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France and universal jurisdiction and the Rwandan *génocidaires*: the Pascal Simbikangwa trial

Abstract: In 2014, twenty years after the Rwandan genocide, the first trial took place in France of a Rwandan génocidaire, Pascal Simbikangwa, despite the presence on French territory of a number of genocide suspects for many years, various extradition requests by Rwanda – declined by France – and numerous arrests and investigations. This article looks at issues of jurisdiction regarding the Simbikangwa case and the reasons the French courts heard his case, and examines some issues which may be of significance in the choice of arena for the bringing to justice of Rwandans genocide suspects living in France in future.

1. Introduction: The Simbikangwa trial

On 14th March 2014, Pascal Simbikangwa was finally found guilty by the *Cour d'Assises* in Paris for the part that he had played in the Rwandan genocide nearly twenty years earlier, when approximately eight hundred thousand Rwandan citizens, mostly Tutsis or moderate Hutus, were massacred by the Hutu majority in a fearsome demonstration of ethnic cleansing. On trial for complicity in genocide and complicity in crimes against humanity,¹ Simbikangwa, former head of the Rwandan *Service Central de Renseignement*² and captain of the presidential guard, was convicted and sentenced to twenty-five years in prison. His was no 'ordinary' crime, but the very lengthy delay in bringing him to justice was not due to lack of evidence or inability to track down the culprit. For Simbikangwa had been arrested in October 2008 on the French island of Mayotte,³ remanded in custody on the Ile de la Réunion in April 2009 and transferred to Fresnes prison in the south of Paris, in mainland France some months later.⁴ He remained at Fresnes until his trial in 2014. His trial was also no 'ordinary' trial, marking as it did the first ever complete trial of a Rwandan genocide suspect by a French court, despite the presence of a number of suspected *génocidaires* currently living in

¹ Simbikangwa was initially charged with complicity to commit genocide and complicity to commit crimes against humanity, but in the course of the trial, the *avocat général* (assistant public prosecutor) requested that charges be upgraded to include genocide and not simply complicity. See 'Premier procès lié au génocide rwandais: perpétuité requise contre l'accusé,' *Le Monde*, 12 March 2014, available on line at http://www.lemonde.fr/afrique/article/2014/03/12/premier-proces-lie-au-genocide-rwandais-la-perpetuite-requise-contre-l-accuse_4381978_3212.html (last visited 27 March 2015).

² Central Intelligence Services.

³ M. Barbier, 'Génocide des Tutsi: vingt ans après, un procès en France', *L'Humanité*, 4 February 2014, available on line at <http://www.humanite.fr/societe/genocide-des-tutsi-vingt-ans-apres-un-proces-en-fr-558362> (last visited 20 July 2015).

⁴ M. Lugaz and Y. Ronda, 'Pascal Simbikangwa devant la Cour d'assises de Paris: quels sont les enjeux du premier procès français lié au génocide rwandais?' *Clinique de droit international pénal et humanitaire*, Université de Laval, available on line at <http://www.cdiph.ulaval.ca/blogue/pascal-simbikangwa-devant-la-cour-d-assises-de-paris-quels-sont-les-enjeux-du-premier-proces> (last visited 20 July 2015).

France, and despite a number of similar trials of *génocidaires* in other countries, both in Europe and beyond.⁵ This article examines how Simbikangwa came to find himself before the French courts and the significance of the Simbikangwa trial in France in the bringing to justice of Rwandans living in France and suspected of committing the ‘crime of crimes’, a term often used to describe genocide since the World War II Nuremberg trials.

2. Arrest and Investigation

The journey which was to take Simbikangwa before the French courts began when he fled Rwanda in July 1995, after the genocide. At this stage in his life, Simbikangwa was already a paraplegic, confined to a wheelchair, following a car accident in which he was involved as a young man in 1986.⁶ His first destination was Goma in Zaire (now the Democratic Republic of Congo), thereafter he went to East Africa in October 1996, and from there to the Comoros Islands in 1998, where he was assisted by various catholic missions. Finally, in 2005, he obtained a passage on a boat, alongside other illegal immigrants, to Mayotte, where he claimed asylum under the name of Safari Senyamuhara. There, he lived with an assumed name and illicitly-created identity until his involvement in the production of false ID papers brought him to the attention of the local police in Mayotte in 2008.⁷ At that point, his real name came to light, and it was discovered that he was in fact wanted for genocide offences by the Rwandan authorities and was the subject of an Interpol red notice ‘... to seek the location and arrest of a person wanted by a judicial jurisdiction or an international tribunal with a view to his/her extradition.’⁸ The Rwandan authorities in Kigali had even classified him as a Category One *génocidaire*, the category reserved for alleged orchestrators and organisers of the genocide and crimes against humanity,⁹ as opposed to those with a more minor

⁵ Germany, the Netherlands, Belgium, Norway, Sweden, Switzerland, Canada have all tried Rwandan genocide suspects.

⁶ Paris Cour d’assises, Arrêt criminel, 13/0033, *Pascal Senyamuhara Safari (alias Pascal Simbikangwa)*, 14 mars 2014, available online at: <http://proces-genocide-rwanda.fr/wp-content/uploads/2014/04/scan005.pdf>, 3.

⁷ B. Thiolay, ‘Rwanda: qui est le capitaine Simbikangwa, jugé en France pour complicité de genocide?’ *L’Express*, 3 February 2014, available on line at http://www.lexpress.fr/actualite/monde/afrique/rwanda-l-ombre-du-genocide-poursuit-le-capitaine-simbikangwa_1318749.html (last visited 27 March 2015).

⁸ Interpol, *International Notices System – Fact Sheet*, (2015).

⁹ Art. 2 Rwandan Organic Law No. 08/96, 30 August 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990 (unofficial copy) states: ‘Persons accused of offences set out in Article 1 of this organic law and committed during the period between 1 October 1990 and 1994 shall, on the basis of their acts of participation, be classified into one of the following categories:

Category 1: a) person whose criminal acts or whose acts of criminal participation place them among the planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity; b) persons who acted in positions of authority at the national, prefectural, communal, sector or cell

involvement, who occupied categories two to four. Category Two offenders, for example, include perpetrators, conspirators or accomplices of homicide and assault causing death, Category Three, those responsible for serious assaults against the person, and Category Four, persons who committed offences against property. At the time these categories were established by Rwandan Organic Law No. 08/96 of 30 August 1996, Category One defendants (and Category One defendants alone) were liable to the death penalty if found guilty.¹⁰

Once aware of his arrest, Kigali requested Simbikangwa's extradition from France to face justice in Rwanda, but the French authorities refused the request, wishing first of all to try him in Paris for the matter of the false documents – he was sentenced to two years in Fresnes prison in 2012 for that offence¹¹ – and then to pursue the genocide charges themselves.

However, of all the signatories to the European Convention of Human Rights (ECHR), France has one of the worst reputations for violations of Article 5(3),¹² unreasonable delays in bringing cases to court, and it has taken a considerable number of years to bring Simbikangwa to trial for the genocide offences. The case of Corsican Félix Tomasi is regularly held up to demonstrate the delays in French justice. Tomasi was arrested in Bastia in March 1983 on suspicion of involvement in an attack by Corsican independantists, only to be released immediately after his trial in October 1988, five and a half years later, when he was found not guilty.¹³ Although Simbikangwa's trial procedure for falsifying identity documents was slightly less drawn out than Tomasi's (Simbikangwa endured three years of pre-trial detention), it has taken French courts a similar length of time to bring Pascal Simbikangwa to trial for the genocide counts: arrested and detained on 28th October 2008 in Mayotte for the falsification of the identity documents, officially remanded in custody for the

level, or in a political party, or fostered such crimes; c) notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed; d) persons who committed acts of sexual torture. See also V. Thalmann, 'Rwandan Genocide Cases,' in A. Cassese et al (ed.) *Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) 498-505.

¹⁰ Art. 14 (a), Organic law No. 08/96, 30 August 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990.

¹¹ Collectif pour les Parties Civiles pour le Rwanda, 'Procès Génocide Rwanda, FAQ,' available on line at <http://proces-genocide-rwanda.fr/faq/>, (last visited 21 May 2015).

¹² Art. 5 (3) ECHR reads as follows: 'Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.'

¹³ *Tomasi v France*, ECtHR (1993) Series A, No. 241-A, 1.

genocide offences on 16th April 2009, and sentenced to twenty-five years in prison on 14th March 2014,¹⁴ following a trial which began on 4th February 2014.¹⁵ In fact, France had already received a warning about unreasonable delays in dealing with Rwandan cases in June 2004, when the European Court of Human Rights had unanimously decided that the French courts had violated the rights of Yvonne Mutimura, a victim, to be heard promptly. It had taken nine years to investigate the role in the genocide of Rwandan priest Wenceslas Munyeshyaka, who was arrested in France in 1995 following a complaint by genocide survivors that he was complicit in torture and inhuman or degrading treatment during the genocide.¹⁶ Indeed, although he was officially charged with genocide offences and referred by the ICTR to France for prosecution in 2007,¹⁷ the investigation into Munyeshyaka was only completed in April 2015. Furthermore, a recent decision of the *juge d'instruction* (examining magistrate) investigating Munyeshyaka has ruled that there is no case to answer against him for the genocide offences, and it remains to be seen whether this decision not to prosecute Munyeshyaka for the offences of genocide, rape as a crime against humanity, extermination as a crime against humanity, and murder as a crime against humanity outlined on the ICTR indictment drafted before the referral to France was agreed¹⁸ will be appealed by the *Fédération Internationale des Droits de l'Homme* (FIDH) and the *Ligue des Droits de l'Homme* (LDH).¹⁹

The investigation by the French authorities into Simbikangwa's involvement in the genocide was finally completed in February 2013, and passed to the prosecutor's department, in order

¹⁴ Fédération Internationale des Droits de l'Homme/Ligue des Droits de l'Homme, *Rwanda - Procès de Pascal Simbikangwa: Retour sur un procès emblématique*, December 2014, available on line at https://www.fidh.org/IMG/pdf/rwanda_proces_simbikangwa.pdf and in translation at <https://www.fidh.org/IMG/pdf/rwandaproces654ang2014.pdf> (last visited 14 May 2015), at 6.

¹⁵ J. Hubrecht, *Les Leçons du procès Simbikangwa: une "révolution judiciaire" en marche*, Institut des Hautes Etudes, Forum sur la Justice, February 2015, available on line at http://www.ihej.org/wp-content/uploads/2015/02/Proces_Simbikangwa_Joel_Hubrecht_fevrier_2015.pdf (last visited 14 May 2015), at 1.

¹⁶ 'Munyeshyaka, Wenceslas (ICTR)', The Hague Justice Portal – Academic Research, available on line at <http://www.haguejusticeportal.net/index.php?id=10679> (last visited 10 June 2015).

¹⁷ Decision on the Prosecutor's Request for the Referral of Wenceslas's Indictment to France, *Munyeshyaka* (ICTR-2005-87-i) Trial Chamber, 20 November 2007.

¹⁸ Indictment, *Munyeshyaka* (ICTR-05-87) 20 July 2005.

¹⁹ In August 2015, the French public prosecutors' office asked to have the case into Munyeshyaka dismissed, due to lack of evidence of his direct involvement. On 2 October 2015, this request was granted. See 'Génocide rwandais : le parquet demande le non-lieu pour le Père Munyeshyaka,' *Le Monde*, 19 August 2015, available on line at http://www.lemonde.fr/afrique/article/2015/08/19/genocide-rwandais-le-parquet-demande-le-non-lieu-pour-le-pere-munyeshyaka-installe-en-france_4730227_3212.html#QDMCIThkbIjBvJBu.99 (last visited 30 September 2015) and Fédération Internationale des Droits de l'Homme *Non lieu dans l'affaire Wenceslas Munyeshyaka – Les victimes méritent un procès!* (2015) available on line at <https://www.fidh.org/fr/themes/justice-internationale/competence-universelle/non-lieu-dans-l-affaire-wenceslas-munyeshyaka-les-victimes-meritent-18554> (last visited 15 October 2015).

for the charges to be finalised. April 2013 would mark the end of Simbikangwa's fourth year in detention in France, and the maximum duration which the law allows detention of a suspect pre-trial for a crime punishable by a custodial sentence exceeding twenty years and committed outside of France.²⁰ Although these limits can be extended by up to eight months in exceptional circumstances – where the examining magistrate requires more time to complete the investigation and releasing the suspect could put property or members of the public at risk²¹ – it was becoming urgent to deal with Simbikangwa's case.

Following the four-year investigation, which included four expeditions to Rwanda by the examining magistrates,²² Simbikangwa was formally indicted for complicity in genocide and complicity in crimes against humanity on 29th March 2013,²³ for the role which he played in distributing weapons to the guards stationed at the road blocks in Kigali, and for giving them instructions and encouragement which led to the massacre of the Tutsis. Initially, he had been investigated in connection with and indicted for a number of other offences as well – genocide through wilful attacks and attempts on life, crimes against humanity through wilful attacks and attempts on life, torture and barbarity²⁴ – but, after having interviewed over a hundred witnesses, the examining magistrates had felt unable to proceed with certain of the

²⁰ *Code de Procédure Pénale*, article 145-2, available on line at <http://www.legifrance.gouv.fr/affichCode.do?idSectionTA=LEGISCTA000021331519&cidTexte=LEGITEXT000006071154> (last visited 14 May 2015).

²¹ *Ibid.*

²² Fédération Internationale des Droits de l'Homme/Ligue des Droits de l'Homme, *Rwanda - Procès de Pascal Simbikangwa: Retour sur un procès emblématique*, December 2014, available on line at https://www.fidh.org/IMG/pdf/rwanda_proces_simbikangwa.pdf (last visited 14 May 2015), at 6.

²³ Cour d'assises de Paris, Arrêt criminel No. 13/0033, *Pascal Senyamuhara Safari (alias Pascal Simbikangwa)*, 14 mars 2014, available on line at: <http://proces-genocide-rwanda.fr/wp-content/uploads/2014/04/scan005.pdf>.

²⁴ See Cour d'appel de Paris, Ordonnance de Requalification, de non-lieu partiel et de mise en accusation devant la Cour d'assises, *Pascal Senyamuhara Safari (alias Pascal Simbikangwa)* 29 mars 2013, available on line at http://cec.rwanda.free.fr/documents/Simbikangwa/Rwanda-_Ordonnance_des_juges_dinstruction.pdf (last visited 30 September 2015). Simbikangwa was initially charged with '...crimes de génocide (par des atteintes volontaires à la vie et tentatives, et des atteintes graves à l'intégrité physique ou psychique) et complicité de génocide (par des atteintes volontaires à la vie et tentatives, et des atteintes graves à l'intégrité physique ou psychique); crimes contre l'humanité (par des atteintes volontaires à la vie – meurtres/assassinats - et tentatives et autre actes inhumains); participation à un groupement formé ou à une entente établie en vue de la préparation caractérisée par un ou plusieurs faits matériels, de l'un des crimes définis par les articles 211-1, 212-1 et 212-2 du code pénal [these provisions relate to definitions of genocide and crimes against humanity]; actes de tortures et de barbarie,' resumed in English as follows in Fédération Internationale des Droits de l'Homme/Ligue des Droits de l'Homme, *Rwanda - Procès de Pascal Simbikangwa: Retour sur un procès emblématique*, December 2014, available on line at https://www.fidh.org/IMG/pdf/rwanda_proces_simbikangwa.pdf and in translation at <https://www.fidh.org/IMG/pdf/rwandaproces654ang2014.pdf> (last visited 1 October 2015), at 7: '...for genocide through wilful attacks and attempts on life and wilful and grievous attacks on the physical integrity of persons and for complicity in genocide, for crimes against humanity through wilful attacks and attempts on life and other inhumane acts, for complicity in crimes against humanity, for participation in a group ... or in an established agreement created to carry out genocide or crimes against humanity, and for acts of torture and barbarity.'

charges initially envisaged, notably relating to the massacre at Kesho Hill. The accounts of the witnesses were felt to be too ‘fragile’ to enable the examining magistrates to pursue Simbikangwa for the charges of genocide through wilful attacks and attempts on life and crimes against humanity through wilful attacks and attempts on life. At issue had been the extent of Simbikangwa’s involvement in the massacre on Kesho Hill, where between one thousand four hundred and one thousand six hundred Tutsis died, having gathered there to seek refuge from their Hutu aggressors in the aftermath of the assassination of President Juvénal Habyarimana – the incident which set the genocide in motion. Simbikangwa was denounced by certain witnesses as having been not only present on 8th April 1994, but also instrumental in the massacre that day.²⁵ Interestingly, even before the 1994 genocide, Simbikangwa, who owned a property at Kesho, was feared as merciless and above the law by the Tutsi workforce he employed to look after his farm, and the FIDH had already expressed serious concerns as to Simbikangwa’s violations of human rights and his reputation as a torturer.²⁶ However, the Paris *Cour d’appel* found that there was insufficient evidence to try Simbikangwa for the events at Kesho Hill, so charges relating to the Kesho Hill massacre were removed from the indictment. Charges of torture, for which Simbikangwa was also to be prosecuted, under the 1984 UN Convention against Torture²⁷ and Articles 222-1 to 222-6 of the *Code Pénal*,²⁸ were also dropped, falling foul of the French statute of limitations (*prescription*), which prevents the prosecution of most *crimes* (the most serious offences and which include offences of torture) more than ten years after they have been committed.²⁹

²⁵ ‘A Kesho, on se souvient de Simbikangwa, premier Rwandais jugé en France pour génocide,’ *Jeune Afrique*, 31 January 2014, available on line at <http://www.jeuneafrique.com/actu/20140131T162040Z20140131T162019Z/> (last visited 14 May 2015).

²⁶ A report published in 1993 referred to his reputation for torturing people in the presidential buildings. See Fédération Internationale des Droits de l’Homme, *Rapport de la Commission Internationale d’enquête ‘Violations massives et systématiques des droits de l’homme depuis le 1er octobre 1990,’* 8 March 1993, available on line at <https://www.fidh.org/La-Federation-internationale-des-ligues-des-droits-de-l-homme/afrique/rwanda/14463-rwanda-violations-massives-et-systematiques-des-droits-de-l-homme-depuis> (last visited 14 May 2015), at 81.

²⁷ Art. 2 (1) ‘Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.’ UN Convention against Torture, incorporated into French domestic law through Art. 689-2 of the *Code de Procédure Pénale*.

²⁸ ‘Le fait de soumettre une personne à des tortures ou à des actes de barbarie est puni de quinze ans de réclusion criminelle,’ (The fact of subjecting a person to torture or acts of barbarity carries a penalty of imprisonment for a term of fifteen years). Art. 222-1, *Code Pénal*.

²⁹ ‘En matière de crime et sous réserve des dispositions de l’article 213-5 du code pénal, l’action publique se prescrit par dix années révolues à compter du jour où le crime a été commis si, dans cet intervalle, il n’a été fait aucun acte d’instruction ou de poursuite.’ (In the case of serious crimes and subject to the provisions of article 213-5 of the Criminal Code, no action or proceedings shall be taken by the state more than ten years after the date on which the crime was committed if, during this time, no investigation or legal proceedings have been commenced). Art. 7, *Code de Procédure Pénale*.

Thus, only charges for complicity in genocide and complicity in crimes against humanity remained on the indictment when Simbikangwa went to trial in 2014.

3. The genocide case and issues of jurisdiction

It was understandable that France would want to try Simbikangwa for producing false documents, since this was an offence that he had committed while resident on French territory in Mayotte, but trying him for complicity in genocide was perhaps a little less obvious. The offences had not been committed on French soil, nor against French nationals, nor by a French national, the normal criteria where issues of jurisdiction are concerned being criteria of territoriality or nationality. His case is a classic illustration of the tensions at play when deciding jurisdiction, balancing the claims of the international tribunals, the territorial states where the offences were committed and third-party states, which often have a more tenuous connection with the accused and the offences.³⁰ At first sight, a number of alternative routes would have been open to bring him to justice, and various jurisdictions could have asserted their rights to jurisdiction to try Simbikangwa.

A. Trial before the International Criminal Tribunal for Rwanda

The most logical solution would perhaps have been for his case to be heard before the International Criminal Tribunal for Rwanda (ICTR), established by the United Nations Security Council in Arusha, Tanzania, in 1995, to ‘prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring States, between 1 January 1994 and 31 December 1994.’³¹ The ICTR clearly had jurisdiction to deal with Simbikangwa’s case. The issues of territoriality (violations committed in the territory of Rwanda and neighbouring States) and temporality (between 1 January 1994 and 31 December 1994) were satisfied, and the charges related to offences of genocide and crimes against humanity, which could be dealt with under Articles 2 and 3 of the ICTR Statute. The ICTR also had primacy over states to deal with the genocide suspects.³² However, at the time of Simbikangwa’s arrest in Mayotte in 2008, the

³⁰ For a discussion of these issues see L. Sadat, ‘Transjudicial dialogue and the Rwandan genocide: aspects of antagonism and complementarity,’ 22, *Leiden Journal of International Law*, (2009), 543-561, at 544.

³¹ Art. 1 ICTRSt.

³² Art. 8 (2) ICTRSt states: ‘The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.’

ICTR had already commenced its completion strategy, the Security Council, in August 2003, ‘...[u]rging the ICTR to formalize a detailed strategy... to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions, as appropriate, including Rwanda, in order to allow the ICTR to achieve its objective of completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010 (ICTR Completion Strategy)...’³³ This was not going to prove the moment for the ICTR to open a new investigation. Indeed, there had already been referrals of two cases to French jurisdiction (those of Wenceslas Munyeshyaka and Laurent Bucyibaruta in 2007), even if their trials have yet to take place. The ICTR has in fact also successfully transferred cases to the Rwandan courts: Jean Bosco Uwinkindi’s case was finally transferred to Rwanda in April 2012, and Bernard Munyagishali’s in July 2013.³⁴ Despite the intention to conclude its work in 2010, five years on, in 2015, the ICTR still has not met its target of completing all its cases (14th December 2015), and is still engaged in hearing the ‘Butare’ appeal, involving amongst others Pauline Nyiramasuhuko, who was the Minister for Family Welfare and the Advancement of Women at the time of the genocide. Nyiramasuhuko, who is appealing her sentence of imprisonment for life handed down in June 2011, was the first woman to be convicted of genocide by the ICTR as part of the ‘Butare Group’ and is also the first woman to be convicted of genocidal rape, having been accused of inciting troops and militia to carry out rape during the genocide.³⁵ Trying Simbikangwa before the ICTR or, rather, the United Nations Mechanism for International Criminal Tribunals (UNMICT), the temporary body established in 2010 to complete outstanding work on any trial or appeal proceedings of the ICTR and ICTY which were pending, might theoretically have been possible. The UNMICT was still operational in 2014. Indeed, in view of subsequent serious rifts and tensions between Rwanda and France, the UNMICT would certainly have provided a forum to bring Simbikangwa to justice with a little more serenity, on a neutral stage, than other options. However, this would have added to the difficulties the ICTR was already experiencing in completing its work and meeting the ever-receding deadlines by which to close its doors.

³³ S.C. Res. 1503, 28 August 2003, at 2.

³⁴ Human Rights Watch, *Rwanda - Justice after Genocide: 20 years on*, 28 March 2014, available on line at http://www.hrw.org/sites/default/files/related_material/2014_March_Rwanda_0.pdf (last visited 21 May 2015), at 8.

³⁵ Judgment, *Nyiramasuhuko et al* (ICTR-98-42-T), Trial chamber II, 24 June 2011, § 6186, 6200, 6271.

A further consideration is that the ICTR was only ever intended to try those with a leading role in the genocide, and certainly, before his trial in France commenced, the ICTR as well as the French authorities did not perceive Simbikangwa as one of the ‘big fish’ of the genocide, even if the Rwandan authorities had not been of entirely the same opinion. He was not on the list of fugitives to be tried by the Tribunal. The statute of the UNMICT gives the Mechanism the power to prosecute the persons indicted by the ICTR who are among the most senior leaders suspected of being most responsible for the crimes committed (Article 1 (2)), and to prosecute as well those who are not the most senior (such as Simbikangwa), but only after it has exhausted all reasonable efforts to refer the case to a state in whose territory the crime was committed, or in which the accused was arrested, ‘...or having jurisdiction and being willing and adequately prepared to accept such a case’ (Articles 1 (3) and 6).³⁶

B. The International Criminal Court

If the ICTR was not to be the tribunal to hear Simbikangwa’s case, neither was the International Criminal Court (ICC). When Simbikangwa was arrested in 2008, the ICC was already in operation in The Hague. Its remit is to ‘...exercise its jurisdiction over persons for the most serious crimes of international concern...’,³⁷ Article 5 of The Rome Statute of the International Criminal Court specifying clearly that ‘...[t]he Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) genocide, (b) crimes against humanity, (c) war crimes and (d) the crime of aggression.’³⁸ So in terms of *ratione materiae* (subject matter), the ICC had jurisdiction over the offences which Simbikangwa was initially alleged to have committed in Rwanda: genocide through wilful attacks and attempts on life and crimes against humanity through wilful attacks and attempts on life. In addition, the ICC is only empowered to initiate an investigation or prosecution into individuals (rather than states) in certain specific sets of circumstances: firstly, if they are referred to the ICC by State Parties, secondly, if the United Nations Security Council puts forward a request for investigation or prosecution into them, or thirdly, on its own initiative,³⁹ additional requirements being that, in the first and third situations cited, the reprehensible conduct be committed on the territory of a State Party or that the accused person be a national

³⁶ Arts 1 (2), 1 (3) and 6, Statute of the International Residual Mechanism for Criminal Tribunals (IRMCT).

³⁷ Art. 1 ICCSt.

³⁸ Art. 5 (1) ICCSt.

³⁹ Art. 13 ICCSt.

of a State party.⁴⁰ However, the jurisdiction of the ICC is founded on the principle of complementarity. This means that it is the State parties that have primary jurisdiction and the primary obligation to investigate, punish, and prevent genocide, crimes against humanity, war crimes and the crime of aggression, and a case will generally be considered inadmissible by the ICC if it has been or is being investigated or prosecuted by a State with jurisdiction. The ICC will only intervene if national courts are either unwilling or unable to bring perpetrators to justice, for example in the event that national justice systems do not carry out proceedings or claim they to do so but in reality they are not carrying out proceedings genuinely.⁴¹ Rwanda was not a State Party to the Rome Statute, but Article 12 also allows for non-Party states to accept the jurisdiction of the ICC, and this is not inconceivable in view of the fact that Rwanda had already requested the assistance of the United Nations in bringing the genocide suspects to justice, in 1994, at a time when, following the devastation of the genocide, the country simply lacked the infrastructure and manpower to do this itself. However, the ICC would not provide the arena for Simbikangwa's trial, as, although the ICC was established for precisely this kind of situation, on condition that Simbikangwa's actions had passed the gravity threshold outlined in article 17, the ICC Statute states clearly that its jurisdiction is limited temporally: 'The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute...',⁴² the entry into force being 1st July 2002, and thus falling six years after the end of the genocide.

C. Extradition to face justice in the Rwandan courts

The third option would have been to extradite Simbikangwa to Rwanda, as requested by the Rwandan authorities in 2008. This request was flatly refused by the French authorities. Relationships between Rwanda and France had been strained to say the least, with France accused by Rwandan President Paul Kagame of having played an active role in supporting the former Hutu government, even training some of the forces which went on to commit the genocide,⁴³ and France's denial of and refusal to apologise for any wrong doing.⁴⁴ Tensions had mounted to extreme limits by 2008, when Simbikangwa was arrested. In 1997, the

⁴⁰ Art. 12 ICCSt.

⁴¹ Art. 17 ICCSt.

⁴² Art. 11 ICCSt.

⁴³ Human Rights Watch, *Rwanda - Justice after Genocide: 20 years on*, 28 March 2014, available on line at http://www.hrw.org/sites/default/files/related_material/2014_March_Rwanda_0.pdf (last visited 21 May 2015), at 9.

⁴⁴ O. Marsaud, 'Le juge Bruguière démenti par l'un de ses témoins-clés,' *RFI*, 4 December 2006, available on line at http://www1.rfi.fr/actufr/articles/084/article_47956.asp (last visited 22 May 2015).

daughter of the French co-pilot of President Habyarimana's aeroplane, Jean-Pierre Minaberry, one of three French crew members who perished on board the aeroplane, filed a criminal complaint and sued for damages for the acts of terrorism and complicity in acts of terrorism which had led to the loss of her father, as is authorised by the French *Code de Procédure Pénale*.⁴⁵ As a direct consequence, *juge* Jean-Louis Bruguière, France's leading anti-terrorist expert for more than twenty years, examining magistrate and vice president of the anti-terrorist unit at the *Tribunal de Grand Instance* in Paris, opened an investigation into President Paul Kagame and nine of his officials, for deliberately assassinating President Habyarimana in order to provoke the genocide against his own ethnic group, with a view to taking power thereafter. *Juge* Bruguière had subsequently recommended the trial of Kagame by the ICTR for complicity in the attack (since he benefitted from presidential immunity, he could not be tried by the French national courts), and, in 2006 requested the issuing of international arrest warrants for the nine other officials, with the intention of trying them in the French courts.⁴⁶ The response from Kagame was to sever diplomatic relations with France, to prepare his counter-attack by initiating proceedings before the United Nations' International Court of Justice.⁴⁷ Kagame went still further and, in 2008, released a report compiled by a commission of the Rwandan Justice Ministry, which had been charged with gathering evidence into France's implication in the genocide, and which accused thirteen French politicians, including former President François Mitterrand, of having prior knowledge of the genocide, planning it and directly participating in it.⁴⁸ Relations between France and Rwanda were resumed late in 2009, but by this time, Rwanda had moved several symbolic steps away from its francophone heritage, joining the Commonwealth in November 2009 and turning towards the teaching of English as a first foreign language in its schools rather than French. Promises to drop Bruguière's investigation and to prosecute the genocide

⁴⁵ 'Toute personne qui se prétend lésée par un crime ou un délit peut en portant plainte se constituer partie civile devant le juge d'instruction compétent...' ('Anyone who claims to have been the victim of a criminal offence may, when filing a criminal complaint, bring a civil action before the appropriate examining magistrate...') Article 85, *Code de Procédure Pénale* (Code of Criminal Procedure).

⁴⁶ Tribunal de Grande Instance de Paris, Cabinet de Jean-Louis Bruguière, *Délivrance de mandats d'arrêts internationaux, Ordonnance de soit-communicé*, 17 novembre 2006, available at http://www.olny.nl/RWANDA/Lu_Pour_Vous/Dossier_Special_Habyarimana/Rapport_Bruguiere.pdf (visited 15 October 2015). See also V. Thalmann, 'French Justice's Endeavours to Substitute for the ICTR,' 6 (5), *Journal of International Criminal Justice (J Int Criminal Justice, subsequently abbreviated)* (1 November 2008) at 1.

⁴⁷ International Court of Justice Press Release, 'The Republic of Rwanda applies to the International Court of Justice in a dispute with France,' 18 April 2007, available on line at <http://www.icj-cij.org/presscom/index.php?pr=1909&p1=6&p2=1> (last visited 4 June 2015).

⁴⁸ *Ibid*, at 2.

suspects in France were demanded of Nicolas Sarkozy,⁴⁹ but progress was slow in this department.

In fact, diplomatic issues aside, France, like other states, would have had immense difficulties extraditing Simbikangwa or other Rwandan genocide suspects to Rwanda for trial for fear of infringing their human rights. The death penalty had still been in place in Rwanda until July 2007, and in use until 1998,⁵⁰ and was only abolished following a vote in the Rwandan parliament in June 2007, in which ninety-six per cent of MPs voted in favour of abolition.⁵¹ It was hoped that this move would pave the way for states to extradite suspects back to Rwanda for trial, but in fact states were still very reticent to comply with Rwandan extradition requests. For example, although the request for asylum from President Habyarimana's widow, Agathe, was refused in 2009, on grounds of her potential involvement in the genocide, and she was arrested and questioned immediately following an official visit by Sarkozy to Rwanda in March 2009,⁵² France was unwilling to extradite her to Rwanda, preferring to pursue their own inquiries on French soil.⁵³ The Paris *Cour d'Appel* eventually formally refused Rwanda's request for her extradition in 2011, concluding, in the words of Agathe Habyarimana's lawyer *maître* Philippe Meilhac, that '*...les juges ont marqué le coup de façon cinglante vis-à-vis des demandes rwandaises, en soulignant que les faits reprochés sont décrits sans aucune précision et ne sont détaillés par aucun élément à charge et à décharge...*'⁵⁴ and followed previous rulings by the *Cour de Cassation*⁵⁵ that the Rwandan

⁴⁹ 'Reprise des relations diplomatiques entre Paris et Kigali', *RFI*, (29 November 2009), available on line at <http://www.rfi.fr/contenu/20091129-reprise-relations-diplomatiques-entre-paris-kigali/> (last visited 28 May 2015); F. Petit, 'All eyes on French inquiry,' *International Justice Tribune* (30 March 2011) available on line at <https://www.justicetribune.com/articles/all-eyes-french-inquiry> (last visited 28 May 2015).

⁵⁰ Rwanda last implemented the death penalty in 1998 when twenty-two people found guilty of genocide crimes were put before a firing squad. J. Standley, 'From butchery to executions in Rwandan,' *BBC News*, 27, April 1998, available on line at http://news.bbc.co.uk/1/hi/programmes/from_our_own_correspondent/84120.stm (last visited 23 July 2015).

⁵¹ 'Rwanda scraps the death penalty,' *BBC News*, 8 June 2007, <http://news.bbc.co.uk/1/hi/world/africa/6735435.stm> (last visited 21 May 2015).

⁵² C. Gouëset, 'Chronologie des relations Franco-Rwanda (1975-2012),' *L'Express*, 11 January 2012, available on line at http://www.lexpress.fr/actualite/monde/afrique/chronologie-des-relations-france-rwanda-1975-2012_803234.html (last visited 29 May 2015).

⁵³ 'L'asile politique refusé à Agathe Habyarimana,' *RFI* (16 October 2009) available on line at http://www1.rfi.fr/actufr/articles/118/article_85723.asp (last visited 28 May 2015); 'Rwanda: la demande d'extradition d'Agathe Habyarimana rejetée,' *L'Express* (28 November 2011) available on line at http://www.lexpress.fr/actualite/monde/afrique/rwanda-la-demande-d-extradition-d-agathe-habyarimana-rejetee_1035030.html (last visited 28 May 2015).

⁵⁴ '... the judges made their point with a resounding response to the Rwandan request, emphasising that the facts held against her were described with imprecision and accompanied by no supporting details either for the prosecution or the defence.' *Maître* Philippe Meilhac, quoted in Ibukabose, 'Madame Agathe Habyarimana ne sera pas extradée au Rwanda,' *Tribune Franco-Rwandaise*, 30 September 2011, [12](http://www.france-</p></div><div data-bbox=)

courts did not meet international standards, and could not guarantee a fair trial nor access to an independent judiciary.⁵⁶

In fact, the first countries to agree to requests to extradite genocide suspects to Rwanda – Norway and Sweden – did not do so until the example was set by the ICTR itself. In June 2011, the ICTR referred the case of Jean Bosco Uwinkindi from its jurisdiction to Rwanda for trial⁵⁷ under the terms of Rule 11*bis* of the ICTR’s Rules of Procedure and Evidence, which requires the Trial Chamber to be satisfied that the accused will be assured of a fair trial in the state to which s/he is to be transferred, and not subject to the death penalty there.⁵⁸ Although Uwinkindi’s appeal against extradition was not heard – and dismissed – until December 2011, confirmation that European states would not be violating genocide suspects’ human rights if they extradited them to Rwanda came in the form of a ruling by the European Court of Human Rights in October 2011, which upheld the 2009 decision of the Swedish courts to extradite Sylvere Ahorugeze, and which the Rwandan had appealed.⁵⁹ This particular case demonstrates clearly the difficulty of bringing genocide suspects to court. Ahorugeze fled to Denmark in the immediate aftermath of the genocide. The subject of an Interpol red notice, he was arrested there in 2006, formally charged with killing twenty-five Tutsis in a suburb of Kigali during the first day of the genocide, and detained in custody. Denmark has no extradition agreement with Rwanda, and could have heard Ahorugeze’s case itself as Danish law allows for trials of Rwandan genocide suspects who are resident in Denmark, but released him without trial in 2007 due to lack of evidence against him.⁶⁰ A year later, Ahorugeze was arrested once more, this time in Sweden, after a visit to the Rwandan

rwanda.info/article-mme-agathe-habyarimana-ne-sera-pas-extradee-au-rwanda-85514195.html (last visited 29 May 2015).

⁵⁵ Cour de Cassation - Chambre criminelle, Audience publique, *M. Claver X.*, 9 July 2008 (No. de pourvoi 08.82.922) available on line at <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000019248120> (last visited 21 October 2015).

⁵⁶ Trial, *Agathe Kanziga Habyarimana*, available at <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/759/action/show/controller/Profile/tab/legal-procedure.html> (last visited 29 May 2015).

⁵⁷ Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, *Uwinkindi* (ICTR-2001-75-r11*bis*) Referral Chamber, 28 June 2011.

⁵⁸ Rule 11 *bis*, ICTR Rules of Procedure and Evidence: (A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State: (i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State. (C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.

⁵⁹ Human Rights Watch, *Rwanda - Justice after Genocide: 20 years on*, 28 March 2014, available on line at http://www.hrw.org/sites/default/files/related_material/2014_March_Rwanda_0.pdf (last visited 21 May 2015), at 10. See *Ahorugeze v Sweden*, ECtHR (2011) No. 37075, 09.

⁶⁰ According to s. 3 Danish Extradition Act, a request for extradition may be denied if the evidence in support of the request is deemed insufficient. See *Ahorugeze v Sweden*, ECtHR (2011) No. 37075, 09.

embassy in Stockholm in 2008. The Swedish government agreed to extradite him to Rwanda, but following his appeal of this decision to the European Court of Human Rights (ECtHR), Ahorugeze was released from custody whilst the ECtHR considered his case, and he took advantage of the opportunity to return to Denmark, where he currently lives with his family. Any discussions regarding his extradition must now be made between Denmark and Rwanda. In the meantime, Ahorugeze remains at liberty.⁶¹

In Simbikangwa's case, Human Rights considerations had also been at the forefront of the matter. In November 2008, the *Chambre d'instruction* of the *Tribunal supérieur d'appel* in Mayotte had refused Rwanda's request to extradite Simbikangwa for genocide (*complicité et complot/complicity in genocide and conspiracy*), crimes against humanity (*assassination et extermination*) and 'ordinary crimes' (*association de malfaiteurs/criminal association*) on grounds that the sentence he would be likely to receive, although not the death sentence as it had by that time been abolished, would be a life sentence with twenty years in solitary confinement, which was unacceptable for international (and French) norms. Furthermore, the court accepted there were serious concerns as to whether Simbikangwa would receive a fair trial. Human Rights Watch (HRW) had published a report in July 2008 questioning the impartiality of the Rwandan courts, highlighting the fact that '...Judges remain subject... to pressure from members of the executive branch and other powerful persons. Basic fair trial rights are not fully assured, including the presumption of innocence, the right of equal access to justice, the right to present witnesses in one's own defense, the right to humane conditions of detention, the right to freedom from torture, and the right to protection from double jeopardy.'⁶² It was feared that the defence would have great difficulty in bringing witnesses to court safely to testify in a country where, in the words of the presiding judge Jean-Claude Sarthou, '...*Certains prisonniers ont tendance à se retrouver avec une balle dans le dos s'ils tentent de s'enfuir....*'⁶³ Simbikangwa's lawyer, *maître* Sylvie Prat, also drew the court's attention to the appalling conditions of detention in Rwandan prisons, where over one hundred thousand people were detained awaiting trial, emphasising that her client was a paraplegic who required special care for his medical conditions and was at risk of dying

⁶¹ Trial, *Sylvère Ahorugeze*, available on line at <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/476/action/show/controller/Profile/tab/legal-procedure.html> (last visited 21 May 2015).

⁶² Human Rights Watch, *Law and Reality: Progress in Judicial reform in Rwanda*, July 2008, 3, available on line at http://www.hrw.org/sites/default/files/reports/rwanda0708_1.pdf (last visited 10 June 2015).

⁶³ 'Some prisoners tend to find themselves with a bullet in their backs if they attempt to escape.' in L.G. 'Mayotte: la justice refuse l'extradition du 'génocidaire' rwandais', 15 November 2008, available on line at <file:///I:/Simbikangwa/extradition%20mayotte%20Malango15novembre2008.pdf> (last visited 8 June 2015).

before reaching trial before a Rwandan court.⁶⁴ In 2008, no Rwandan genocide suspects had been extradited from France to Rwanda, and the only time that a court had agreed to an extradition request (the Chambéry *Cour d'appel*),⁶⁵ in the case of Claver Kamana, the *Cour de Cassation* had quashed the decision and subsequently referred the matter to the Lyon *Cour d'appel*,⁶⁶ which rejected the extradition request, reversing the initial ruling of the Chambéry *Cour d'appel* on grounds that the conviction of Kamana *in absentia* by the Rwandan courts amounted to inhuman and degrading treatment.⁶⁷

In the course of the years afterwards, the *Cour de Cassation* has reinforced this situation, also refusing to extradite genocide suspects to Rwanda for prosecution on the ground that genocide and crimes against humanity had not been criminalized in Rwanda at the time of the events of 1994 – for example, in the case of Claude Muhayimana, whose extradition to Rwanda was approved by the Rouen *Cour d'appel* in March 2012, which considered that

...les conditions légales de l'extradition sont remplies, que les faits reprochés n'ont aucun caractère politique et sont de nature criminelle, que la prescription ne saurait être acquise et que les juridictions rwandaises sont en mesure d'assurer les garanties fondamentales de procédure et de protection des droits de la défense en conformité avec la conception française de l'ordre public international.⁶⁸

⁶⁴ M. Chateaneuf, 'Accusé de génocide, il ne sera pas extradé,' *Le Mahorais*, 18 November 2008, 5, available on line at http://issuu.com/lemahorais/docs/lm_226 (last visited 8 June 2015); 'Mayotte: un Rwandais accusé de génocide', *Le Figaro*, 20 April 2009, <http://www.lefigaro.fr/flash-actu/2009/04/20/01011-20090420FILWWW00498-mayotte-un-rwandais-accuse-de-genocide.php> (last visited 21 May 2015).

⁶⁵ Cour d'Appel de Chambéry, Chambre de l'instruction, Arrêt criminel No. 08/00082, *M. Claver X*, 2 avril 2008 (No. 2008/88), referred to in Redress, *Extraditing Genocide Suspects from Europe to Rwanda: Issues and Challenges* (2008) http://www.redress.org/downloads/publications/Extradition_Report_Final_Version_Sept_08.pdf (last visited 21 October 2015), at 13 footnote 39.

⁶⁶ Cour de Cassation - Chambre criminelle, Audience publique, *M. Claver X*, 9 July 2008 (No. de pourvoi 08.82.922) available on line at <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte= JURITEXT 000019248120> (last visited 21 October 2015).

⁶⁷ See Trial, *Claude Muhayimana*, available on line at <http://www.trial-ch.org/fr/ressources/trial-watch/trial-watch/profils/profile/3677/action/show/controller/Profile/tab/legal-procedure.html> (last visited 10 June 2015).

⁶⁸ 'The legal conditions of extradition have been fulfilled, the facts with which he stands accused are not political in character but criminal, there is no issue of the limitation period expiring and the Rwandan courts are in a position to provide the essential guarantees concerning procedure and protection of the rights of the defence, in a manner which conforms to the French conception of public international law.' Trial, *Claude Muhayimana*, available on line at <http://www.trial-ch.org/fr/ressources/trial-watch/trial-watch/profils/profile/3677/action/show/controller/Profile/tab/legal-procedure.html> (last visited 10 June 2015).

This decision was quashed by the *Cour de Cassation* in July 2012,⁶⁹ which considered that the Rouen court had not assured itself that Muhayimana's rights would be respected, and sent the case to be heard before the Paris *Cour d'appel* – which reached the same decision in November 2013 as the Rouen *Cour d'appel* had in March 2012: that the defendant would indeed receive a fair trial in Rwanda. This decision was finally overturned once more by the *Cour de Cassation* on 26th February 2014,⁷⁰ on the grounds that Rwanda's request for extradition was based on laws which had not been in place at the time of the facts. Muhayimana could not be extradited to be tried for genocide, since genocide was not legally defined in the Rwandan Criminal Code at the time the crimes were allegedly committed. Paul Bradfield, a member of the Defence team of Ildephonse Nizeyimana at the ICTR, finds the *Cour de Cassation* ruling '... deeply perplexing, as it goes against established norms of international law, and the fact that many other jurisdictions have held the complete opposite – that Rwanda does have the legal competency to try crimes of genocide.'⁷¹ He remarks that this may appear to be '...[a] classic case of *nullum crimen sine lege*...[which] holds that a criminal conviction can only be based upon a law which existed at the time the acts or omission with which the accused is charged were committed,' but that, in fact, as Rwanda had adopted both the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the Convention of 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity in 1975, the ICTR and numerous national jurisdictions considered that Rwanda had the requisite jurisdiction and legal competency to try crimes of genocide.

However, this appears to be the path which France has chosen to follow in the case of Rwandan genocide suspects residing on its territory. Precisely at the time the *Cour de Cassation* reached its decision in the Muhayimana case, the trial of Simbikangwa was underway in France, and it is interesting to note that Muhayimana was arrested in Rouen in April 2014 to face genocide charges in France, shortly after the conclusion of Simbikangwa's

⁶⁹ Cour de Cassation - Chambre criminelle, audience publique, *M. Claude X*, 11 July 2012 (No. de pourvoi 12-82.502) (unreported) available on line http://www.trial-ch.org/uploads/tx_wetwdb/Cour_de_cassation_criminelle_Chambre_criminelle_11_juillet_2012_12-82.502_Inedit.pdf and <http://www.juritravail.com/jurisprudence/JURITEXT000026181811.html> (last visited 21 October 2015).

⁷⁰ Cour de Cassation - Chambre criminelle, Arrêt criminel No. 810, *M. X*, 26 February 2014 (No. de pourvoi 13-87.888) ECLI:FR:CCASS:2014:CR00808 available on line https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/810_26_28535.html (last visited 21 October 2015).

⁷¹ P. Bradfield, 'France vs the rest of the world – who is right?' Beyond the Hague, 3 March 2014, available on line at <http://beyondthehague.com/2014/03/03/800/> (last visited 10 June 2015).

trial.⁷² He was released a year later, in April 2015, but is currently awaiting trial at a future date.

To this date, an increasing number of national courts as well as the ICTR itself have approved the extradition of genocide suspects to Rwanda for trial,⁷³ but as yet France has not done so, and the signs are that there is little intention to change this situation in the immediate future.

D. Trial before the French Courts

Having refused to extradite Simbikangwa to Rwanda for trial, France then tried him in its national courts under the doctrine of universal jurisdiction, a doctrine which allows states to claim criminal jurisdiction over an accused person regardless of where the alleged crime was committed, of the nationality of the accused, or of his or her country of residence. As mentioned above, for the French courts to have jurisdiction, the offences concerned should normally have been committed on French soil, or by a French citizen or aimed at a French citizen. However, for the most serious violations of international law, generally considered to be war crimes, crimes against humanity, genocide and torture, a state may exercise universal jurisdiction over crimes which are neither committed against it, nor committed by or against its own nationals. In short, these offences can be tried regardless of whether there is a connection between the offence and the territory of the prosecuting state, or its citizens. The nature of the crime creates universal disapproval. The philosophy behind universal jurisdiction is that certain crimes affect the international legal order as a whole, that serious violations of international law affect all States and peoples, and that, unfortunately, not all States tackle violations effectively. Consequently, international law endows all States with the right to prosecute international crimes.⁷⁴

Today, universal jurisdiction in France is defined in Articles 689 and 689-1 of the *Code de Procédure Pénale*. Article 689, created by loi no. 75-624 du 11 juillet 1975, and amended most recently by loi no.2009-1503 du 8 décembre 2009, extended French jurisdiction to

⁷² Trial, *Claude Muhayimana*, available on line at <http://www.trial-ch.org/fr/ressources/trial-watch/trial-watch/profils/profile/3677/action/show/controller/Profile/tab/legal-procedure.html> (last visited 10 June 2015).

⁷³ Eg the USA, Canada, Sweden, Norway, Denmark and the Netherlands. See M. Bolhuis, L. Middelkoop and J van Wijk, 'Refugee Exclusion and Extradition in the Netherlands,' 12 *J Int Criminal Justice* (2014), 1115-1139, at 1117.

⁷⁴ R. Higgins, *Problems and Process: International Law and how we use it* (Oxford: Oxford University Press, 1994) at 56-63 in R. Cryer, H. Friman, D. Robinson and E. Wilmschurst, *An Introduction to International Criminal Law and Procedure* (3rd edn., Cambridge: Cambridge University Press, 2014), at 57.

prosecute perpetrators of offences committed outside of French territory or their accomplices either when French law is applicable, under the provisions of *Livre Ier* of the *Code Pénal*, or any other piece of domestic legislation, or when an international convention, or decree in application of the treaty establishing the European Communities gives jurisdiction to French courts to deal with the offence.⁷⁵ A piece of legislation passed in France in 1996, loi no. 96-432 du 22 mai 1996, effectively transposed into French law United Nations Security Council Resolution 955, the resolution which created the ICTR and its statute. Article 1 of loi no.96-432 du 22 mai 1996 states clearly that France will co-operate with the ICTR and will participate in the repression of acts of genocide or other crimes against humanity committed in Rwanda or neighbouring states between 1st January and 31st December 1994, and makes specific reference to the prosecution of the offences outlined in articles 2 to 4 of the ICTR statute, (genocide, crimes against humanity and offences under Common Article 3 of the Geneva Conventions and Additional Protocol II). It was Article 689 of the *Code de Procédure Pénale* and loi no. 96-432 du 22 mai 1996 which enabled French courts, using the principle of universal jurisdiction, to try Simbikangwa for offences of genocide and crimes against humanity under the ICTR statute,⁷⁶ on condition that he found himself on French territory.⁷⁷ This kind of outcome was clearly the intention of the ICTR statute, whose Article 8 states unequivocally that national courts as well as the ICTR ‘...shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda, and Rwandan citizens for such violations committed in

⁷⁵ ‘Les auteurs ou complices d’infractions commises hors du territoire de la République peuvent être poursuivis et jugés par les juridictions françaises soit lorsque, conformément aux dispositions du livre Ier du code pénal ou d’un autre texte législatif, la loi française est applicable, soit lorsqu’une convention internationale ou un acte pris en application du traité instituant les Communautés européennes donne compétence aux juridictions françaises pour connaître de l’infraction.’ (Perpetrators of offences committed outside of French territory or their accomplices may be prosecuted and tried by French courts either when French law is applicable, under the provisions of Book 1 of the Criminal Code or any other statute, or when an international convention or decree in application of the treaty establishing the European Communities gives jurisdiction to French courts to deal with the offence). Article 689, *Code de Procédure Pénale*, created by loi no. 75-624 du 11 juillet 1975, amended by loi no. 92-1336 of 16 décembre 1992, loi no. 99-515 of 23 juin 1999 and Loi no.2009-1503 du 8 décembre 2009.

⁷⁶ Paris Cour d’assises, Arrêt criminel, 13/0033, *Pascal Senyamuhara Safari (alias Pascal Simbikangwa)*, 14 mars 2014, available online at: <http://proces-genocide-rwanda.fr/wp-content/uploads/2014/04/scan005.pdf>, 4; Paris Cour d’assises, feuille de motivation, *Pascal Senyamuhara Safari (alias Pascal Simbikangwa)*, 14 mars 2014, § 3.

⁷⁷ JO no. 203 du 31 août 1996 page 13008, Circulaire du 22 juillet 1996 prise pour l’application de la loi no 96-432 du 22 mai 1996 portant adaptation de la législation française aux dispositions de la résolution 955 du Conseil de sécurité des Nations unies instituant un tribunal international en vue de juger les personnes présumées responsables d’actes de génocide ou d’autres violations graves du droit humanitaire commis en 1994 sur le territoire du Rwanda et, s’agissant des citoyens rwandais, sur le territoire d’Etats voisins. This circular makes reference to la loi no. 95-1 du 2 janvier 1995, by which France undertook to prosecute offences listed in the ICTY statute, using the principle of universal jurisdiction, on the condition that they were present on French soil (Article 2), and clarifies that the condition of presence on French territory stipulated in the 1995 law is also applicable to the 1996 law concerning Rwandan suspects.

the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.’ Thus, French courts were able to apply the provisions of the ICTR statute governing the crimes of genocide and crimes against humanity committed in Rwanda or by Rwandan citizens in neighbouring countries between 1 January 1994 and 31 December 1994 directly to a criminal trial held in France. This was assisted further by the fact that, thanks to legislation enacted in 1964, crimes against humanity and genocide are not subject to a statute of limitations.⁷⁸

Simbikangwa was indicted for complicity in genocide (Article 2, ICTR statute) and complicity in crimes against humanity (Article 3, ICTR statute), the allegations of torture being covered by the definition of crimes against humanity in Article 3 (f) of the ICTR statute.

Having invoked this legislation to try Simbikangwa, the courts then turned to Article 211-1 of the French *Code Pénal* for the definition of genocide as found in national law,⁷⁹ the

⁷⁸ Loi no. 64-1326 du 26 décembre 1964: ‘Les crimes contre l’humanité, tels qu’ils sont définis par la résolution des Nations Unies du 13 février 1946, prenant acte de la définition des crimes contre l’humanité, telle qu’elle figure dans la charte du tribunal international du 8 août 1945, sont imprescriptibles par leur nature.’ (Crimes against humanity as defined by the United Nations resolution of 13 February 1946, recognising the definition of crimes against humanity as enshrined in the Charter of the International Tribunal of 8 August 1945, are by nature imprescriptible.). For a discussion of the statute of limitations in relation to crimes against humanity and genocide see C. Fournet, *Genocide and Crimes against Humanity: Misconceptions and Confusion in French Law and Practice*, (Bloomsbury Publishing, 2013), Chapter 5. Now also governed by Art. 213-5, *Code Pénal*, created by loi no 92-684 du 22 juillet 1992: ‘L’action publique relative aux crimes prévus par le présent sous-titre [génocide et crimes contre l’humanité], ainsi que les peines prononcées, sont imprescriptibles.’ (Criminal liability for the offences governed by this Sub-Title [genocide and “other crimes against humanity”], as well as the sentences imposed [on genocide and “other crimes against humanity”], are not subject to statutory limitations).

⁷⁹ Since the introduction of loi no 92-683 of 22 juillet 1992, which came into effect on 1st March 1994, amended by loi no 2004-800 of 6 août 2004: Code Pénale, Art. 211-1: ‘Constitue un génocide le fait, en exécution d’un plan concerté tendant à la destruction totale ou partielle d’un groupe national, ethnique, racial ou religieux, ou d’un groupe déterminé à partir de tout autre critère arbitraire, de commettre ou de faire commettre, à l’encontre de membres de ce groupe, l’un des actes suivants:

- atteinte volontaire à la vie;
- atteinte grave à l’intégrité physique ou psychique;
- soumission à des conditions d’existence de nature à entraîner la destruction totale ou partielle du groupe;
- mesures visant à entraver les naissances;
- transfert forcé d’enfants.

Le génocide est puni de la réclusion criminelle à perpétuité.’

(Genocide occurs where, in the enforcement of a concerted plan aimed at the partial or total destruction of a national, ethnic, racial or religious group, or of a group determined by any other arbitrary criterion, one of the following actions are committed or caused to be committed against members of that group:

- wilful attack on life;
- serious attack on psychological or physical integrity;
- subjection to living conditions likely to entail the partial or total destruction of that group;
- measures aimed at preventing births;
- enforced child transfers.

investigating judges arguing that, as sentencing fell under French law, it had to be linked to a crime covered by national law.⁸⁰ This was a view not universally shared, and the FIDH has voiced its opinion that, if the offences are charged under the ICTR statute, then the broader definition of genocide in the ICTR statute should apply.⁸¹ Article 211-1 came into effect in March 1994, with the provisions of the revised *Code Pénal* and was drafted in the context of a series of very high-profile Nazi war criminals: Klaus Barbie, the butcher of Lyon, in 1987, Paul Touvier, head of the Lyon Milice and the first Frenchman to be convicted of crimes against humanity in 1994, and Maurice Papon, senior police official in Bordeaux, responsible for sending many Jews to their deaths in concentration camps, tried in 1998, but charged in 1992. The definition of genocide in Article 211-1 of the new *Code Pénal* came too late to be used to incriminate these second-world-war criminals, who were charged with crimes against humanity instead, but was in place and could be used to prosecute Simbikangwa.⁸²

Under Article 689-1 of the *Code de Procédure Pénale*, any person having committed, outside of French territory, the offences listed in paragraphs 2 to 13 of Article 689 may be tried in the French courts, where this is provided for in certain international treaties, which are listed in the article, on condition that he or she is found to be in France. The presence of the suspect within national territory when proceedings are initiated is a requirement, and proceedings simply may not be initiated in the absence of the suspect.⁸³ The offences listed include, amongst others, torture as defined by article 1 of the 1984 UN Convention against Torture (Article 689-2),⁸⁴ as well as crimes which fall under the jurisdiction of the International Criminal Court (ICC) (Article 689-11),⁸⁵ effectively extending jurisdiction to cover genocide, war crimes and crimes against humanity as stipulated by the ICC statute. The list is expanded

Genocide is punished by criminal imprisonment for life. Official translation, Legifrance, available on line at <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>, last visited 22 October 2015).

⁸⁰ Fédération Internationale des Droits de l'Homme/Ligue des Droits de l'Homme, *Rwanda - Procès de Pascal Simbikangwa: Retour sur un procès emblématique*, December 2014, available on line at https://www.fidh.org/IMG/pdf/rwanda_proces_simbikangwa.pdf and in translation at <https://www.fidh.org/IMG/pdf/rwandaproces654ang2014.pdf> (last visited 20 July 2015), at 8.

⁸¹ *Ibid*, at 9.

⁸² Hubrecht *supra* note 15, at 1.

⁸³ 'En application des conventions internationales visées aux articles suivants, peut être poursuivie et jugée par les juridictions françaises, si elle se trouve en France, toute personne qui s'est rendue coupable hors du territoire de la République de l'une des infractions énumérées par ces articles. Les dispositions du présent article sont applicables à la tentative de ces infractions, chaque fois que celle-ci est punissable.' (In application of the international conventions which are the subject of the following articles, any person guilty of having committed, outside of French territory, any of the offences listed in these articles may be prosecuted and tried by the French courts, if he or she is found to be in France. The provisions of this article are applicable to attempt to commit the offence whenever this is subject to punishment). Art. 689-1, *Code de Procédure Pénale*, Loi no. 92-1336 du 16 décembre 1992, in force 1st March 1994.

⁸⁴ Art. 689-2, *Code de Procédure Pénale*, created by Art. 30, loi no. 99-515 du 23 juin 1999.

⁸⁵ Art. 689-11, *Code de Procédure Pénale*, created by Art. 8, loi no. 2010-930 du 9 août 2010.

regularly, with enforced disappearances being added by a new law passed in 2013.⁸⁶ However, neither of Articles 689-2 or 689-11 were in fact used to prosecute Simbikangwa. As mentioned above, torture (as well as most other crimes) is subject to a ten year statute of limitations in French law,⁸⁷ and this time period had long since passed when Simbikangwa was arrested. With regard to offences falling under the jurisdiction of the ICC, these could only be prosecuted if committed after the date Article 689-11 entered into force, on 11 August 2010.

In order to ensure the effective prosecution of these and future such offences, a special ‘pôle’ of investigating magistrates was created in 2012 at the Tribunal de Grande Instance in Paris to deal with crimes against humanity and war crimes in general.⁸⁸ There are now three full-time examining magistrates, two prosecutors and four specialised legal assistants in post, but their case load is not limited to Rwandan genocide suspects, also stretching to accusations of torture in Chad, chemical attacks in Baghdad and the missing of Brazzaville beach.⁸⁹

On 14th March 2014, after a trial in Paris lasting just short of six weeks, Simbikangwa was found guilty of genocide (as opposed to complicity in genocide, the offence with which he was originally charged) and complicity in crimes against humanity for offences committed in Kigali, notably for having supplied arms to the *interahamwe* on the barriers at Kigali and having encouraged them to kill the Tutsis⁹⁰ – but acquitted of having participated in offences at the barriers in Gisenyi on grounds of inadequate evidence – and sentenced to twenty-five years in prison. Simbikangwa has appealed the verdict, and his appeal is due to be heard before the French courts in 2016.⁹¹

4. The French courts: the best forum for the *génocidaires*?

⁸⁶ Art. 689-13, *Code de Procédure Pénale*, created by Art. 16, loi no. 2013-711 du 5 août 2013.

⁸⁷ Art. 7, *Code de Procédure Pénale*.

⁸⁸ Art. 22 of loi no. 2011-1862 du 13 décembre 2011 establishes a *pôle judiciaire spécialisé*, to deal with crimes against humanity and war crimes, inserting articles 628 to 634 in the *Code de procédure pénale*. See website Ministère de la Justice, ‘Crimes contre l’humanité: La France mobilisée,’ 5 March 2013, <http://www.justice.gouv.fr/organisation-de-la-justice-10031/crimes-contre-lhumanite-la-france-mobilisee-25168.html> (last visited 24 July 2015).

⁸⁹ S. Maupas, ‘Un premier dossier pour le pôle crimes de guerre français,’ *Le Monde*, 3 February 2014, available on line at http://www.lemonde.fr/international/article/2014/02/03/un-premier-dossier-pour-le-pole-crimes-de-guerre-francais_4358958_3210.html (last visited 24 July 2015).

⁹⁰ Paris Cour d’assises, Arrêt criminel, 13/0033, *Pascal Senyamuhara Safari (alias Pascal Simbikangwa)*, 14 mars 2014, available online at: <http://proces-genocide-rwanda.fr/wp-content/uploads/2014/04/scan005.pdf>.

⁹¹ Association française pour la promotion de la compétence universelle, ‘Appel Pascal Simikangwa,’ available on line at <https://afpcu.wordpress.com/tag/appel-pascal-simbikangwa/> (last visited 20 July 2015).

So is this the start of a mass of prosecutions of the large number of genocide suspects currently residing in France? At first sight, it may look as if that could be the case. At present, there are twenty-seven Rwandan genocide suspects under investigation by the *pôle génocide et crimes contre l'humanité*, and certainly, there has been a flurry of activity since the Simbikangwa verdict in order to progress these cases. In addition, one must not underestimate nor undervalue the role of NGOs such as the FIDH and the *Collectif des Parties Civiles pour le Rwanda* in bringing civil actions in France, both in terms of the energy and determination they have given to demanding that perpetrators are prosecuted and in the research which they have carried out and shared with the *pôle*. While some suspects are still the subject of extradition spats between Rwanda and France, some appear to have inched closer to trial in France. Claude Muhayimana, driver for a guest house, accused of having conveyed soldiers to execute Tutsis in Rwanda, was arrested in April 2014, indicted for genocide and is awaiting trial in France. Charles Twagira, a doctor based in a Rouen hospital and formerly regional health director in Kibuye, was placed under investigation by the French authorities for genocide and crimes against humanity immediately after the conclusion of Simbikangwa's trial. Octavien Ngenzi, mayor of the Kabarondo district in the East of the country, and local leader of the former political party, the National Republican Movement for Development and Democracy (MNRD) and Tito Barahira, chairman of MRND were indicted in France on 30 May 2014 for genocide and crimes against humanity in Rwanda, the indictment confirmed on appeal on 28 January 2015. Innocent Musabyimana has not yet been indicted by the French courts, but the Prosecution strongly advocated his extradition to Rwanda before the *Cour de Cassation* denied their request,⁹² so it is likely that the French authorities will investigate his case. Father Wenceslas Munyeshyaka, former head of the Sainte-Famille parish in Kigali, and parish priest in France since 2001, was expected to be the subject of the next French trial, and fittingly so, as he was the first genocide suspect against whom charges were brought in France, as early as 1995. Before the examining magistrate investigating Munyeshyaka declared that there was no case

⁹² Heard with Muhayimana. Cour de Cassation - Chambre criminelle, Arrêt criminel No. 810, *M. X*, 26 February 2014 (No. de pourvoi 13-87.888) ECLI:FR:CCASS:2014:CR00808 available on line https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/810_26_28535.html (last visited 21 October 2015).

to answer,⁹³ the trial had been expected to commence in 2015 or 2016.⁹⁴ It remains to be seen what will result from this decision.

Although this may appear to represent considerable progress in the fight against impunity, and in ensuring that the numerous genocide suspects who fled to France do not continue to live there in all tranquillity alongside those of their Tutsi victims who have also claimed refuge in this *terre d'asile* and who continue to struggle to put the nightmare of their past behind them in the knowledge that their persecutors might resurface in their lives at any moment, there are a certain number of issues which have been raised regarding the application of universal jurisdiction in this type of case, and which cause some considerable unease in some quarters. Simbikangwa was tried before the *Cour d'assises* in Paris, the verdict reached by a jury of six 'ordinary' citizens, selected at random from the electoral roll. The first two weeks of the trial were spent setting the context for the three judges and the jurors of a genocide which took place twenty years previously, seven thousand kilometres away, in a country in which, in all probability, none of them had ever set foot. Aside from the very obvious vast differences of everyday life in an East African country, where appreciations of time and distance and relationships do not match European norms, judges and jurors had to grapple with the historical and political events preceding the genocide, which are immensely complex, and the role played by France, which still remains somewhat ambiguous and partisan. One could argue that the challenge facing the jurors simply to comprehend the events and the role played by the accused in them is too great – and the learning of them too traumatic to be reasonably imposed on 'the man in the street' – and this in itself could jeopardise the provision of a fair trial. This, of course, can be off-set by an advantage, in theory at least, of a greater likelihood of finding neutral, unbiased jurors in France than in Rwanda, where each citizen must be drawn in one direction or the other, due to the very nature of the crimes committed. It is also to be noted that, had Simbikangwa appeared before an international court (ICTR or ICC), there would have been no jury, for, there, decisions are reached by professional judges alone. Indeed, presiding *juge* Olivier Leurent considers that trials such as Simbikangwa's should be heard by professional judges and not by juries, as is already the case for terrorism offences in France (in front of *cour*

⁹³ *Le Monde*, 'Génocide rwandais : non-lieu pour Wenceslas Munyeshyaka', 6 octobre 2015, available on line at http://www.lemonde.fr/international/article/2015/10/06/genocide-rwandais-non-lieu-pour-wenceslas-munyeshyaka_4783542_3210.html (last visited 23 October 2015).

⁹⁴ A. Gauthier, 'Affaire Wenceslas Munyeshyaka: clôture de l'instruction,' Collectif Parties Civiles Rwanda, 9 April 2015, available on line at <http://www.collectifpartiescivilesrwanda.fr/affaire-wenceslas-munyeshyaka-cloture-de-linstruction/> (last visited 24 July 2015).

d'assises spécialement composées). He justifies his views not only by the complexity of these cases, and by suggesting that hearing such cases systematically before judges specially trained to deal with these type of matters would bring about real savings of time and money, but also by asking us to bear in mind that the justification of the popular jury is to associate the people in the judging of offences committed in their neighbourhood, and this argument can hardly be advanced to support the hearing of trials of Rwandan genocide suspects before a people's jury in France.⁹⁵

In addition to the 'knowledge gap,' arguably costly enough to fill in terms of court time, if it is indeed possible to do so to a degree appropriate to reach a fair decision as to guilt, as Professor Xavier Philippe of the University of Aix-Marseille doubts,⁹⁶ come other issues necessary to ensure a fair trial: the cost of transporting witnesses from Rwanda to testify, of extracting convicted Rwandan criminals from prison to attend court in France, of providing appropriate interpretation between French and Kinyarwanda,⁹⁷ of the exploratory visits by the *juges* to Rwanda, of the setting up of the *pôle* in Paris, all of which would lean to suggesting that the appropriate forum for the trial of a Rwandan genocide suspect is a Rwandan court, or at least one with in-depth local knowledge, and not a French court.

Professor Leila Sadat further emphasises the delicate situation of France exercising jurisdiction over genocide suspects, when it itself potentially has 'unclean hands,'⁹⁸ and suggests that trying Simbikangwa before a neutral international court in preference to a national one could have helped diffuse the antagonism between France and Rwanda arising from the extradition request. Although it may certainly be argued that the need to bring Simbikangwa – and others – to justice obliged the French courts to find a way to do so, in theory opening the gates to future trials, this was not without major problems, which could

⁹⁵ S. Delval, 'Regards croisés sur les procès de Germain Katanga et de Pascal Simbikangwa: entretien avec les juges Bruno Cotte et Olivier Leurent,' Institut des Hautes Etudes sur la Justice, Octobre 2014, available on line at http://www.ihej.org/wp-content/uploads/2015/02/Proces_Katanga_Simbikangwa_Entretien_Cotte_Leurent_fevrier_2015.pdf, at 17 and 22 (last visited 25 July 2015).

⁹⁶ Specialist in constitutional law and formerly legal advisor for Eastern Europe, 2004-5 for the International Committee of the Red Cross. X. Philippe, 'Rwanda: juger un génocidaire? Pas si simple!' *Le Monde*, 7 February 2014, available on line at http://www.lemonde.fr/idees/article/2014/02/07/rwanda-juger-un-genocidaire-pas-si-simple_4362145_3232.html, (last visited 27 July 2015).

⁹⁷ On this subject, see N. Combs, *Factfinding without facts: the uncertain evidentiary foundations of international criminal convictions* (Cambridge: Cambridge University Press, 2010), and H. Trouille, 'How far has the International Criminal Tribunal for Rwanda really come since *Akayesu* in the prosecution and investigation of sexual offences committed against women? An analysis of *Ndindiliyimana et al.*' 13 *International Criminal Law Review* (2013) 747–788.

⁹⁸ Sadat, *supra* note 30, at 545.

potentially have led to creating insurmountable diplomatic incidents, and these may have been better avoided. Sadat also highlights the Princeton Principles, devised by a working group of professional jurists and academics to study the problems raised by universal jurisdiction, and to produce principles to help clarify what universal jurisdiction is, in order to promote greater justice for victims of serious crimes under international law, to close the gaps which have often led to impunity for the most serious of crimes, and to ascertain the best forum for their trial.⁹⁹ She refers specifically to principle eight, which suggests various factors to be considered when ascertaining the appropriateness of a particular forum where universal jurisdiction is an issue. These factors include (i) the place of commission of the crime, (ii) the nationality of the perpetrator, (iii) the nationality of the victim, (iv) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim, (v) the likelihood, good faith, and effectiveness of a prosecution in the requesting state, (vi) the fairness and impartiality of the proceedings in the requesting state, (vii) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state, and (viii) the interests of justice. Whereas none of these elements are absolute requirements, and they are not to be considered in any particular order, a quick glance through the list indicates that a third party state will not normally be anticipated to be the forum of choice for crimes of this nature, the sticking point being, of course, the interpretation of what ‘the interests of justice’ might be in any given case. Many factors tend towards a belief that it is better for cases to be tried where the offences took place. Certainly, the policy of the ICC – enshrined in its statute – is essentially to step in if domestic courts do not do so. The vast costs of investigating and holding international trials have limited the number of cases which the ICC has been able to hear, and it is usually financially preferable, if at all possible, to send suspects to be dealt with by the domestic courts where the conflict took place.¹⁰⁰ Indeed, since the transfer of Uwinkindi to Rwanda by the ICTR in 2011, many states are handing genocide suspects back to Rwandan courts.¹⁰¹ There is no doubt that the choice of forum will rarely be straightforward and will likely involve much legal argument – in the United Kingdom, for example, we await the decision of the Supreme Court regarding the extradition of Vincent Bajinya (also known as Vincent Brown), Celestin Ugirashebuja, Charles Munyaneza, Emmanuel Nteziryayo and Celestin Mutabaruka, arrested in 2013 on charges of

⁹⁹ ‘The Princeton Principles on Universal Jurisdiction,’ Program in Law and Public Affairs, available on line at https://lapa.princeton.edu/hosteddocs/unive_jur.pdf, (last visited 25 July 2015).

¹⁰⁰ J. McManus, ‘Domestic implementation of the Rome Statute,’ talk at the Summer School on the International Criminal Court, at the Irish Centre for Human Rights, National University of Ireland, Galway, 19 June 2015.

¹⁰¹ Human Rights Watch, ‘Rwanda, Justice after genocide: Twenty years on,’ 28 March 2014, at 10-11.

murder and genocide after living in Britain for more than a decade, their extradition to Rwanda refused by the High Court in 2009 because of the risk they would face a ‘flagrant denial of justice,’ but since in discussion again following the introduction of measures in Rwanda which would counter the High Court’s objections.¹⁰² If their challenge is successful, the five men will be granted permission to remain and stand trial in the UK. If they are unsuccessful, they will no doubt again raise the issue that extradition to Rwanda constitutes a denial of their right to a fair trial, using the 1998 Human Rights Act.¹⁰³

5. Conclusion

Any discussion of jurisdiction where multiple fora are possible will unveil numerous complex issues which cannot be resolved quickly and easily, but it is crucial to find an appropriate forum to prosecute the perpetrators of crimes such as genocide, crucial that criminals do not remain unpunished because the mechanisms which exist to prosecute them are reaching the end of their life cycle, or are not trusted to provide a fair trial, or are incapable of investigating and prosecuting within a reasonable delay. As states continue to seek the best way to deal with the genocide suspects living in impunity on their territory, it may be appropriate for the international community to reflect upon Professor William Schabas’ suggestion that the ‘... multitude of tribunals...’ which bring ‘... varying perspectives and, occasionally, different results...’ might actually strengthen international law, rather than fragmenting it.¹⁰⁴

¹⁰² C. Milmo, P. Akumu, ‘Men facing extradition over Rwandan genocide face “most serious charges”,’ *The Independent*, 5 June 2013, available on line at <http://www.independent.co.uk/news/uk/crime/men-facing-extradition-over-rwandan-genocide-face-most-serious-charges-8646337.html> (last visited 27 July 2015).

¹⁰³ R. Pells, ‘Supreme Court to rule on Rwandan genocide extradition this week,’ *The Independent*, 2 November 2014, available on line at <http://www.independent.co.uk/news/uk/home-news/supreme-court-to-rule-on-rwandan-genocide-extradition-this-week-9833595.html> (last visited 27 July 2015).

¹⁰⁴ W. Schabas, ‘International Criminal Law and the European Convention on Human Rights: Synergy or fragmentation?’ 9 (3) *J Int Criminal Justice* (2011) 609-632, at 632.