in irregular conditions. The same Chamber that feared a miscarriage of justice in the case of the Prosecution, did not consider for a moment that it was important for justice to examine the serious allegations made against the Prosecutor. There is every reason to believe that the ICTR Judges rendered justice according to the principle of double standards.

For some specialists in international criminal law, the legal arguments presented by the Appeals Chamber to review the November 3, 1999 judgment are not at all convincing because, first of all, they are based on distortion of the law and on "new facts" that are truly dubious. For William Schabbas, *"...it allowed some rather dubious fresh evidence to be adduced in order to justify revesiting its earlier decision. [...]. ...the judges' insistence that Rwanda's pledge not to cooperate with the Tribunal- a threat echoed by the prosecutor at the February 2000 hearing on the review motion - had no bearing in their deliberations was, and remains unconvincing. The price to pay has been some rather embarrassing contortion of applicable law in the second decision- including threshold for admissibility of " new facts " that no other self-respecting appellate tribunal anywhere in the world would accept" SHABAS W., AJIL, 2000).* In its July 7, 2001 report on the ICTR, the International Crisis Group (ICG) shares the opinion of Mr. William Shabas. It recognizes *that "the 'new facts' presented by the prosecutor's office and accepted by the judges were not new in the legal sense of the term (ICG, 2001)*. There was therefore no legal basis for revising the judgment of November 3, 1999, concerning the release of Jean-Bosco Barayagwiza. However, as the ICG experts note, *"politics has openly interfered in the judicial debate (ICG, 2001).* This was the consecration of the failure of justice imposed by the UN Security Council.

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