

ANALYSIS

International Criminal Tribunal for Rwanda

by *Thierry Cruvellier*

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Bagaragaza: eight years as agreed

Michel Bagaragaza's confession, remorse and contrition convinced the three judges to sentence him to just eight years in prison even though he admitted to being part of President Juvénal Habyarimana's inner circle.

Until now, the lightest sentence imposed by the International Criminal Tribunal for Rwanda (ICTR) on defendants who pleaded guilty is six years imprisonment. Michel Bagaragaza's sentence falls within the 6 to 10 years range agreed by both parties when a guilty plea was negotiated. However, he is likely to serve just four years.

The International Criminal Tribunal for Rwanda (ICTR) sentenced a former close associate of the Habyarimana regime to eight years in prison last week, after he pleaded guilty to complicity in genocide.

Michel Bagaragaza had cooperated with the ICTR prosecutor since 2002 in the hope of having the case heard before a court in Europe where he might receive a more favourable outcome. However, although the tribunal agreed to move his case to a European country, it was prevented from doing so.

In February 2006, in order to expedite the case, the prosecutor asked for Bagaragaza to be tried in Norway where he would face a maximum sentence of twenty years imprisonment if he were found guilty. Due importance would be given to his confession, and clear rules on early release would apply. However, the ICTR judges refused Bagaragaza's transfer to Norway because under Norwegian law he couldn't be prosecuted for crimes of genocide committed in 1994. It had been hoped that the Netherlands would then step in. But in July 2007, a Dutch court ruled that it too had no jurisdiction over crimes of genocide committed before 2003. Three weeks later, the ICTR had to rescind its order to transfer Bagaragaza to The Hague.

Although the 64-year-old man had confessed to his crimes during dozens of hours of interviews, he could no longer be sure of getting anything in return. The ICTR prosecutor even stated that he would ask for the case to be transferred to Rwanda, unless Bagaragaza entered a guilty plea.

In March 2009 a tenacious

new lawyer, Wayne Jordash, joined Bagaragaza's defence team. Jordash had worked on several international tribunals, including the ICTR. He knew that the best he could do for his new client was to reach an agreement with the prosecutor. But the Bagaragaza case illustrates the limits and paradoxes faced by an international court when trying to unravel Rwanda's history.

In 1994, Bagaragaza was the head of OCIR-Thé, a lucrative parastatal controlling Rwanda's national tea production. He was from the same region as then president, Juvénal Habyarimana, and described himself as a member of the "large akazu", a name given to the group of people who were actually running Rwanda at the time. At the centre of the akazu were Habyarimana's wife and her three brothers, including Protais Zigiranyirazo, also known as "Z".

It was because of Bagaragaza's relationship with Z and other powerful members of the regime that he caught the interest of the Office of the Prosecutor. Bagaragaza said he knew who gave the order to kill several prominent members of the opposition in the early hours of April 7th, 1994. These murders were the first act of the mass killing campaign that engulfed Rwanda over the following three months and it has never been clear who ordered them. The information was so sensitive that it took two and a half years for Bagaragaza to reveal it to the prosecutor.

Bagaragaza claimed that his good friend Pasteur Musabe, a powerful businessman close to Habyarimana's family, was called by Z early in the morning on April 7th and asked to come to the presidential residence with

money. There, Musabe said, Z ordered the presidential guard to go and kill the leaders of the opposition. When Musabe first told Bagaragaza about what he saw and heard on that day, another person was present, Juvénal Uwilingiyimana. In February 1999, Musabe was murdered in Cameroon. In November 2005, Uwilingiyimana was also found dead in a canal in Belgium, where he'd been meeting with the ICTR Prosecutor.

Bagaragaza twice testified in Arusha against the once feared "Mister Z". But the judges did not accept his evidence as it was deemed hearsay and nobody could corroborate it. From a legal point of view, the matter was clear. From a historical point of view, however, Bagaragaza's allegation could possibly shed light on how events unfolded.

Eight persons convicted by the Special Court for Sierra Leone (SCSL) were transferred to Rwanda's Mpanga prison last month, where they will begin serving sentences ranging from 15 to 52 years.

Those transferred include three former leaders of Sierra Leone's Revolutionary United Front, whose sentences were upheld on appeal three weeks ago. Also transferred were three former leaders of Sierra Leone's Armed Forces Revolutionary Council and two former leaders of the Civil Defence Forces.

The SCSL's registrar, Binta Mansaray, says that while there are no prisons in Sierra Leone that meet international standards, Rwanda is able and willing to enforce the sentences: "They have excellent facilities as far as a prison is concerned."

Mpanga prison, an hour and a half outside Kigali, was built in 2004 to house up to 7,500 genocide suspects or convicts. One wing was designed to hold potential transfers from the UN International Criminal Tribunal for Rwanda (ICTR). Although the ICTR has not transferred any of its detainees, it brokered the agreement between Kigali and the SCSL.

Rwanda's justice minister Tharcisse Karugarama could not understand why the Tanzania court had not returned convicts when Rwanda's jails were deemed sufficient for those convicted by Sierra Leone's war crimes court. "We signed an agreement with the ICTR to transfer the convicts to serve out their sentence here. So far they have not done it. We don't know why," he said.

Living conditions are better for those transferred than for regular Rwandan prisoners. The UN-block at the prison can house 30 prisoners, in rooms measuring 32 square meters. By contrast, the average living space for Rwandan prisoners is estimated at 2 square meters.

The long arm of universal jurisdiction

As the International Criminal Tribunal for Rwanda (ICTR) prepares to close its doors in Tanzania, courts around the world are taking up the task of trying suspected Rwandan *génocidaires*. They do so under the principle of universal jurisdiction: a doctrine that allows prosecutors to reach beyond national borders in cases of torture, war crimes or genocide committed elsewhere.

Several countries, including Finland, Belgium and Canada, have already brought cases against Rwandans for their part in the 1994 genocide while others, including the Netherlands, are revising their laws to allow them to do so in the future.

For the next three weeks, a twelve-member jury at the Assise Court in Brussels will hear the case against the former director of the Rwanda Commercial Bank (BCR), Ephrem Nkezabera. The 56-year-old Rwandan is charged with violations of international criminal law and war crimes.

He admits many of the charges alleged against him, including arming and financing the machete-wielding Interahamwe militia which spearheaded the three-month massacre. He also acknowledges providing funding for the extremist Radio Television Libre des Mille Collines (RTLM). Although he denies charges of rape and murder, he does admit that individuals from his immediate circle killed two people in front of him.

Nkezabera was arrested in Belgium in 2004. Because of his earlier assistance to the ICTR prosecutor as an informer, the tribunal allowed him to be tried in Europe. It's the fourth time that the Assise Court has tried a Rwandan suspect. Earlier trials – in 2001, 2003 and 2007 – resulted in the sentencing of seven people, including two Catholic nuns, a university professor and a businessman for aiding the mass murders.

However, because the crime

of genocide was only introduced into Belgian law in 1999, and cannot be applied retroactively, none of those who stood trial before Brussels' Assise Court faced genocide charges. Even Nkezabera – who admitted that he took part – will not face a genocide charge.

Canada

On the other side of the Atlantic, on October 29th a Canadian judge at the Superior Court of Quebec in Montreal sentenced Désiré Munyaneza to 25 years without parole for his participation in the massacres.

Munyaneza is the first to be tried under Canada's Crimes Against Humanity and War Crimes Act, enacted in 2000. The 42-year-old former Interahamwe was found guilty in May of seven counts of genocide, war crimes and crimes against humanity because he "chose to kill, rape and torture countless Tutsis." Munyaneza's lawyer Richard Perras said he would appeal against the conviction.

Canada's genocide trial took place over two years, and heard testimony from 66 witnesses about the atrocities, including the late Rwanda expert Alison Des Forges and Canadian head of the UN peacekeepers in Rwanda, Romeo Dallaire.

As well as being the first trial under the principle of universal jurisdiction in Canada, it was the first time that a case involving the Rwandan genocide had been heard before a single judge. Andre Denis heard half of the witnesses in Kigali, Paris and Dar es Salaam.

Many countries are now working to bring *génocidaires* to justice under the principle of universal jurisdiction. However, there have been setbacks. A British court had to release four Rwandan suspects in April since UK law does not allow British courts to prosecute foreign crimes against humanity. Spain is also reconsidering its laws on universal jurisdiction.

Karadzic: pitfalls of a parallel defence

Radovan Karadzic conducts his own defence in his genocide trial, but he has an international team of top lawyers, academics and interns at his disposal. For months they have been preparing the defence of the former Bosnian-Serb leader.

Karadzic's defence team is led by US lawyer Peter Robinson, who is coordinating procedure while Serb lawyer Goran Petronijevic heads up the legal advisers.

Karadzic also has three case managers and two researchers at his disposal, paid for by the UN court. As well as this he can call on around forty international academics and lawyers who work for him unpaid.

The Amsterdam professor of international law Göran Sluiter was one of the academics asked to form part of the team along with other international colleagues. He insisted as a precondition that Karadzic should respect the rules of the ICTY. After he had received assurances, he agreed to the request. Sluiter has also advised prosecutors at the court in the past.

When questioned on his motives for assisting with Karadzic's defence, he replied, "In the first place because I consider that he too has the right to an effective defence. Ultimately, also with the goal of improving the quality of the administration of criminal justice. You can only have good administration of criminal justice if there's also a good defence"

Legitimacy

The Amsterdam lawyer is studying procedural matters, and working on the question of which documents and statements from other cases may be used in the trial. He is particularly concerned at the question of whether the arrest of Karadzic in Belgrade in July 2008 was lawful.

Professor Sluiter is doing the work on a voluntary basis, and is using students from the University of

Amsterdam (UvA) to carry out research. Students have also been recruited in Australia and the former Yugoslavia to investigate matters, which could be important for the defence.

Cooperation refused

Sluiter doesn't know how the trial of Karadzic will proceed, especially since the former Bosnian-Serb president refused to cooperate at the start of the trial on October 26th. Karadzic has repeatedly said he needs more time to prepare his defence. Sluiter agrees:

"If you put that to people, the reaction is very often: 'this man is delaying the business, so you must take strong action'. But if you then explain that it's about someone who is confronted with millions of pages of documents, and that he wants to study and read them properly, then it's easy to understand why this can't be done in the time allowed. I also find it wholly unjust that the trial is already beginning."

The court has now assigned a stand-by lawyer to Karadzic against his wishes and adjourned the genocide trial until March 1st. Some see this as a minor victory for Karadzic who has once again succeeded in delaying his trial. However, it still does not meet his request for an extra 10 months to prepare his defence and study the 1.3 million pages of evidence and the hundreds of witness statements submitted by the prosecution.

The situation is complicated. The stand-by lawyer appointed by the court will need at least six months to prepare himself and Karadzic has already said he doesn't want to work with him.

Sluiter warns that conducting two parallel defences could be very difficult. It raises the question of whether Karadzic can submit motions and requests, or cross-examine witnesses.

The International Criminal Tribunal for Yugoslavia (ICTY) has ordered the appointment of counsel to Radovan Karadzic, but recognised his fundamental right to self-representation. The chamber recognised that he would continue to represent himself, with the appointed counsel only taking over as assigned counsel if he continued to obstruct the proceedings.

The decision follows Karadzic's refusal to attend the opening of his trial on October 26th, and all subsequent trial days. The Chamber concluded that Karadzic had "substantially and persistently obstructed the proper and expeditious conduct of his trial by refusing to attend the proceedings until such time as he considers himself to be ready."

The former Bosnian Serb leader claims his defence was not ready despite the court's decision that he had been given enough time.

The court repeatedly warned Karadzic that the consequence of his boycott could be the assignment of counsel to him and the continuation of the proceedings without him.

The Trial Chamber stated that "the overall interests of justice are best met by the appointment of counsel", and ordered the Registrar to proceed in that regard. The Trial Chamber also ordered the trial to resume on March 1st 2010, allowing the appointed counsel three and a half months to prepare for the trial.

The trial will resume with Karadzic's opening statement in March. But the tribunal already warned that if Karadzic continues to be absent from the resumed trial proceedings in March "he will forfeit his right to self-representation, no longer be entitled to assistance from his assigned defence team, and the appointed counsel will take over as an assigned counsel to represent him."

At the Special Court for Sierra Leone (SCSL) in The Hague, the prosecution has started its cross-examination of Charles Taylor.

Acting Chief Prosecutor Joseph Kamara says: "After 13 weeks of direct examination, we are very happy to be beginning our cross. We've been waiting patiently for our turn to test Mr Taylor on his version of events. That version is very different from the evidence the prosecution presented."

Kamara says the prosecution intends to test Taylor's version of his role during the civil war in Sierra Leone: "Our approach and strategy will become known as the cross-examination unfolds. What I can tell is that we will directly challenge Mr Taylor in three ways – on the accuracy, the truthfulness and the completeness of his testimony."

The prosecution, led by Brenda Hollis, hopes not to take as long as Lead Defence Counsel Courtenay Griffiths. Kamara says, "timing can depend on a number of factors, including how direct or evasive the accused chooses to be on the stand."

After the cross-examination, the parties may ask additional questions to Taylor. Then the Defence will seek to have documents tendered into evidence and will call its other witnesses. Griffiths has not yet revealed how many, nor whom he intends to call.

A trial of legal principle?

The Special Court for Sierra Leone (SCSL) Appeals Chamber upheld sentences for three former Revolutionary United Front (RUF) leaders on October 26th. Wayne Jordash was lead defence counsel for Issa Hassan Sesay who received a sentence of 52 years. He spoke to IJT's Karl Dowling.

In upholding the RUF judgement, the court dismissed 96 defence grounds for appeal. Why was that?

We hoped that the appeal chamber would take some action, but in large part the grounds were simply ignored. In the most significant instance in relation to Mr. Sesay, an annex which was attached to the grounds of appeal, containing 300 new or amended charges that had been disclosed to the defence throughout the prosecution case was simply dismissed because the appeals chamber argued that we had gone over the page limit.

What about the trial as such?

The indictment [is] the least specified indictment at any tribunal. The accused was constantly bombarded with new allegations. The fact that prosecution witnesses were paid was ignored by the trial chamber subsequently ignored by the appeal chamber. Ex-rebels were cross-examined very robustly and their evidence didn't stand-up to proper scrutiny. Nonetheless, the trial chamber accepted [it] without offering any explanation. The Sesay defence called 60 witnesses, our defence case spanned 7 months, and in a judgement of 800 pages the defence case was mentioned in 16 paragraphs. So the defence case was dismissed in 16 paltry paragraphs. If academics and legal experts study that judgement and see those types of features in this process they will arrive at the same conclusion as I have - that this really was not a satisfactory process.

Do you feel that Sesay and his 2 co-defendants were used as scapegoats in this trial?

Once the very top commanders Sankoh, Bockarie and John Paul Koroma could not be arrested or put on trial the focus became somewhat concentrated on these three. Given so much money had been spent on the court and given the court was set up principally to try the RUF, then clearly what was required from the judges was a careful and rigorous application of principle to ensure that politics stayed out of the equation. In my view it is difficult to argue that this trial really was a trial of legal principle.

As international tribunals were set up to fight impunity some argue those appearing before the tribunals are instantly assumed to be guilty. How can this be tackled?

The predominant view throughout the courts and in the public in general is that the accused must be guilty and this is the atmosphere in which the trials are contested. You could deal with that by having a registry, which is rigorous in abiding by the defence rights and you have competent and professional judges who do the same, who guard the process in a way that makes sure that those emotions, and understandable emotions, stay out of the court arena.

In what area do you feel some tribunals fail or succeed in comparison to the others?

I would say that the ICTY is by far and away the most impressive of the tribunals because there's a degree of transparency. It's located in The Hague where obviously there is a good deal of international scrutiny. The further you go away from that transparency the less fair these courts - it seems to me – become. The general perception among the legal community is that there is a hierarchy of competence in the jurisprudence starting with The Hague, moving down to the ICTR, moving down to the Special Court and to an extent the jury is still out on the Cambodian Court. This is not coincidental. It coincides with the degree of scrutiny.

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