

# Rwanda's national criminal courts and the International Tribunal

by **Olivier Dubois**

Questions inevitably arise about the concurrent competence and complementary nature of an international tribunal and national courts, and about cooperation between them. Those questions may well apply to any State on earth because, by virtue of the principle of universal competence, many crimes which international tribunals are competent to try may also be tried by any State irrespective of the place where they are committed or the nationality of the perpetrator.

In the case of the genocide, crimes against humanity and massacres committed in Rwanda, these questions are particularly pertinent for the International Criminal Tribunal for Rwanda and Rwanda's own courts. Rwanda has itself arrested tens of thousands of suspects and started to try them, and the Tribunal is conducting the bulk of its enquiries on Rwandan territory. The two legal systems often overlap. This article sets out to show how the structures introduced and the provisions adopted by each have or have not allowed for the existence of the other. For a proper understanding of the logic behind each system, however, it is essential to recall Rwanda's position when the Tribunal was set up.

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## Rwanda and the creation of the International Tribunal

Ever since a government of national unity was set up following the victory of the Rwandan Patriotic Front in July 1994, Rwanda has been alerting the international community to the need to internationalize the repression of those who perpetrated the genocide and massacres. The Rwandan Government wrote to the President of the Security Council calling for the earliest possible creation of an international tribunal to try the alleged criminals.<sup>1</sup> The idea was to associate the international community with the repression of crimes which affected it as a whole. The tribunal was intended to allay suspicions of vengeance and summary justice and, above all, to lay hands on criminals who had found refuge abroad. It might be added that one of Rwanda's objectives in drawing the international community's attention to the issue of repression was to gain the support necessary for the functioning of its own criminal justice system.

However, Rwanda voted against resolution 955 which instituted the Tribunal, subsequently explaining its vote in the following manner.<sup>2</sup>

First, Rwanda could not accept the limitation of the Tribunal's *ratione temporis* competence to acts committed in 1994. It cogently argued that the acts committed in 1994 had not occurred spontaneously but had been preceded by a planning period, and that smaller-scale massacres had occurred before 1994.<sup>3</sup> It was told that, under its Statute, the Tribunal's jurisdiction would not be limited in time in respect of any person who had planned, instigated or otherwise aided and abetted in the execution of any of the crimes referred to in the Statute.<sup>4</sup> However, that approach required delicate proof of a causal link between such acts, regarded as a form of criminal participation, and the 1994 genocide itself. Moreover, the crime of incitement to commit genocide, covered in Article 2, paragraph 3 of the Statute, does not require a link with the

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<sup>1</sup> UN Doc. S/1994/115 of 29 September 1994. On 6 October 1994 the President of Rwanda said in his address to the UN General Assembly that it was "absolutely urgent that this international tribunal be established"; Official Records of the General Assembly, Forty-ninth Session, Plenary meetings, 21st Meeting, p. 5.

<sup>2</sup> Security Council, Forty-ninth Year, 3453rd Meeting, 8 November 1994, S/PV.3453, pp. 14 ff.

<sup>3</sup> The international community itself recognized that serious massacres had occurred: Report of 11 August 1993 by the Special Rapporteur on his mission to Rwanda between 8 and 17 April 1993, E/CN.4/1994/7/Add.1.

<sup>4</sup> Article 6, para. 1 of the Tribunal's Statute.

subsequent commission of an act of genocide but remains subject to the 1994 time-limit.<sup>5</sup>

Second, Rwanda stressed that the Tribunal's structure was inadequate for the task facing it. The fact that the Appeals Chamber and the Prosecutor were to be common to the Tribunals for both Rwanda and the former Yugoslavia cast doubts on the effectiveness of a body which, in the harsh words of Ambassador Bakuramutsa, "would simply appease the conscience of the international community".<sup>6</sup>

Third, Rwanda expressed regret that there was nothing in the Statute to establish the Tribunal's priorities with regard to the crime of genocide underlying its very inception.

Fourth, Rwanda was concerned by the fact that countries which had supported the genocidal regime would participate in the process of nominating judges.

Fifth, Rwanda could not accept that persons sentenced by the Tribunal should be imprisoned in third countries or that those countries should have powers of decision over such detainees. Here it must be pointed out that the national law of the host country fully applies only to the prison regulations. The application of national law for any pardon or commutation of sentence is a matter for decision by the President of the Tribunal. The Rwandan Government is informed by the President of any application for pardon or commutation of sentence, but no genuine consultation is involved.<sup>7</sup>

Sixth, Rwanda was firmly opposed to the exclusion of capital punishment from the penalties which the Tribunal could impose, since the death penalty is still in force under its own penal code.<sup>8</sup> Even if the machinery of repression subsequently set up in Rwanda seriously limits

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<sup>5</sup> P. Akhavan, "The International Criminal Tribunal for Rwanda: The politics and pragmatics of punishment", *American Journal of International Law*, Vol. 90, 1996, p. 506.

<sup>6</sup> S/PV.3453, p. 15. Ambassador Bakuramutsa stated that Rwanda still believed that the international community's interest in creating the tribunal was a face-saving measure since it had not reacted to save Rwanda from the genocide even though it was present locally. See "1945-1995: Critical Perspectives of the Nuremberg Trials and State Accountability", Fifth Ernst C. Stieffel Symposium, *New York Law School Journal of Human Rights*, Vol. 12, 1995, p. 650.

<sup>7</sup> Art. 27 of the Tribunal's Statutes and Rules 124 and 125 of the Rules of Procedure and Evidence.

<sup>8</sup> Arts. 26 and 312 (premeditated murder) of the Rwandan Penal Code, Decree-Law No. 21/77 of 18 August 1977, *Journal officiel de la République rwandaise*, 1 July 1978.

cases in which the death penalty may be applied, the planners tried at Arusha will nonetheless avoid paying a penalty which lesser criminals might expect at Kigali. However understandable Rwanda's wish not to rule out that penalty for such crimes, it is completely unthinkable that a United Nations body should impose the death penalty when the organization as a whole is opposing it on several other fronts.<sup>9</sup>

Seventh, Rwanda was insistent that the Tribunal should have its seat in Rwanda, stressing the explanatory and preventive role it was to play among the Rwandan population. Resolution 955 postponed a decision on the Tribunal's location, and it was for geographical, economic and political considerations that resolution 977 of 22 February 1995 established its seat at Arusha.<sup>10</sup>

Despite its negative vote, Rwanda has always said it will cooperate fully with the Tribunal.

### **Is the International Tribunal really an ad hoc tribunal?**

In resolution 955, the Security Council stressed that international cooperation was necessary to strengthen Rwanda's own judicial system and courts, *inter alia* because of the large number of suspects to be arraigned before those courts.<sup>11</sup> The Tribunal might therefore logically be expected to help Rwanda's courts and tribunals try those who perpetrated the genocide. In this respect, the international community and the Tribunal appear to have missed some opportunities which might have made for closer harmony between national and international justice without fundamentally calling into question the Tribunal's impartiality and efficiency. Nowadays, the question being asked is whether the Tribunal is appropriately tailored — ad hoc — for carrying out its mission.

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<sup>9</sup> Second optional additional protocol to the International Covenant on Civil and Political Rights, aimed at abolishing the death penalty, adopted by the General Assembly in resolution 44/128 of 15 December 1989. On this issue see W. Schabas, *The Abolition of the Death Penalty in International Law*, 2nd ed., Cambridge University Press, Cambridge, 1997.

<sup>10</sup> Report of 13 February 1995 by the Secretary-General pursuant to paragraph 5 of Security Council Resolution 955 (1994), S/1995/134; and Resolution 977 (1995), S/RES/977 of 22 February 1995.

<sup>11</sup> Resolution 955, ninth preambular paragraph.

*Seat of the Tribunal*

The arguments put forward by the United Nations Secretary-General for turning down Kigali as the seat of the Tribunal are not entirely convincing. According to his report of 13 February 1995, justice and equity required that the trials take place on neutral territory.<sup>12</sup> That argument sounds like both a confession of weakness and a dangerous assumption: a confession of weakness, because it means that the Secretary-General does not regard the Tribunal's international status and procedural safeguards as sufficient to ensure the integrity and equity of its action; a dangerous assumption, because it means that the Rwandan Government is perceived as the instrument of a conqueror seeking to use international justice as a means for revenge. Yet opting for headquarters in Rwanda was exactly what would have enabled the government there to be taken at its word and to match its call for equitable justice based on respect for the fundamental rights of the individual with an international tribunal whose cumbersome procedures and the time allowed the defence it regards as disproportionate in view of the crimes committed. Lastly, how to believe that a justice which is becoming alien and no longer simply international, one which does not show its face, can fulfil its own self-appointed roles as a factor for national reconciliation and peace-keeping? The symbolism of "Nuremberg 1933-1946" should have served as a precedent.

The second argument was an economic one: Rwanda lacked any infrastructure for hosting the Tribunal. Work was also needed at Arusha, however, such as the construction of a detention centre and a second courtroom.<sup>13</sup> In the long term it is far from certain that the initial savings made by choosing Arusha are not being swallowed up by the cost of shuttling the Tribunal's staff between Kigali, Arusha and The Hague. The logistic and psychological problems of taking witnesses to Tanzania may also have been underestimated.<sup>14</sup>

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<sup>12</sup> Report by the Secretary-General of 13 February 1995, *supra*, para. 42.

<sup>13</sup> Report by the Secretary-General of 12 May 1997 on the Financing of the International Tribunal for Rwanda, A/C.5/51/29/Add.1, paras. 44 and 45.

<sup>14</sup> Choosing Kigali as the seat of the Tribunal would have raised problems for certain defence witnesses living outside Rwanda, because the Rwandan justice system suspected many of them of genocide. The Tribunal would have been obliged to obtain guarantees from Rwanda to the effect that such persons would not be arrested and that their safety would be guaranteed when returning to Rwanda to testify. That would probably have created major tensions between the Tribunal and the Rwandan authorities.

Lastly, choosing Kigali would have enabled members of the Rwandan judicial system to attend genocide-related trials and draw lessons for their own benefit.

The choice of Arusha does not rule out the possibility of holding hearings and passing sentence elsewhere, including in Rwanda.<sup>15</sup> Antonio Cassese, President of the Appeals Chamber, says he favours holding hearings in Kigali since they would make the proceedings more visible. According to him, the main difficulties are not psychological, moral or legal but simply practical problems of security.<sup>16</sup>

### *Applicable procedure*

The procedure to be applied by the International Tribunal is modelled on that in force at the International Tribunal for the former Yugoslavia in The Hague. The Rules of Procedure and Evidence adopted by the Arusha Tribunal are only marginally different from those adopted at The Hague. The procedure itself is of a fairly accusatorial nature, of the kind which finds its fullest expression in the common-law countries. It was a perfectly plausible choice *in abstracto* because it allows both the prosecutor and the defence the fairest possible balance of weaponry. Moreover, a gradual alignment is taking place in the inquisitorial rules of procedure of countries in which the first phase of the trial does not allow for full argument on both sides.<sup>17</sup> However, the lack of any investigative body responsible for gathering evidence for the defence and the prosecution makes the task of the defence lawyers a far more active one in that they have to identify witnesses and have them summoned, etc. This is a particularly delicate job when they have to work in such hostile environments as Rwanda and the Democratic Republic of Congo, for example.<sup>18</sup> The misunderstandings are likely to be exacerbated because those countries have a hybrid type of criminal procedure in which the defence plays a lesser role during the investigative phase.

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<sup>15</sup> Resolution 955, para. 6; Rule 4 of the Rules of Procedure and Evidence.

<sup>16</sup> Interview with A. Cassese, *Ubutabera* (independent newspaper reporting on the Tribunal), No. 9, 9 June 1997, available at <http://persoweb.francenet.fr/~intermed>.

<sup>17</sup> M. Delmas-Marty (ed.), *Procédures pénales d'Europe*, PUF, Paris, 1995.

<sup>18</sup> C. Slosser, "Changeover in Kinshasa slows trials", *Tribunal*, Institute for War and Peace Reporting, No. 9, June-July 1997, p. 7.

The choice of an accusatorial procedure by the Tribunal necessarily limits the use it can make of evidence gathered by Rwandan investigators acting in accordance with their own code of criminal procedure. What evidential value is to be attached to a report drafted by an inspector of the criminal police during the interrogation of a person who is only subsequently warned that he is suspected of having participated in the genocide? This issue of compatibility between a partially inquisitorial national procedure and an essentially accusatorial international procedure has not gone unnoticed by jurists from countries which have launched investigations into Rwandan nationals suspected of having participated in the genocide before the Tribunal itself took over the cases.<sup>19</sup>

For the sake of efficiency and out of respect for the rights of the defence, the Tribunal may nonetheless admit evidence gathered by other States in accordance with differing procedures. Rule 5 of the Rules of Procedure and Evidence appears to allow for that possibility:

“Any objection by a party to an act of another party on the ground of non-compliance with the Rules or Regulations shall be raised at the earliest opportunity: it shall be upheld and the act declared null only if the act was inconsistent with the fundamental principles of fairness and has occasioned a miscarriage of justice.”

The judges have a great deal of room for manoeuvre, but it remains to be seen how that provision is applied.

### *One-way cooperation*

As a body created by the Security Council, the Tribunal has primacy over national courts. Accordingly, it may require States to cooperate fully in its action by identifying and seeking suspects, producing evidence, forwarding documents, and arresting and detaining persons against whom it has initiated proceedings.<sup>20</sup> It may also request a national court to defer cases to it at any time during the proceedings.<sup>21</sup> The

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<sup>19</sup> A. Ribaux, “Folie meurtrière au pays des mille collines: carnet de notes d’un enquêteur suisse au Rwanda”, *Recueil de jurisprudence neuchâteloise*, 1996, p. 29; M.-A. Swartenbroeckx, “Le Tribunal pénal international pour le Rwanda”, in J.-F. Dupaquier (ed.), *La justice internationale face au drame rwandais*, Karthala, Paris, 1996, p. 107; D. Vandermeersch, “La loi du 22 mars 1996 relative à la reconnaissance du Tribunal pour l’ex-Yougoslavie et du Tribunal international pour le Rwanda et à la coopération avec ces tribunaux”, *Revue de Droit pénal et de Criminologie*, 1996, p. 873.

<sup>20</sup> Art. 28 of the Statute and Rules 8, 40, 55 and 61 of the Rules of Procedure and Evidence.

<sup>21</sup> Art. 8, para. 2 of the Statute.

*non bis in idem* principle is not fully binding on the Tribunal which, under certain conditions, may retry a person who has already been tried by a national court.<sup>22</sup>

The Tribunal's compelling powers and primacy are essential attributes of an international court. It is unfortunate, however, that cooperation should be of a one-way nature. For instance, neither the Statute nor the Rules of Procedure and Evidence indicate how the Tribunal should respond to a request for legal assistance by the Rwandan Public Prosecutor's office or courts, and yet the very nature of the crimes committed means that some cases being tried by one court or the other are likely to be linked. It is unlikely that the structure of the Tribunal would have been fundamentally altered had such potential cooperation been formalized.<sup>23</sup>

Caught between budgetary constraints and a desire to act quickly, the United Nations has created a tribunal which has unfortunately got off to a slow and laborious start. According to one author,<sup>24</sup> the difficulties encountered reflect the Security Council's inability to manage operational organs which require constant attention to detail. This has all too easily enabled the Tribunal's opponents in Rwanda to query its efficiency and cost, withhold their cooperation and depict it as a sop to the international community's conscience.

### **Repression by Rwandan courts**

In terms of numbers, the trials of perpetrators of the genocide by Rwanda's own courts will be by far the most significant legal response to the wholesale slaughter, crimes against humanity and massacres committed in that country. Over 100,000 detainees are at present awaiting trial, an appallingly high figure. Not even in a highly developed country which had known neither war nor genocide could the penal system cope with such a workload without an overhaul. What is to be said of Rwanda, where the judiciary has traditionally been subordinate

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<sup>22</sup> Art. 9, para. 1 of the Statute.

<sup>23</sup> In this connection see D. De Beer *et al.*, *The organic law of 30 August 1966 on the organization of the prosecution of offences constituting the crime of genocide or crimes against humanity: commentary*, Alter Égoux, Kigali, 1997, p. 30, footnote 4.

<sup>24</sup> C. Bassiouni, "From Versailles to Rwanda in seventy-five years: The need to establish a permanent international criminal court", *Harvard Human Rights Journal*, Vol. 10, 1997, p. 9.



to the executive power, largely owing to the under-qualification of its staff?<sup>25</sup> In July 1994 the entire judicial system needed rebuilding, or rather just building. Buildings, equipment, personnel and finance — all were in short supply.

### *The search for new solutions*

The Rwandan Government took a two-pronged approach to repressing the genocide. First, material reconstruction of the judicial system's infrastructures and the accelerated training of its staff, starting with those working at the beginning of the penal process (criminal police inspectors),<sup>26</sup> was intended to create minimum conditions for criminal justice to start functioning again with an eye to the coming trials. That relaunching of a penal system to try the perpetrators of genocide and massacres must be distinguished from the task of rehabilitating the judicial system as a whole, a longer-term undertaking which involves training law graduates at university, followed by further training at the Nyabisindu Judicial Training Centre.

Then, the Government and Parliament dealt with the legislative and institutional adaptations needed for holding the trials. Their exercise in collective reflection really started at an international conference organized by the Government in November 1995,<sup>27</sup> at which crucial questions were raised. For instance, how to ensure justice which respects the rights of the individual, with so many suspects, while ruling out an amnesty? What forum to choose for trying such persons: emergency courts, specialized chambers within existing courts, or assize courts? What law to apply so that the specific nature of the crimes committed can be recognized: the direct application of international law, the inclusion of the crime of genocide and crimes against humanity in the penal code, or a specific law? How to avoid being accused of violating the principle of non-retroactivity of criminal law?

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<sup>25</sup> F.-X. Nsanzuwera, *La magistrature rwandaise dans l'état du pouvoir exécutif*, CLADHO, Kigali, 1993.

<sup>26</sup> For this process and its results by the end of 1995, see Réseau de Citoyens/Citizens' Network, *Aperçus du système judiciaire - Rwanda décembre 1995 — Présentation de la collaboration technique de R.C.N.*, R.C.N., Kigali, 1996.

<sup>27</sup> See *Recommendations of the Conference held in Kigali from 1 to 5 November 1995 on "Genocide, Impunity and Accountability"*, Presidency of the Republic, Kigali, 1995.

*The specific law option*

Rwanda opted for a specific constitutional law to institute proceedings and repress the genocide and crimes against humanity committed between 1 October 1990 and 31 December 1994.<sup>28</sup> In strictly legal terms it did not need to do this, because Rwanda could have directly applied the international law defining genocide and crimes against humanity.<sup>29</sup> Although Rwanda has not explicitly provided penalties for those crimes, it could have invoked the dual indictment mechanism whereby the same act (e.g. premeditated murder or genocide) is regarded as a crime in both national and international law but the penalty applied is the one provided solely for the criminal offence under domestic law.<sup>30</sup> There is not yet a consensus on the direct applicability of rules of international law in domestic law.

The choice of a specific constitutional law removes that ambiguity by repressing acts punishable under the Penal Code which at the same time constitute crimes of genocide or crimes against humanity. The acts committed must therefore meet both those qualifications if the law is to be applied. That requirement reflects a concern to avoid any criticism based on retroactivity of the law.<sup>31</sup> Genocide and crimes against humanity are defined by reference to relevant international instruments. It is worth noting that the Rwandan legislators did not deem it expedient to mention resolution 955, which contains the most recent definition of crimes against humanity.

*Categorization*

Perpetrators of crimes are classified in one of four separate categories.<sup>32</sup> This makes it simpler to indicate the degree of individual respon-

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<sup>28</sup> Organic Law of 30 August 1996 on the organization of prosecutions for offences constituting the crime of genocide or crimes against humanity committed since 1 October 1990, Law No. 8/96, *Official Gazette of the Republic of Rwanda*, 30 August 1996.

<sup>29</sup> Rwanda has ratified the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide and the Convention of 26 November 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Decree-Law No. 8/75 of 12 February 1975, *Journal officiel de la République rwandaise*, 1975, pp. 230, 246 ff.

<sup>30</sup> D. de Beer, *The Prosecutions for Crime of Genocide and Crime against Humanity: Legal Basis*, R.C.N.-Rwanda Editor, 1995; W. Schabas, "Justice, democracy, and impunity in post-genocide Rwanda: Searching for solutions to impossible problems", *Criminal Law Forum*, Vol. 7, 1996, p. 535.

<sup>31</sup> On this issue, see D. de Beer, *op. cit.*, p. 21.

<sup>32</sup> Organic Law, Art. 2.

sibility involved and possible to limit recourse to capital punishment and imprisonment by applying a graduated scale of penalties.

The first category includes the organizers and planners of the genocide and crimes against humanity, persons who abused positions of authority within the administration, the army, political parties, religious groupings or militias to commit or encourage crimes, notorious killers who distinguished themselves by their ferocity or excessive cruelty and, lastly, perpetrators of sexual torture. Pursuant to Article 9 of the Organic Law, the Prosecutor General of the Supreme Court has published an initial list of 1,946 persons provisionally placed in Category 1.<sup>33</sup> Category 2 includes the perpetrators of or accomplices to intentional homicides or serious assaults against individuals which led to death. Category 3 contains persons guilty of other serious assaults against individuals, and Category 4 covers persons who committed offences against property.

*Penalty reduction and the confession and guilty-plea procedure*

The confession and guilty-plea procedure is the cornerstone of the Organic Law and is designed to foster confessions, elicit apologies to victims and encourage collaboration with justice. Its success is crucial if Rwanda's penal system is to cope, if only partially, with the enormous task facing it.

In exchange for a complete confession including a detailed description of the acts committed, the names of all accomplices and apologies to the victims, accused persons in Categories 2, 3 and 4 enjoy a major reduction in their sentence if they plead guilty. Accused persons whose acts place them in Category 1 may also enjoy the same benefit and be placed in Category 2 if their names have not been published in the list of Category 1 persons provided for in Article 9.

This confession and penalty-reduction mechanism is entirely new in Rwanda and may be compared with the practice of plea-bargaining widely used in the United States of America to accelerate the processing of criminal cases. By encouraging a plea of guilty, the mechanism absolves the court from having to provide evidence against the accused

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<sup>33</sup> List published in the *Official Gazette of the Rwanda Republic*, special issue, 30 November 1996. Those figuring on the list are not there definitively. The Office of the Public Prosecutor and the Tribunal have full powers to place any listed person in another category.

and allows it simply to determine the penalty after verifying the legality and sincerity of the confession.

### *Penalties*

It is worth stressing here the benefits which the perpetrators of the genocide and massacres may derive from the adoption of the Organic Law. Even if no confession is forthcoming, sentences are considerably reduced in relation to those that might have been expected under the Penal Code. For instance, only those in Category 1 risk the death penalty pursuant to the Penal Code,<sup>34</sup> and the judge is at liberty to reduce that sentence by allowing mitigating circumstances.<sup>35</sup> In the case of persons whose acts place them in Category 2, the death penalty is replaced where appropriate by life imprisonment. Terms of imprisonment are never served for property offences, which only give rise to civil damages determined by amicable agreement.

Furthermore, a confession and a guilty plea may have a considerable impact on the penalty. Depending when their confession is made, convicted persons in Category 2 may have their sentences reduced by 7 to 11 years, while those in Category 3 may be given only one-third of the normal sentence.<sup>36</sup>

### *Channels of appeal*

The Organic Law modifies the appeal procedure provided for under Rwanda's Code of Criminal Procedure. Under Article 24 of the Organic Law, only appeals based on questions of law or flagrant errors of fact are admissible. No appeal may be lodged against decisions based on acceptance of the confession and guilty-plea procedure. The appellate court rules on the basis of written evidence, which means that the procedure will be in writing, the parties being invited to communicate their defence statements and documentation. The appeal decision is final

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<sup>34</sup> The principle of non-retroactivity of penal sanctions prohibits the imposition, by application of the Organic Law, of the death penalty on any person against whom it could not be imposed under the Penal Code.

<sup>35</sup> Art. 14 of the Organic Law. Art. 39 of the same law specifies that the Penal Code is applicable unless otherwise provided in the Organic Law. The latter makes no provision for the allowance of mitigating circumstances (Arts. 82-84 of the Penal Code); it must therefore be concluded that the judge may allow them in favour of any person sentenced, including those in Category 1.

<sup>36</sup> Arts. 15 and 16 of the Organic Law.

except in the case of persons acquitted at the trial stage and sentenced to death by the appeal court. The Public Prosecution Office is legally obliged to appeal against any death sentence by virtue of Article 99 of the Code of Criminal Procedure.

The right to appeal is therefore sharply reduced, although it should be noted that the means of appeal when the ordinary procedure is applied are comparable to those offered by Article 24 of the International Tribunal's Statute. Both make allowance for errors of law and, while the Organic Law refers to flagrant errors of fact, the Statute allows for errors of fact that have led to a denial of justice.

### *Defence*

The right to defence is enshrined in Article 36 of the Organic Law. However, that law rules out the possibility of legal aid, a limitation which reflects Rwanda's practical and financial inability to pay lawyers for all the accused. It is not a matter of systematically denying the accused legal aid. The Ministry of Justice has authorized foreign lawyers working for *Lawyers Without Borders* to plead on behalf of accused persons and third-party plaintiffs. The passing of the law setting up the Bar,<sup>37</sup> and the appointment of the President of the Bar late in August 1997, show that Rwanda is determined to professionalize defence activities within the justice system.

### *The first trials*

The first trials based on the Organic Law opened on 27 December 1996. They were sharply criticized because the rights of the defence had not been respected in several cases: refusal of application to adjourn in order to consult the case-file or seek a lawyer, unjustified refusal to hear a defence witness, etc. The influx of lawyers from abroad,<sup>38</sup> essentially from Africa and Europe, has helped to put across to Rwanda's inexperienced magistrates the role and importance of respect for the fundamental rights of the defence. Gradually, the procedures are being observed.

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<sup>37</sup> Law No. 3/97 of 19 March 1997, *Official Gazette of the Republic of Rwanda*, 1 August 1997.

<sup>38</sup> Rwandan lawyers have to date played only a marginal part in defending those accused in the genocide-related trials. As victims, or relatives or friends of victims, it is quite understandable that they should find it hard to engage in such proceedings. The constitution of the Bar may offer them support within a better-regulated professional and ethical framework.

A report on the mission to Rwanda by the High Commissioner for Human Rights stresses the positive effects that the presence of a lawyer has on the proceedings.<sup>39</sup> According to that report, by 30 June 1997 142 judgments had been handed down by the specialized chambers of the country's trial courts. These included six acquittals and 61 death sentences, 13 of them against persons on the list of Category 1 criminals as defined in Article 9 of the Organic Law.

It is particularly interesting to note that of those 142 decisions, 25 were delivered after acceptance of a confession and a guilty plea. Here again, the positive role of the lawyer becomes patent, for he can explain to his clients the advantages available to them under the new procedure. According to the figures compiled by the High Commissioner for Human Rights, 38 percent of the accused defended by a lawyer made a confession, compared with only five percent of those receiving no advice.<sup>40</sup> The confession and guilty-plea procedure is essential for accelerating the proceedings of a swamped judiciary. Generalized access by lawyers to places of detention to explain how the procedure works is a practical step which should enable the submission of confessions to increase tenfold.

All those intervening in the trials for genocide and massacres express fears for their own safety, a fact which obviously constitutes a serious threat to the quality of justice rendered.

### **Reasonable cause for hope**

The cumbersome nature of the International Tribunal's proceedings has come in for much and increasingly bitter criticism within Rwanda, usually on the grounds that the Tribunal has no prosecutor of its own and, worse still, that no new charges were brought between October 1996 and June 1997.<sup>41</sup> The hostility even boiled over into a demonstra-

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<sup>39</sup> Human Rights Field Operation in Rwanda (ed.), *Genocide trials to 30 June 1997 — Status report as of 15 July 1997*, Doc. FRFOR/STRPT/52/1/15JULY 1997/E, p. 3.

<sup>40</sup> *Ibid.*, p. 4.

<sup>41</sup> See, for example, the local press: "Le TPIR a 180 yeux qui ne voient pas", *IMVAHO*, No. 1188 of 30 June 1997; "Je reviens d'Arusha et du TPIR, ce véritable nid de vipères pour le Rwanda", *Rwanda Libération*, No. 24, May 1997; "Who is Justice Louise Arbour? A "no" friend to women!", *The Central African Newslite*, No. 5, 15 May 1997.

tion against Justice Louise Arbour, organized by an association of people who escaped the genocide.<sup>42</sup>

Things changed radically with the so-called *Naki* operation on 18 July 1997, in which senior political and military authorities of the "interim government", set up in Rwanda in April 1994, were arrested in Kenya and transferred to the Detention Unit at Arusha.<sup>43</sup> In Rwandan eyes, the Tribunal thus demonstrated its usefulness compared with the country's own national courts,<sup>44</sup> since it had been able to reach the most senior people responsible for the genocide who had sought refuge in a foreign country. Disappointment with any new delays could, however, quickly resurface in Rwanda. The Tribunal is not unaware of the problem and President Kama has asked out loud whether the Tribunal's human resources should be increased in order to deal with this influx of accused persons without undue delay. An increase in the number of judges and chambers would be feasible under Security Council resolution 955.

There is also growing hope for the national courts. The specialized chambers are following procedural rules more strictly, the confession and guilty-plea procedure is starting to win over certain detainees and the Bar has just been created. Here again, hopes are somewhat muted because it would be naive to expect the legal system to deal with all the genocide-related cases within a reasonable period of time. Moreover, the worsening of the security situation in Rwanda during 1997 poses a serious threat to the safety of those intervening in the judicial process. It is nonetheless essential that some cases be submitted to the courts and tribunals publicly if any political solutions are to emerge.

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<sup>42</sup> Radio Rwanda, news broadcast in Kinyarwanda at 1900 hours on Saturday, 24 May 1997 (transcribed into French for the author).

<sup>43</sup> For these arrests, see *Ubutabera*, 21 and 28 July 1997, available at <http://persoweb.francenet.fr/~intermed>.

<sup>44</sup> "Rwanda thanks Arusha tribunal, UN, Kenya over genocide arrest", AFP, 23 July 1997.