CRITICAL ANALYSIS OF THE FINDINGS OF INVESTIGATIONS CARRIED OUT BY JUDGE BRUGUIÈRE AND JUDGE MERELLES.

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Introduction

From November 2006, Rwanda has openly been a victim of acts of judicial sabotage launched by two investigating magistrates, namely Jean-Louis Bruguière of France and Fernando Andreu Merelles of Spain. Each one of them issued an arrest warrant of Rwanda's civilian, political and military higher authorities, accusing them of involvement in serious crimes such as genocide, crimes against humanity, war crimes and terrorism, committed both in Rwanda and in the Democratic Republic of Congo (hereinafter called DRC). These judges base their investigative power on the death of some of their nationals and on the rule of universal competence. They drew up arrest warrants of the suspects, demanding their immediate arrest and their transfer to France and Spain. While it is true that universal competence is a rule of law which must be supported in the fight against the impunity of fugitive criminals, it is equally true that the manner in which it is being applied by the two judges gives rise to new legal questions which must be dreaded, more so since they seriously threaten State sovereignty.

In fact, the abusive practice initiated by these two judges of using a rule of law which is universally accepted for political motives is a recent and extremely dangerous phenomenon for the future of States, especially the poorest States. A closer look at this issue shows that Judge Bruguière and Judge Merelles, working hand in hand, took advantage of the legal vacuum existing in the international criminal procedure and violated in an extremely serious manner the fundamental rights of suspects. They violated very seriously the rules of procedure and committed flagrant errors of facts and legal analysis which are likely to result in the nullity of the cases concerned.

In the field of criminal proceedings, when the procedure is vitiated, the whole case crumbles even if the merits are solid and well-founded. It is necessary to respect the procedure first before considering the merits. What this means is that the slightest error of procedure justifies the pure and simple cancellation of consideration of the merits. That is why in this analysis, we are going to give an outline of the main legal flaws found in the submissions of the judges, underlining the defects in form in order to highlight the weaknesses of the indictments raised by Bruguière and Merelles. When one analyses these indictments, it becomes clear that the legal proceedings initiated have no justification under the law, mainly on the grounds that not only the procedure has been deeply vitiated, but also because the pieces of evidence produced are insufficient to reasonably support the responsibility of the suspects. Our analysis will be more substantiated with regard to the indictment of Judge Merelles since it is the longest and the most scandalous in terms of the seriousness of the errors it contains and the high number of persons he intends to indict; all this without any foundation.

PART I : INDICTMENT BY JUDGE BRUGUIÈRE

1. Historical background of the case

Judge Bruguière began his investigation on 27th March 1998, following the complaint submitted on 31st August 1997 by the daughter of the co-pilot of President Habyarimana's aeroplane, Jean-Pierre Minaberry, who died in the crash. Subsequently, the families of the other members of the crew associated also in the court action with the public prosecutor in the case. Although the complaint was lodged in 1997, more than three years after the crash, Judge Bruguière waited until March 1998 to commence a judicial investigation. The choice of this date is not entirely coincidental. It will in fact be recalled that it was in March 1998 that the journalist of *Le Figaro*, Patric de Saint-Exupéry, published a series of very compromising articles on the role of France in the genocide of the Tutsi. On the 3rd of the same month, a group of French intellectuals published in the daily newspaper *Libération* an appeal for setting up a commission of inquiry in France with a view to establishing the responsibilities.

With great haste, Paul Quilès, chairman of the Foreign Affairs Commission of the French National Assembly, announced on the same day the establishment of a fact-finding mission, but which was given very limited powers compared to a Commission of Inquiry. Some observers feel that this coincidence between the commencing of a criminal investigation by Bruguière and the establishment of a fact-finding mission instead of a Commission of Inquiry was motivated by political intentions of concealing the truth. Indeed, under the French law, when a judicial investigation is under way, it takes precedence over inquiries which may be carried out by a commission. This means that to the extent that Bruguière was investigating the crash of the aeroplane of the President of Rwanda, the Parliamentarians of the Quilès Mission could not go further in their investigations and findings in this case. Hence the question which continues to be asked but without an answer, namely why the victims waited for a period of four years before lodging their complaint, and why the investigation and the establishment of a fact-finding mission occurred so hurriedly at the same time and at a time when the criticisms on the controversial role of France in Rwanda were resurfacing with virulence in the press. These questions, even without answers, make it possible right away to realise the predominance of politics in the case raised by Bruguière.

Another sign of the political aspect of this case came to light from March 2004 with an article in the newspaper *Le Monde*, which revealed that it had obtained the whole investigation report by judge Bruguière and announced that this investigation named the President of the Republic of Rwanda, Paul Kagame, as the culprit number one of the assassination attempt. *Le Monde* added that the findings would be published soon. But it took two years for these to be published. Analysts agree that the aim of this article by *Le*

Monde was in reality to sabotage the tenth commemoration of the genocide of the Tutsi which the International Community was about to mark in a special style.

The final date chosen for the official publication of the order raises also a question. In fact, judge Bruguière's order was published on 23rd November 2006 at a time when at ICTR, the trial of the alleged brain of the genocide of the Tutsi, Col. Bagosora, an ally of France, had reached a delicate phase and when French high ranking officers who had worked hand in hand with the ex-FAR were awaited to come and give evidence in his defence. A few days after judge Bruguière's order was out, Bagosora's lawyers wrote an application to ICTR asking that this order be submitted as a piece of evidence in his defence. All this goes to show straight away to what extent Bruguière's investigations were tainted with bad faith right from its beginning. It is for this reason that his findings contain serious legal defects which could have been avoided if the investigation had sought to achieve a purely judicial objective.

2. Violation of the impartiality of investigation

Under the French law, the mission of the investigating magistrate is to find out the objective truth. This requires him to conduct investigation on incriminating facts and exonerating evidence, by accepting both the facts which establish the culpability of the accused and those in his favour to prove his innocence[1]. With regard to Bruguière's report, it is clear that this requirement of objectivity was the least of his concerns. In fact, a careful reading of his order shows very clearly that he investigated one side, the side of the prosecution, very certainly motivated by the keen desire of proving the guilt of the mentioned Rwandan personalities. There is nowhere in his report any element indicating that during his investigations, he tried to gather pieces of evidence exculpating these personalities. He never tried to interview the suspects. He never tried to visit the scene of the crime to check on the truthfulness or the authenticity of the information he had received. Let us even suppose that he did not want to visit Rwanda himself, why did he not dispatch a rogatory commission to this end? He carried out investigation where he wanted, he interviewed those who had the version he wanted to hear. This is a serious defect in the conduct of a criminal procedure.

3. Violation of the secrecy of investigation and respect of the presumption of innocence

The French law provides: (...) *"without prejudice to the rights of the defence, the procedure during the inquiry and investigation is secret[2]"*. This text cannot be clearer with regard to the obligation of discretion required of the investigating magistrate. Yet, judge Bruguière was an exception in this matter since not only the conduct of his inquiry was made public knowledge everywhere, but also its findings were published in the press, without any respect of the normal procedure of communicating discreetly the case file to the prosecution. The articles which appeared in the authoritative newspaper in France, *Le Monde*, as the tenth commemoration of the genocide drew near, implicated

[1] Art. 81, French Code of Criminal Procedure
[2] Article 11, French Code of Criminal Procedure

some important persons in Rwanda in the assassination attempt, stating that it was basing its disclosures on the case file of judge Bruguière. This means that judge Bruguière had communicated illegally the findings of his investigation to the press.

In fact, in its issue of 10th March 2004, *Le Monde* published a long article entitled *"Revelations on the assassination attempt which sparked off the Rwandan genocide".* In this article, it was stated that: *"the anti-terrorist judge Jean-Louis Bruguière has completed his investigation on the crash of the aeroplane of President Habyarimana on 6th April 1994".* The author of the article, Stephen SMITH, wrote *"Le Monde has read the final report which puts the responsibility on the Rwandese Patriotic Front (RPF) of General Kagame, the current ruling party in Kigali[3]".* Smith explained that the final report of Bruguière dated 30th January 2004 and had 220 pages.

The order that was published has only 64 pages, which means that a very big part of the real contents of the charges against the Rwandans accused by Bruguière is known only to a few French Secret Service insiders, including journalists. We should add that during the whole of March to May 2004, *Le Monde* continued to regularly attack the Rwandan Head of State, Paul Kagame, by repeating the still vague findings of judge Brugière. These recurrent attacks, which were based on leaks organised by Bruguiere in breach of the requirement of discretion, had effects on the press and caused moral damage to those Rwandans who were openly accused of a crime, without any respect of the legality applicable in such a case. This is a serious wrong to their presumption of innocence; another no less serious defect.

4. Indictment based on non credible witnesses

Judge Bruguière confined himself on quite an original approach which consisted of using only the witnesses who confirmed him in his arguments and convictions, without trying to know whether those witnesses could not be manipulators and liars. And yet, some of them declare themselves to be criminals; others have defects which would disqualify their evidence such as the fact that they fled Rwanda after being tried and convicted for various offences or in order to escape legal action brought against them. The minimum judicial logic would require that these witnesses be indicted for the serious acts they recognise having committed. The admission of guilt does not exempt the perpetrator from legal action and trial. Moreover, the French law prohibits expressly such persons from being witnesses. Thus, witnesses such as Ruzibiza and others who admit having participated in the shooting down of Habyarimana's aeroplane should not have been allowed to testify. The law provides: *"Persons against whom there are serious and corroborating indications that they have participated in the facts brought before the investigating magistrate cannot be heard as witnesses[4]".*

Other witnesses used by judge Bruguière are defectors and dissidents from RPF or declared opponents of the Government of Rwanda who today live in exile, often after

[3] The day before, the Catholic daily news *La Liberté* of Fribourg (Switzerland) had published an article repeating almost the entire article of *Le Monde.*
[4] Article 105, French Code of Criminal Procedure

having been spirited away from Africa by the French secret service, which meets their daily subsistence allowances. We are referring here to asylum seekers who are granted settlement authorisations as a result of false evidence which they sell against RPF and the Government of Rwanda. Bruguière's report is almost exclusively based on such pieces of evidence. Worse still, another category of Bruguière's witnesses consists of those who committed genocide and who are detained and under trial by ICTR (Bagosora, Renzaho, Ntabakuze....), or who are roaming the forests in DRC where they commit atrocities on the Congolese civilian population, while carrying out military acts and genocide ideologies against Rwanda (Aloys Ntiwiragaba,...). Such witnesses have no reliability when they intend to bring evidence against their opponents.

5. Use of threats to extort evidence

Judge Bruguière used methods of terror and intimidation of witnesses so that they may accept endorsing information he had prepared in advance. He moreover interrogated witnesses who did not speak French without the services of an interpreter as required by the law[5]. This method of using threats to obtain information shows the intention of Bruguière of making the persons he intended to indict feel guilty in advance. The evidence of Ruzigana is enlightening in this regard. He says that he wanted to have the experience of going abroad. He then got in touch with his former companion in the army, Ruzibiza, who was in Europe. Ruzibiza contacted Bruguière who indirectly organized his journey from Rwanda through the French secret service who granted him an entry visa to France from the French Embassy in Tanzania. On his arrival in Paris, he was immediately taken to the office of Bruguière who interrogated him about the person responsible for the assassination attempt. When he was not giving the answers corresponding to what the judge wanted, the latter would threaten him that he would not be granted political asylum in France.

Here is his account: *"It is through my former friend, Abdul Ruzibiza, that I went to France. Following my demobilisation after the war, I was deployed to the Police. But I wanted to lead a different life, to try my luck abroad. Ruzibiza then advised me to go to Tanzania. He informed some people in France who then contacted the French Embassy in Tanzania, and the latter granted me a visa and helped me to fly to France. I however was not an asylum seeker, I have never been one...Upon my arrival in Paris, policemen were waiting for me at the airport and they immediately took me to the judge. Although I do not speak French, there was no interpreter, there was only a secretary. I more or less understood the questions and tried to explain myself.*

The judge asked me where I was coming from, how long I had been in the army. He asked me again whether I was a member of the death squad, the notorious Network Commando. I replied that there had never been such a network in Rwanda. He then interrogated me about the assassination attempt. Since I had no answer to this question, he insisted saying that I was a member of RPF Intelligence Service. I replied that I was indeed a member of the Intelligence Service but that in my country, one gets information about the service to which one belongs and nothing more. He then asked me about senior officers and wanted

[5] Art. 102, French Code of Criminal Procedure

me to explain how these officers went about killing people. It is at this juncture that the interrogation went sour because I told him that no senior officer did that kind of killing; of course I told him that there had been dead people, but that this was during the war. There had been dead people even among our ranks....

As the conversation dragged on, I became angry because when I gave him an answer he did not like, he said that that was not true, that the answer did not correspond to what he had been told. It is then that it dawned on me that I had been tricked...Fortunately, the friend who had been waiting for me at the airport had followed me to the judge's office and parked nearby waiting for me. As soon as I came out of the office of the judge, very angry, I did not even want to spend a single night in France; we immediately went to Belgium and from there, I went to Norway. At the end of my hearing, I signed the statement, but in reality, my statement did not even amount to five lines because when he asked me a question and I could not answer, I said nothing. Yet in the judge's report, the statement he alleges is mine is quite longer.... In fact, he already had all the answers to those issues....If I have decided to testify today knowing well that these people could kill me, it is because the judge wronged me in terms of my reputation, in relation to my country[6]*..."*

6. Violation of diplomatic immunity

Among the Rwandese personalities accused by judge Bruguière, there are some who enjoy immunity from criminal jurisdiction under the Vienna Convention of 18th April 1961 relating to diplomatic relations, which came into force on 24th April 1964. That was the case especially of Rwanda's Head of State and Rwanda's Ambassador to India, General Kayumba Nyamwasa. These two personalities enjoy the immunity of their persons and immunity from legal proceedings and cannot be sued as along as they are in office. This principle is a permanent feature which is regularly recalled by the International Court of Justice, underlining the imperative necessity of respecting the privileges and immunities of diplomats.

In the ruling dated 14th February 2002 in the case of the Democratic Republic of Congo *vs* Belgium, the Court even specified the nature and scope of these immunities by pointing out that during their term of office, the Heads of State, the Minister of Foreign Affairs and other diplomats in office, shall enjoy immunity against criminal jurisdiction and total immunity abroad. The same applies when these authorities are on the territory of another State, whether on official or private business. The Court pointed out that these immunities cover all the actions carried out both before the appointment of these authorities and in the course of their duties, whether these are official or private actions. Finally, the Court considered that there was no exception to this rule in international law. Pursuant to this rule and jurisprudence, Rwanda's Head of State cannot be legally subjected to any form of arrest or detention. Any attack on his person, his freedom or his dignity is prohibited by international law[7]. And it should be noted that the immunity from

[6] Testimony published in *Le Soir*, 5th April 2007; cf also his letter to judge Bruguière : « Lettre d'Emmanuel Ruzigana au juge Bruguière, Oslo, 30th November 2006 ».
[7] Cf Article 29 of the Vienna Convention referred to

legal proceedings enjoyed by the Heads of State and diplomats concerns both administrative and civil jurisdictions as well as criminal jurisdictions. Bruguière was aware of this problem because while he was issuing an arrest warrant of the President of Rwanda, Paul Kagame, he specified that he was covered by immunity, but he hurriedly wrote to the UN Secretary General asking him to compel the ICTR Prosecutor to take legal action against him. This is rather a petty political than a legal ploy. Moreover, ICTR did not take long to denounce the action of judge Bruguière. At a press conference held in Arusha, the spokesperson of the Tribunal, Everard O'Donnell, recalled that *"the ICTR Prosecutor does not take any instruction from anybody in the world".* Article 15 of the ICTR Statute provides that: *"the Prosecutor shall act in total independence. He shall not solicit or receive instructions from any government or any other source".*

7. Negation of an internationally established and recognized genocide

From the view of the Convention of 9th December 1948 on the prevention and punishment of the crime of genocide, genocide is an action committed with the intention of destroying wholly or in part a national, racial, ethnic or religious group as such. The crime of genocide presupposes therefore the existence of the intention to commit a criminal act against the above mentioned four groups. In other words, there is no genocide without the specific intention of committing it. Yet, Bruguière concludes that it is President Kagame who was behind the attack against Habyarimana's plane and that, consequently, it is Kagame who lit the fuse of the genocide of the Tutsi. To assert that it is the attack against the aeroplane which led to the genocide amounts to saying that the extermination of the Tutsi was a spontaneous act, not premeditated, devoid of genocide intentions. Such an argument has important legal consequences since it clears the act of killing the Tutsi of its genocide nature, consigning it to the act of manslaughter or an unintended criminal act or, perhaps, to the act of crime against humanity.

The logical consequence is that the perpetrators of the genocide are absolved from this crime in favour of a less serious offence such as the crime against humanity or simple murder. The defence lawyers at ICTR have always attempted this ploy, desperately trying to negate the existence of the genocide in Rwanda in favour of the offence of the crime against humanity, in order to reduce the scope of the crime of genocide and applicable punishment. However, in terms of international jurisprudence, there is a very important historical judgement, that of Jean-Paul Akayesu, which has since become a constant reference point for the crimes that were committed in Rwanda in 1994: *"the genocide was organised and planned not only by the members of FAR, but also by political forces grouped around Hutu Power, and it was implemented by the majority of the civilians, including particularly armed militia and even ordinary citizens; and Tutsi victims were in their big majority non combatants, including thousands of women and children, even foetuses. The fact that this genocide was committed when FAR were fighting RPF cannot in any case be used as extenuating circumstances to its perpetration[8]".* And then ICTR clarifies*: "It is then clear that the massacres which were committed in Rwanda in 1994 had a specific objective: namely the extermination of the Tutsi, who were targeted especially because they belonged to the Tutsi group, and not because they were RPF*

[8] Cf ICTR, AKAYESU Judgement, paragraph 18

fighters. In any case, Tutsi children and pregnant women would naturally not have been among the fighters. The Chamber concludes therefore from all the foregoing that genocide was, indeed, committed in Rwanda in 1994 against the Tutsi as a group. In the opinion of the Chamber, this genocide appears to have been meticulously organised[9]*".*

The special Rapporteur of the United Nations Commission for Human Rights, René Degni-Segui had come to the same conclusion in his report of 28th June 1994 where he notes: *"The clear and unambiguous intention is well contained in the continuous calls to kill by the media (in particular RTLM) and in the pamphlets. (...) A corroborating body of evidence: preparation of massacres (distribution of firearms and training of militia), number of killed Tutsi, and outcome of the application of a policy of extermination of the Tutsi. (...) The qualification of genocide must already be accepted with regard to the Tutsi. It is different with regard to the killing of the Hutu".* Faced with the multiplicity of attempts by the defence lawyers at ICTR to negate the existence of the genocide, the judges of this Tribunal finally brought to a close the debate on 16th December 2006 in the case of Karemera, by stating that the genocide of the Tutsi was public knowledge which should no longer be debated.

[9] ICTR, Akayesu Judgement, paragraphs 125-126

PART II : INDICTMENT BY JUDGE MERELLES

1. Background to the proceedings

Judge Merelles began his investigation following a complaint lodged by an association called *Forum international pour la vérité et la justice dans la région des Grands Lacs.* This association comprises members of the families of the Spanish victims killed in Rwanda and in the Democratic Republic of Congo between 1994 and 2000, some political personalities and small groups of Rwandan opponents most of which represent a well known revisionist trend, such as the *Centre de lutte contre l'impunité et l'injustice au Rwanda,* established in Brussels and headed by Joseph Matata. Judge Merelles based himself on the Spanish Organic Law No. 6/1985 of 2nd July 1985, Article 23§4 which provides: *"The Spanish jurisdiction shall also have competence to hear acts committed by Spanish or foreigners outside the national territory which are likely to be considered, under the Spanish criminal law, as some of the following offences:*

a) *Genocide ;*
b) *Terrorism ;*
c) *Piracy and illegal hijacking of aircraft;*
d) *Foreign currency forgery;*
e) *Offences relating to prostitution and corruption of minors or persons with disability;*
f) *Illegal trafficking of drugs, toxins and narcotics;*
g) *And any other which, under international treaties and conventions, must be prosecuted in Spain"...* This point "g" can cover various international offences, including torture.

The Rwandan case is not the first international case raised by the Spanish courts. For more than ten years, in fact, the Spanish courts have been in the habit of getting involved in judicial battles aimed at arresting and prosecuting in Spain leaders or former leaders of foreign States. The judge who proved to be the most active in this field is called Balthasar Garzon who became known through the arrest warrant of General Pinochet in 1998. In addition to this case, other warrants for arrest issued by Spain based on the principle of universal competence targeted the offences committed in Latin America, particularly in Argentina and Guatemala. In 2003, judge Garzon applied for the extradition of former Argentinian leaders whom he charged of *"genocide, State terrorism and torture".* As a result of these arrest warrants, the President of Argentina, Nector Kirchner, authorised the arrest of 45 former officers on 24th July 2003, including many Generals and one civilian. On 29th June of the same year, Mexico extradited upon the request of Spain, a former Argentinian officer, Ricardo Miguel Cavallo, who was accused of having been one of the torturers at the Buenos Aires Mechanical School. This extradition of a citizen of another

State which Mexico granted to a third State in application of the universal competence was a world first. On 19th April 2005, the Spanish justice sentenced an Argentinian soldier, Adolpho Scilingo, to 640 years in prison for crimes against humanity!

However, it should be noted that at first, the Spanish courts had appeared very hesitant in applying the rule of universal competence. When Mrs Rigoberta Menchu, the 1992 Nobel Peace Prize winner, lodged a complaint about the crimes of *"genocide, torture, assassination and illegal detention"* against the military governments which ruled Guatemala from 1976 to 1986, Spanish courts at first refused to assume jurisdiction. In March 2003, the Supreme Court gave a dismissal decision of the application of Rigoberta Menchu, by arguing that the jurisdiction of the Spanish courts should be limited to the only crimes committed against its citizens or in which they are involved as perpetrators. The complainants appealed the decision before the Constitutional Court, which is the highest Spanish jurisdiction. On 5th October 2005, the latter squashed the decision of the Supreme Court by stating that *"the principle of universal jurisdiction takes precedence over the existence or non existence of national interests".* It is in this context that judge Merelles allowed himself to be manipulated by individuals and lobbyists with bad intentions and carried out a biased inquiry, leading to erroneous factual and legal findings. We will review below the main loopholes, shortcomings and errors.

I. Blatant mistakes of facts

The indictment by judge Merelles is riddled with blatant errors in relation to the existence of the alleged facts. He hides and deliberately distorts a number of facts which have been unquestionably established and recognised today at the international level, and reverses roles by asserting that all the crimes committed in Rwanda and in the Democratic Republic of Congo during the period under consideration fall all under the sole responsibility of RPF civilians and soldiers. He washes clean the government of Habyarimana of all suspicions and responsibility in the killing of civilians during the genocide, and in the series of crimes which plunged Rwanda into mourning between 1990 and 1994. He masks the responsibility of ex-FAR and the militia in the crimes they committed in Rwanda during their infiltrations. This is a serious indication which proves that his only motivation was to charge RPF and the civilian and military leaders of the Government of Rwanda.

1. Falsification of facts dating between October 1990 and July 1994

1.1 Lies about the lack of protection of the civilian population

Writing about RPF, the judge states that from the first moments of its attack in October 1990, it eliminated: *"a considerable number of civilians, causing a huge wave of internal displacement of the persecuted population".* (p. 4). The expression *"from the first moments"* suggests that RPF entered Rwanda on 1st October 1990 with the only aim of killing civilians. All this is wrong. The first concern of RPF was rather to protect the civilians against the risks and consequences of the armed conflict. And it should not be forgotten that RPF was demanding the legal and legitimate rights which it had failed to

obtain by peaceful means. Merelles continues his accusations against RPF by alleging that it committed acts of genocide during the conflict which consisted of *"carrying out acts of systematic elimination of the members of the Hutu ethnic group, Hutu intellectuals and politicians, as well as monks/nuns and missionaries who were considered as collaborating with the Hutu"* (pages 4-5).

In fact, RPF could not think of the elimination of the Hutu when it had them among its cadres: the late Alexis Kanyarengwe, Pasteur Bizimungu, Seth Sendashonga,..., and it continued to receive the Hutu in its organs. Then, saying that RPF was chasing persons belonging to religious orders is a totally untrue claim since all the parishes in the areas which RPF had conquered since 1990 continued their activities throughout the war. We can mention Rusaki, Nyagahanga, Rukomo, Muhura, Nyarurema, Runaba, etc..., except of course where the priests opted to leave voluntarily. Those who left freely owe it to their conscience; this should not be attributed to RPF and should not be interpreted in any case as a strategy aimed at getting rid of the alleged embarrassing witnesses.

It could also be that at one time or another, RPF asked the civilian population, including the monks/nuns, to leave the battle zones with a view to securing their protection. Is it then justified in such cases to interpret this concern of protecting civilians as a manoeuvre aimed at hiding its crimes? Let it be recalled that as a combatant in terms of the international humanitarian law, RPF was under the obligation of protecting the civilian population in the zone under its control in accordance with the provisions of this law, and that it had actually committed itself to the respect of this law in a declaration addressed to ICRC. No one can therefore blame it for having respected the law, and it is not justified to doubt its good intentions in the decisions it took to protect persons who were not involved in the fighting.

1.2 Assassinations committed by the Government of Habyarimana are attributed wrongly to RPF

Inside Rwanda, the year 1993 was characterised by a fresh upsurge of targeted assassinations of Tutsi civilians and Hutu influential personalities from the opposition. Judge Merelles attributes them all to RPF with unrealistic and untrue explanations. He writes that *"in February 1993, RPA/RPF launched systematic massacres in the town of Byumba and its surroundings and did the same with indiscriminate attacks against the population of Ruhengeri: the result of these attacks was the massacre of more than 40,000 persons"* (p. 6). We should be reminded that this judge has never visited the area to ascertain the occurrence of these events. How then can he put forward an exact figure without the risk of being mistaken? The lie becomes blatant when judge Merelles apportions to RPF the responsibility of *"45 terrorist attacks"* which were carried out, says he, *"on the entire territory"* of Rwanda *"since July 1991 to September 1992"* (p. 6). He attributes to RPF the murder of Félicien Gatabazi, Martin Bucyana, Fidèle Rwambuka and Emmanuel Gapyisi.

During this period, RPF did not control the whole country and was rather stationed in the north of the country. The rest of the country was cordoned off and controlled very tightly

by the army and the central, communal and prefectural administration. How could RPF clear all these obstacles to reach Cyangugu, Kibuye, Butare and elsewhere to carry out the acts of violence imputed to it by the judge? In reality, Martin Bucyana, a staunch CDR extremist, was killed in broad daylight in Butare by the supporters of PSD, who were furious because of the killing, the day before, of their leader, Félicien Gatabazi, by the extremists of Hutu Power. Before Bruguière, everybody agreed that Gatabazi had been killed by extremist Hutu. What is then the new concrete evidence adduced today to justify the reversal of responsibilities, if not the pure fabrications of RPF defectors?

It should be pointed out insistently that the government of Habyarimana had at all times carried out assassinations of its opponents before even the creation of RPF and its entry on the territory of Rwanda. Thus the government, in 1976, killed a considerable number of Hutu personalities of the First Republic. Towards the end of 1980s, the same government targeted and killed Hutu officials who dared to mention the abuses committed by the government. We can mention the killing, between 1987 and 1988, of four well known personalities: the journalist Father Silivio Sindambiwe of *Kinyamateka*, the former Health Minister François Muganza, Colonel Stanislas Mayuya, MP Félicula Nyiramutarambirwa, and the American Diane Fossey who had devoted her life to the protection of gorillas. According to the American journalist, Nick Gordon, who published a book of inquiry into the circumstances which led to the death of Diane Fossey[10], she was killed on the orders of Protais Zigiranyirazo, the Prefect of Ruhengeri and brother-in law of President Habyarimana, because she was against gorilla trafficking carried out by the dignitaries of Akazu.

Judge Merelles writes that *"The diocese of Byumba which is situated in the north of Rwanda, was a zone entirely under the control of RPA/RPF. In this zone and only during the first two months following the assassination of the President on 6th April 1994, thousands of people were killed, including 64 Hutu members of the Christian clergy and their collaborators".* This is a typical example of an untrue claim which yet constitutes a very serious charge against Rwandan officers. In fact, the catholic diocese of Byumba was, in 1994, among those with a very small number of Rwandan priests. It is quite certain that this diocese has never had 64 Hutu priests, both in the past and today. How then could RPF kill a number of priests which is higher than the number of those present in the diocese?

2. Falsification of facts after the genocide of the Tutsi in 1994

In a similar manner, judge Merelles distorts the responsibility for several crimes committed by ex-FAR and Hutu militia after the end of the genocide and puts it all on the shoulders of RPF. He thus negates the killings carried out by *"Abacengezi"*[11], describing them as simulations fabricated by RPF as a pretext for killing Hutu civilians.

[10] "Murders in the Mist", Hodder and Stoughton, London, 1993

[11] This is the name given to Hutu infiltrators who attacked Rwanda from DRC between July 1994 and the beginning of 2000.

3.1 Impossibilty for RPA to carry out systematic and widespread massacres between July 1994 and 2000

Judge Merelles claims that from July 1994 to 1995, RPF killed a total of 321,726 people (p. 11). In reality, the judge picks this figure from the document written by Sixbert Musangamfura, a Rwandan dissident, which was published in Nairobi in December 1995. The judge makes reference to this document and gives it judicial credibility, without any attempt at cross-checking the truthfulness of the facts. Had he wanted to know the truth, he would have realised immediately that during the period in question, it was materially impossible for RPA to carry out the massacres of such magnitude without the knowledge of the 147 UN Human Rights observers who were at the time deployed in every commune of the country. These observers submitted public reports to the UN on the situation in Rwanda, and nowhere in any of these reports is mentioned the perpetration of such large-scale massacres which would have been ordered by the military hierarchy of RPA, as alleged by judge Merelles. These accusations were made only several years after. They were prepared by Hutu extremists who committed the genocide of the Tutsi and taken over by their Western allies and sponsors so as to tarnish the image and the reputation of RPF and the present Rwandan Government.

Reference to the massacre of Kibeho contains also scandalous falsehoods. In this connection, the judge writes that on 20th April 1995, RPA massacred about 8,000 people in Kibeho camp, adding that on 23rd April, the same RPA soldiers killed *"some 2,000 people by indiscriminate shootings in Butare, in the neighbourhood of the airstrip"* (p. 15). Concerning Kibeho first, it is important to point out that an international commission of inquiry, composed of ten neutral and independent experts, carried out a thorough inquiry and came to the conclusion that the massacre was in no way premeditated. Here is its conclusion: *"The tragedy of Kibeho is not the result of a planned action by the Rwandan authorities aimed at killing some group of people or of an accident which could not have been prevented".* This report stressed also "*the need for both the Government and the International Community"* to close *"as soon as possible"* the camps of the displaced people inherited from the former Zone Turquoise. This was for both: *"security reasons"* and because the continued existence of the camps and their networking by ex-militia "*was hindering the efforts of the country to overcome the devastating effects of the genocide of last year"*. In short, this report of international experts recognised the dangerous nature of the camps located in the former Zone Turquoise and recommended their closure.

These camps were actually sanctuaries for the perpetrators of the genocide, ex-FAR and the militia who had taken the civilian population hostage and sowed insecurity and widespread criminality. Worse still, these camps were places of arming and military training in preparation of the launching of attacks against the regular army. How can one, in such a case, blame the leadership of RPA for having decided to close those camps when they had the obligation of maintaining public order and ensuring national security? Considering this context of criminality, is it reasonable and justified to ignore this reality and ascribe to RPA today the bad intention of having fabricated the pretext of insecurity in order to be able to commit massacres of the Hutu? The Rwandan authorities acted in a

responsible manner; they did everything possible to sensitise the population for voluntary and peaceful departure in order to avoid the shedding of blood.

3.2. Denial of criminal infiltrations of ex-FAR and militia

Soon after the dismantling in 1996 of camps in DRC which were used as sanctuaries, places of training and renewal of supplies of arms and ammunitions for ex-FAR and the militia who had perpetrated the genocide of the Tutsi, these ex-FAR and militia reorganised themselves and even carried out infiltrations in Rwanda, killing tens of thousands of civilians, both Rwandans and expatriates. Schools were attacked, buses carrying civilians were assaulted and Tutsi passengers were killed, etc. Judge Merelles totally distorts the truth about the occurrence of these events, alleging on one hand that these criminal acts were simulations by RPF and, on the other, insinuating that these alleged simulations aimed at justifying the massacres of Hutu civilians intended by RPF. This is how he puts it: *"In the course of 1997, attacks were organised against Hutu civilians during which a new technique was used, which was invented by the Intelligence Service, consisting of simulating attacks against civilians by infiltrators (Hutu extremists),....., and these attacks justified a rapid reaction by RPA/RPF against the Hutu population, under the pretext of eliminating so many extremists"(p. 17).*

This is a typical example of the bad faith of this judge. In fact, during the period he is describing, RPA lost many human lives, caught in ambushes or fallen on the battle field against the infiltrators. If it was RPA which simulated attacks as a pretext of subsequently killing Hutu civilians, to whom should be attributed the death of RPA soldiers killed at that time? Does it mean that RPA killed its own fighters? Another illustration of his bad faith is shown when he talks of the murder, on 5th February 1997 at Karengera (Cyangugu), of five employees of the United Nations Human Rights Observer Mission, two expatriates and three Rwandan interpreters (p. 17). Actually, this massacre took place, but it was carried out by Hutu infiltrators, ex-FAR and Interahamwe, who came from DRC. And it is unfortunately not the only one to have been committed in this region.

In fact, during the night of 10th to 11th May 1996, the burgomaster of Karengera, Mrs Mukandoli Anne Marie, was killed at her home by these infiltrators. In the night of 27th to 28th October 1996, the burgomaster of Nyakabuye, still in Cyangugu, Mrs Mukabaranga Judith, was killed at her home by the same elements, and part of the communal office was set on fire after these attackers had freed the prisoners who were detained there. One RPA soldier was killed and four others were seriously wounded. These killings and acts of intimidation aimed at the Hutu who occupied positions of responsibility were carried out with the aim of weakening the Government of Rwanda.

Judge Merelles, who probably knew about these killings, is silent about them because he certainly thinks that if he mentions them, he will raise some question marks likely to weaken the scope of his accusations. Any sensible person will understand that RPA had no reason whatsoever to kill UN Human Rights Observers, and less still communal political leaders who represented the Central Government on the hills and who helped it

to restore order and security in the country. There are many testimonies today from ex-FAR and Interahamwe militia who were among those infiltrators, and they agree to testify to the scale of the killings they committed in Rwanda, mainly in the prefectures bordering DRC of Gisenyi and Ruhengeri in particular, as well as in Cyangugu, Gikongoro, Kibuye and Gitarama.

II. Errors and legal shortcomings

The mistakes of law that one can detect in the indictment by judge Merelles are of two types: errors of procedure, which are in the majority; and errors of merits which are related mainly to the false qualification of facts contained in the indictment and, like in the case of Bruguière, to the insidious negation of internationally and irrevocably recognised facts. In order to underline the importance of the respect of the rules of procedure, it should be pointed out that their violation leads automatically to the withdrawal of the proceedings. This means that if the indictments by judges Bruguière and Merelles were submitted to a trial court, they would be declared void due to procedural defects. The problem is that before coming to this stage, one or several suspects must first of all be arrested, and it is without doubt this humiliation that judges Bruguière and Merelles are aiming at.

1. An amazingly quick investigation

Merelles began his investigation on 26th February 2006, and his indictment came out on 8th February 2008 after a period of two years, covering the phase of gathering information and the phase of analysing it. Probably, Merelles closed his investigation several weeks in order to draw up his bill of indictment, which presupposes a period of analysis and writing. In short, the investigation proper, if at all it was carried out, could not have taken more than one year and a half. It is thus in order to wonder about the seriousness of an investigation carried out in such a short time, considering the seriousness of the facts of the case, their complexity and the distance from the scenes where they are supposed to have been committed. An investigation about such serious crimes in respect of which the judge alleges to prove the perpetration by and responsibility of the Rwandan authorities cannot be carried out in a comprehensive and impartial manner over a short period, except where there is abundant evidence likely to prove irrevocably the existence of the intentional element. Now, nothing in the factual findings established by Merelles proves that RPF/RPA had an evident intention of exterminating wholly or in part a group protected by international law or that it committed acts of terrorism, crimes against humanity and war crimes which the judge imputes to it.

2. An investigation carried out from afar

The distinctive feature of a criminal investigation is that it must, at best, be carried out at the scene of the crime to ensure that exact information is obtained and in order to subsequently have all their guarantees of its verification[12]. Visiting the scene of the crime has the advantage of enabling the judge to have an exact vision of the places, to be aware

[12] Art. 81 French Code of Criminal Procedure

of the physical facts and their sequence, to be able to test the authenticity of the accounts presented by the witnesses, etc. Under the French law, such a visit is even a requirement in case of an offence discovered while it is being committed or immediately afterwards, i.e. in case of a crime or a misdemeanour in respect of which the law provides a prison sentence[13]. In the absence of such precautions, there is a danger of error or manipulation of the investigating magistrate by evil-minded witnesses. No genuine investigation can be carried out in an office which, moreover, is hundreds of kilometres away from the scene. It would have been useful to learn from the example of ICTR investigators who, despite their experience gained over several years on the field, visit regularly the country to gather information and verify it, before deciding whether it is proper to draw up an indictment. Judge Merelles claims to have worked together with Bruguière, particularly by sending a rogatory commission to France (p. 55). Why didn't he use the same method in Rwanda?

3. Bypassing judicial cooperation and international cooperation

In the field of international criminal proceedings, inter-State cooperation is necessary in punishing crimes. This principle is set out in all the international conventions relating to the punishment of international crimes, and in the resolutions of the Security Council establishing international criminal jurisdictions. These resolutions are binding and compulsory for all the States. This means that the Spanish investigating magistrate had in any case to carry out his investigation in a transparent manner, in collaboration with Rwanda. This was all the more necessary since the crimes were committed on Rwandan territory and the suspects are supposed to be Rwandans.

In such a case, Rwandan courts were also competent to prosecute these individuals, and this implies a cooperation approach in order to solicit judgement before Rwandan courts before rushing into a one way investigation, far from the context of the perpetration of the crimes. Now, Rwandan courts had already dealt with some of the cases and had certainly elements which could have been of interest to the Spanish courts. This is evidenced by the fact that, in his indictment, judge Merelles refers to an investigation which had been launched in Rwanda in 2002 about the murder of Father Isidro Uzcundum at Mugina. If he had really wanted to carry out a transparent and impartial investigation, he would have asked at least for the transfer of the files in possession of Rwandan courts. He on the contrary preferred to trust only the statements of witness TAP-038 made while in exile and concluded blindly by incriminating senior officers of the Rwanda army.

4. Weakness of oral evidence presented in support of the indictment

There are two types of means of proof which are often used in criminal proceedings: documentary evidence and oral evidence. Merelles rarely makes reference to the documents he used, but any careful reader of his bill of indictment will notice that the only documents he used were those produced by individuals opposed to the Government of Rwanda and to RPF, and this raises the problem of their credibility. The sources of evidence raise the same problem since the bulk of them are based on accounts given by

[13] Art. 67 French Code of Criminal Procedure

discontented deserters from RPF, persons who fled Rwanda to evade justice, some of whom have committed genocide or other offences, revisionist individuals or small groups allied to the former regime, etc. Of course, an RPF dissident or a political opponent can give credible evidence with regard to the alleged facts, provided this is based on serious circumstantial evidence or proofs. Precisely, the allegations made by Merelles lack substance because they are based on indirect, contradictory, unlikely, incoherent, vague and, ultimately, unreliable and incredible evidence.

4.1 Indirect evidence

A great number of testimonies adduced by Merelles to justify his conviction are approximate and do not come from individuals who were direct eyewitnesses. Several witnesses give accounts of what they obtained by hearsay and are not eyewitnesses with an exact knowledge of the facts. Is it sensible for a foreign judge to dare order proceedings against 40 senior officers of an army of another State based on allegations made by a few persons who, moreover, bring indirect accounts? Let us look at some specific cases which prove the qualitative weaknesses of the evidence adduced by Merelles:

1) He trusts witness TAP-004 who accuses General Kayumba Nyamwasa of having given orders to Captain Evariste Kalisa and Captain Justus Majyambere to kill three employees of Médecins du Monde in Ruhengeri. Immediately, Merelles writes that the witness *"was not physically present at the secret meeting between the two captains and their superiors"* (p. 14). Elsewhere, he explains that his evidence comes *"from the disclosures of comrades in the Directorate of Military Police"* (p. 39), but he does not mention their names! This silence about the real authors of the story enables TAP-004 not to have to pit his testimony against that of his former comrades whom he implicates. He thus avoids the risk of being contradicted and seeing his story lose its substance. A careful reading of the account of this witness leads one to realise that he is an embittered former soldier who is seeking better living conditions in Europe and who, to this end, fabricates false evidence against his former superiors.

In order to underline the importance of witness TAP-004, Merelles writes about him that *"he witnessed the planning and/or the commission of many crimes in Rwanda for a period of about 10 years (1990-2001) during which he served as a soldier in various units of RPA"* (p. 37). Let us suppose that TAP-004 was really an informed observer of the facts he refers to. He cannot have been at the same time a passive witness for a period of ten years of crimes committed by an army to which he belonged. If such crimes were committed, either TAP-004 himself took part as a protagonist or an accomplice, in which case he should be indicted and his evidence immediately rejected, or he is taking advantage of having been a member of RPA to fabricate lies incriminating innocent people for publicly undisclosable reasons, in which case his account has no judicial credibility. For the sake of clarity, our research has led us to identify witness TAP-004 as Joseph Ruyenzi who, on 5th July 2004, had posted a text on Internet entitled: *"Paul Kagame responsible for the attack against the plane of Habyarimana".* Merelles repeated

in extenso several accusations contained in this text written by Ruyenzi, whose tone appears to be motivated more by revenge than any other consideration of the truth.

2) Still talking about the killing of the three Spanish expatriates, Merelles gives the account of witness TAP-006 in these words: *"the witness came to know the fact that"; "according to what the informant knows"* (p. 39). He does not explain how the witness came to know exactly the alleged facts. He only mentions generalities which, we should underline, are not admissible in criminal proceedings because they present the danger of harming the rights and basic freedoms of individuals. It is in fact not acceptable that during criminal investigations, application is made to arrest and detain an individual based on generalities and approximations without convincing factual substance. Yet, the evidence of witness TAP-006 adduced by Merelles to support the indictment against General Kayumba Nyamwasa and Captain Denis Karera in the case of the murder of Father Joachim Vallmajo, contains an important qualitative weakness which the judge himself describes in these words: *"the witness said that he came to know about it indirectly and after the events".* How then can one make a general and a captain of a national army shoulder the responsibility of a murder on the basis of indirect evidence which was obtained after the events? Isn't there a danger of manipulation and lying?

The same errors are found in the evidence of witness Cynthia Mc Kinney, a Black American MP who undertook only short visits to DRC and Rwanda but who accuses Rwanda of looting DRC, based only on articles in the press (pp. 96-98). Her hatred of Paul Kagame appears very vividly in her story. The problem is that Merelles believes the story of Mrs Mc Kinney without proper judgment and that he espouses her accusations without verifying the validity of her evidence.

4.2 Weak and unreliable evidence

The bill of indictment has 187 pages based on the accounts of 22 witnesses, the great majority of which consist of indirect testimonies of facts as stated above. The qualitative value of these 22 testimonies is unquestionably insufficient to justify the indictment of forty senior officers of the national army of Rwanda. The other characteristic of the weakness of the evidence is in the number of unconvincing arguments put forward to accuse Rwandan soldiers of massacres, without the detractors being able to establish the cause and effect link between the allegations against the suspects and the proof of their possible implication.

4.2.1 Erroneous criteria for the identification of suspects

Marie-Béatrice Umutesi accuses Rwandan soldiers of several massacres of civilians in DRC. When the judge asks her why she says that it was Rwandan soldiers who did it, the witness replies: *"the only people who speak Kinyarwanda in Central Africa are Rwandans, in Uganda they speak Kiganda and the Congolese speak either Swahili or Lingala"* (p. 85). Witness TAP-041 who accuses Rwandan soldiers of attacking Kashusha refugee camp has the same explanation, in that the method of identifying Rwandans is by their language, Kinyarwanda. This is what he says as summarized by

Merelles: *"*[the witness], *in each of these attacks, clearly recognised that the soldiers who were attacking them spoke Kinyarwanda among themselves, a language which is not spoken in Zaire and is spoken only in Rwanda, which made him conclude that those who attacked them were RPA/RPF soldiers"* (pp. 89 and 120). Anybody who is familiar with the Great Lakes region knows that Kinyarwanda is one of the languages commonly used by Congolese living in North and South Kivu, and that speaking Kinyarwanda alone is not a sufficient criterion to determine the Rwandan identity of an individual. Yet Merelles has used long extracts from testimonies based on this explanation, by devoting particularly ten pages in total to Marie-Béatrice Umutesi whose account appears clearly biased. If he had visited the scenes of the events, Merelles would have spared himself of such a blunder.

There is a similar weakness with witness TAP-043 on whom Merelles devotes 17 pages containing very serious charges against Rwandan Generals (pp. 101-117). This witness claims to be a Tutsi who joined RPA in 1991 until 2001 when he went into exile. Merelles idealizes this witness by introducing him as somebody who knows directly the facts since he was an active soldier in the various units of RPA, that he knows the names of the leaders and their criminal acts. Then the witness begins a litany of charges against Paul Kagame, James Kabarebe, Kayumba Nyamwasa, Karake-Karenzi, Dr Joseph Karemera, Jackson Rwahama, Joseph Nzabamwita, etc. The witness imputes several massacres to RPA, including those of Hutu politicians which were committed before the genocide, including the killing of Gapyisi and Gatabazi. When one reads his account carefully, one finds it very little convincing because of a deep ignorance of the facts, contrary to the praises heaped on him by Merelles. Moreover, the judge recognised this weakness but tries strangely to water it down by saying: *"Although witness TAP-043 did not give concrete details on how the operation was organised to end the life of Emanuel Gapyisi, he explained clearly the persons and the structure of RPA/RPF which were responsible for carrying out his violent death"* (p. 109). How can a witness who indicates that he does not know how the killing of Gapysi was organised be believed when he attributes this crime to RPA? He does not indicate how the murder was ordered and how he managed to have access to such precious information. This evidence should have been taken with extreme caution.

4.2.2 General and unwarranted claims

Judge Merelles relies at length on the account of witness TAP-043. Yet this witness presents no more than general, often unwarranted statements, and the judge simply believes his word. Example: *"the witness claimed that he did not have the slightest doubt that Lieutenant-Colonel Karake Karenzi knew and approved the massacres of the civilians after the war"* (p. 11). Admittedly, TAP-043 may have no doubt, but he must prove on what he bases his certainty. He does not do it, and this is not admissible in criminal proceedings. The same witness uses similar methods of uttering unsubstantiated statements by making unwarranted imputation on General Ibingira of the responsibility of the killing of missionaries at Gakurazo (pp. 111-113). He reveals that his two sources of information regarding this murder are, on one hand, his own sister who was on the spot and who lost her son during this same operation; and on the other, TAP-043 says that he

carried out his own investigation on this murder. A question: since it was during the war when the soldiers was very busy, how could this witness, who was obviously a simple soldier, find enough time and the necessary resources to undertake a real investigation? What is his intellectual capacity to be able to carry out a reliable and credible investigation? So many questions about which Merelles does not give any clarifications, but which are necessary and essential to remove any doubt as to the seriousness of the testimony.

Still on the question of the murder of the priests at Kabgayi, TAP-043 claims that he identified two victims: Bishop Innocent Gasabwoya and Jean-Baptiste Nsinga. However, the explanations he gives to authenticate this identification contain errors which go to show his trial and error statement, a sign that he is probably telling a prefabricated story. In fact, he says that he was able to recognise Bishop Gasabwoya because he was *"a great family friend"* (p. 112). This is possible. But the account appears incredible when the witness says that Bishop Gasabwoya was *"a former vicar general of the diocese of Kamonyi"* [our emphasis]. Admittedly, one could say that it does not matter if one mixes up Kabgayi and Kamonyi. But the main question remains, and it is important in criminal proceedings because there is a danger of damaging the freedom and integrity of individuals. In fact, if the witness really knew Bishop Gasabwoya, he would have been able to mention directly and without any mistake the exact name of the diocese where the prelate worked as bishop. It was Kabgayi and not Kamonyi. It is not possible for somebody who really knew Bishop Gasabwoya to get mistaken about the name of a well known diocese like Kabgayi, where Bishop Gasabwoya worked as vicar general for many years! These are so many details which would have been necessary and sufficient for the judge to conclude to the disqualification of the witness. The same details lead to the recognition of the weakness of the evidence and, therefore, to the inadequacy of the proofs to justify the indictment of the 40 accused personalities.

The outrageously unwarranted charge is also found in the account of witness TAP-004 who, in order to accuse Kagame of being first level responsible of the killing of the Spanish from Médecins du Monde in Ruhengeri, merely says: *"it was impossible that the decision to kill the Spanish citizens was taken without prior knowledge or orders of Major General Paul Kagame himself"* (p. 51). No proof is adduced by the witness to show in what ways General Kagame would have been informed of the preparation and execution of the crime charged. And it is also necessary to prove that the planning of this murder was a matter under the direct command of RPA. The witness fails to do this and he merely makes questionable general claims. This can pass for the press, but it does not hold when it comes to the courts.

4.3 Unlikely charges

A big number of testimonies used by judge Merelles contain improbable adversarial claims in relation to the context of the time and the objective reality applicable in times of war.

4.3.1 Unlikelihood of the confidence gained by soldiers from the generals

In several pages of Merelles' bill of indictment, privates and low rank soldiers make allegations against generals without showing their capacity to have direct access and contact with the incriminated RPA senior officers. Sometimes, these so-called witnesses speak of the secrets they allegedly heard directly from Generals Paul Kagame, James Kabarebe and other senior officers of the army, without showing how they were able to have access to these secrets. Example: witnesses TAP-002, TAP-003 and TAP-043 mention *"the formal orders of Major General Paul Kagame for the indiscriminate massacre of the civilian population of Kigali (...) when Kigali was seized".* They mention also similar orders allegedly given in the same manner by Paul Kagame to Colonel Charles Ngoga *"to go down near the junction of the main roads leading to Gitarama and Ruhengeri and shoot and kill indiscriminately, and to prevent by all possible means the population from fleeing"* (p. 58). Logically speaking, how is it possible for private soldiers, in times of war, to capture extremely confidential radio messages coming directly from the highest commanders of the army? One needs not to be a soldier to understand that this is impossible.

The same unlikely accounts are found in several pages (16 in all!) which are devoted to witness TAP-002. This witness often goes back to the secrets which were allegedly confided to him by senior officers, especially Colonel Rwahama, who allegedly showed him priests who were detained by RPF in Byumba, among whom was Father Vallmajo, adding that Colonel Rwahama beat Vallmajo in his presence (p. 123). Elsewhere, the same witness says that *"he was informed by General Kayumba Nyamwasa that four Brothers or priests who were embarrassing during the operations in Congo were killed"* (p. 125). He adds that later, Capt. Joaquim Habimana, who was commanding a section of DMI operating in DRC at the time, revealed to him that *"he was the commander at the head of the group of those who carried out the killing of the four Marist Brothers"* (p. 125). Considering the quality of the information the witness possessed, it can be concluded that only an officer of the same rank as the suspects could be told about the preparation of the alleged acts. Yet TAP-002 confirms himself that he was of a very low rank compared to that of the officers to whom he attributes serious statements of admission of guilt. Without going far, it is difficult to think that a low ranking soldier can be given such important secrets from senior officers of the army concerning serious acts, even if that soldier is an intelligence officer as the witness introduces himself. If his position enabled him to collect intelligence for the command of RPA, it did not give him any guarantee or privilege of receiving military secrets in turn from his superiors, as if this was a bargain in exchange for having successfully discharged his duties. There are other ways of rewarding merits.

4.3.2 Unlikelihood of the methods and the scenes of massacres attributed to RPA

There is mention of a strategy allegedly used by RPA, consisting of *"preventing the displaced population in the camp of Nyacyonga from fleeing, using heavy arms positioned on Mount Jali, which caused the death of thousands of civilians",* writes Merelles. He then adds that *"bodies were cremated or buried in the camps of Bigogwe,*

Mukamira, and others were transported in trucks to common graves or cremating ovens in the forest of Gishwati" (p. 12). Anybody who followed the event mentioned, even if it was on television, saw that RPA left a humanitarian corridor for the population of Kigali, including the displaced persons of Nyacyonga, to enable them to leave the zone of combat. Journalists were there, images were broadcast, and they are available and can be viewed so as to clear the doubts. At the time, even Colonel Tharcisse Renzaho was seen among the population of Kigali heading to Ruhengeri, and he was talking to a journalist: *"The Tutsi spent thirty years outside before returning, we, we will be back in three months. This is a tactical withdrawal in order to get better organised".*

In addition, if Merelles is to be believed, how could RPF transport bodies in lorries in June 1994 from Nyacyonga (Kigali) to Mukamira (Ruhengeri), Bigogwe and Gishwati (Gisenyi), in the presence of a crowd of people who were at the time scattered everywhere on the roads, and not be seen by journalists, employees of humanitarian organisations and other people who were present? So many people could not have missed such an opportunity to publish this in the media and official reports. Then, it should not be forgotten that the camps of Bigogwe and Mukamira were still controlled by FAR! The town of Ruhengeri was seized by RPA on 14th July 1994 and Gisenyi on 17th July. How then could RPA take bodies to military camps which were still under the total control of FAR? Once again, if judge Merelles had taken the trouble of verifying the sequence of events, including a visit to these places in Rwanda, as we have always said, he would have realised the weakness of the testimonies collected in Europe and unhesitatingly closed them without further action.

4.3.3 Unlikelihood of military orders to civilian employees

The unlikelihood of the accounts can also be deduced from the witness identified as TAP-006 who is actually Sixbert Musangamfura, former member of MDR party and a close friend of Faustin Twagiramungu, and former chief editor of the newspaper *Isibo*. He told Merelles and Bruguière that he was *"the head of the civil secret service"* and that in that capacity, *"he had received specific orders to economize on ammunitions during the military operations being carried out at the time, and more particularly during the execution of persons or groups, which brought him to think that Joachim Vallmajo and the other priests were tortured and killed without being shot"* (pp. 36-37). Elsewhere, the judge tells us that TAP-006 is *"a civilian belonging to the Hutu ethnic group and that on 19th July 1994, he was appointed Secretary General of the Government of Rwanda until 22nd August 1994 when he was appointed Head of the Civil Secret Service of the politico-military Government of RPA/RPF".*

It appears to us illogical, if not impossible, that a civilian employee, whatever his title, would receive orders of a purely military nature during the time of war or immediately after the war. Was he a logistician of the Rwandese Patriotic Army? Merelles tries often to substantiate the statements of Sixbert Musangamfura basing himself on his title, but he frequently uses the words *"which brings him to think"*. This shows clearly that Sixbert Musangamfura is not an eyewitness of the events, that he rather bases himself on his anti-RPF sentiments to foment false charges motivated by hatred and revenge. If RPF killed

the Hutu en masse, as Musangamfura and after him Merelles claim, how could it leave a Hutu employee make a report of such massacres?

The same witness tells of the murder of Father Vallmajo in 1994 by claiming that his death had been planned in 1992 because this Spanish priest *"sent information outside Rwanda".* If already in 1992, RPF considered this priest a very dangerous element who should be killed and that, if Merelles is to be believed, RPF was an organisation which carried out systematic massacres of priests, why did it have to wait for two years to kill Father Vallmajo? If this murder was in the plans of RPF since 1992, we do not see why it had to wait another two years before carrying out this crime. Merelles should have asked himself all these questions and provided convincing answers before jumping directly into the legitimisation of insufficiently substantiated accusations, which are very obviously slanderous.

4.4 Contradictions in the evidence

Quite often, important contradictions are found in the bill of indictment submitted by Merelles. He thus writes about the murder of the Spanish volunteers that the motive of their murder was due to the fact that they had received from a certain peasant information about the killing *"of about fifty persons"* by RPA. He adds that *"the bodies had remained at the same place".* The same peasant had allegedly seen *"another massacre committed two days before, on 14th January 1997, at Nyakinama University campus".* The judge comments on this by saying that these volunteers then *"drove to this neighbouring locality so as to be able to see the countless bodies"* (p. 39). If this account is to be believed, RPA killed people and left the bodies at the scene of the killing for everybody to see. Yet, in many other places in his document, Merelles describes the method used by RPA as consisting of killing and immediately erasing the signs of the murder. He says that between 1994 and 1995, RPA carried out *"operations of mass transportation of bodies to Nasho, in the Akagera Park, to cremate them"* and claims that such operations were frequent (p. 53).

These two methods attributed to RPA reveal contradictions which could not be committed by a well organised and disciplined army which the judge himself recognises RPA to be (p.3). A well organised and disciplined army could not display bodies in Ruhengeri while hiding those in Kibungo and Byumba. What would have been the military advantage for RPA to use these two methods which have no similarity at all? And then, we should remind that an army which was fighting to stop the genocide, which was attending to the most urgent things first and which had limited logistic means, could not find time to consider the need of killing civilians who were not a threat to it and transport bodies tens of kilometres away! RPA was busy fighting to stop the genocide; it was in no way preoccupied with the killing of civilians on the only pretext that they were Hutu. If such was the case, how then can one explain today the presence of hundreds of thousands of Hutu living on all the hills of Rwanda, including those in Byumba and Ruhengeri, which RPA occupied for a very long period? What prevented RPA to exterminate them if really such an undertaking was part of its war strategy? A

conscientious investigating magistrate could not have failed to ask himself questions of this kind before proceeding to the validation of evidence.

4.5 Unjustified dismissal of previous findings of Spanish experts

Immediately after the murder of three humanitarian employees of Médecins du Monde, the Spanish police dispatched a rogatory commission to Rwanda which carried out an investigation in Ruhengeri from 7th to 17th May 1997 on the request of the Spanish Ministry of Home Affairs. This commission was composed of two specialists, Mr Juan Lopez Palafox, who was Chief Inspector of National Police, a doctor in odontology and specialist in legal-medical anthropology, and Mr Cristobal Espinoza Martinez, 1st Sgt of Warden Service, with qualifications as judicial police. The Commission was accompanied by the Spanish Ambassador to Rwanda with residence in Tanzania. The Commission carried out its investigation independently and indicated in its findings that it was not able to establish the exact identity of the perpetrators of the crime. Merelles himself recognises this by saying *"They could not determine exactly the perpetrators of the crime as a result of the police investigation carried out"* (p. 76).

Likewise, Médecins du Monde which employed these Spanish carried out its own internal investigation and concluded that there was no incriminating evidence against RPA. These two investigations which were carried out on the ground at a time close to the events could not lead to the identification of the perpetrators of the murder and contradict Merelles' findings which were based on evidence obtained abroad several years later from individuals who are opposed to the Government of Rwanda and to RPF. Merelles does not say why he preferred to dismiss the first findings which were realistic and close to the occurrence of the events and gave credibility to subsequent evidence he collected himself. He does not show any new elements revealed by his investigation to prove with certainty the implication of RPA. He merely interprets the events under the influence of biased evidence which he gathered. This is not a professional way of doing things, and it substantiates the argument of an investigation which is rather political than judicial.

4.6 Accusations based on quoting deceased witnesses

Some witnesses considered and used by Merelles as chief witnesses are dead or corroborate their accounts by referring to other persons who are themselves dead. Thus, Merelles often refers to TAP-007 while specifying that *"he is currently dead"* (p. 61). Yet, this witness levels very serious accusations relating to the political and military strategy of RPF. He also refers to the late Leonard Murefu, father-in law of the Head of State of Rwanda, by attributing to him accounts according to which he (Murefu) allegedly told him that in order to ensure their military victory, the political and military instructions of RPF advocated the elimination of President Habyarimana (p. 62). It is not serious to make this kind of charge while referring to a witness who has a very close relationship with the principal suspect, knowing well that that witness is dead.

Merelles makes the same mistake of referring to dead witnesses in the case of Colonel Lizinde when he says that *"before fleeing in December 1995, he (Lizinde) told witness TAP-007 that he had heard, over the telecommunications system of RPA, Paul Kagame personally ordering the massacres of civilians, saying literally: "get rid of these idiots"* (p. 65). He adds that *"Theoneste Lizinde confirmed also to witness TAP-007 that Paul Kagame had personally ordered the murder of the bishops and priests at Kabgayi, Gakurazo, in 1994"* (p.65). It is the same story with witness TAP-043 who admits to Merelles that the murders of Hutu politicians such as Emmanuel Gapyisi, Félicin Gatabazi, Martin Bucyana, Fidèle Rwambuka and others were carried out by RPA soldiers, and that the chief culprits were Karake-Karenzi and Charles Ngomanziza who, according to TAP-043, was his companion and friend but adding that he was dead (p. 108). This witness attributes the coordination of the murder of Gatabazi to Karake, basing himself on what he allegedly was confidently told by one of those who carried out this crime, Sgt Dan Ndaruhutse, adding that the latter had died in 2001 (p. 110).

This kind of indirect testimonies, which are moreover attributed to dead persons, are unusable in a case concerning such serious charges, more so since they are not made to strengthen other direct testimonies. In their present state, they cannot legitimately be admitted as incriminating elements to the extent that their authors are not there to confirm or invalidate the serious accounts imputed to them. Evidence of dead persons is admissible in court only if it proves to be so irrefutably substantial as to be credible. Such is the case also when they are vindicated by a document written by the persons referred to when they were still alive, validating the accounts attributed to them. This precaution is essential in criminal proceedings where there is a danger of jeopardising the rights and fundamental freedoms of the indicted persons.

4.7 Accusations based on non existent scenes of crime

The distinctive feature of an indictment is that it must be extremely precise from all points of view. The indictment submitted by Merelles is distinguished by the invention of names of places where crimes are supposed to have been committed but which do not really exist. Thus, Merelles mentions massacres which took place at Cymba, Kivube, Butaru and Nkana (p. 4) and Kanana (p. 16). There are no such places in Rwanda, and this means that either the judge has been manipulated, in which case he is not serious, or he has knowingly participated in the fabrication of false accusations and, in such a case, he has committed a professional and criminal mistake in respect of which he should be prosecuted. Admittedly, one can grant him a minimum of good faith by advancing that this is due to the misspelling of names. This excuse does not hold water because in criminal proceedings, where individuals are charged with serious allegations with the risk of damaging their physical and mental integrity, inaccuracies should not be accepted. Merelles is after the arrest, detention and conviction of a significant number of senior officers of the Rwandan army; he cannot therefore allow himself to base his dream on errors

5. Choice of biased and tendentious documentary evidence

The allegations found in Merelles' bill of indictment are an exact copy of the allegations already made by individuals and groups hostile to RPF, even individuals implicated in the genocide of the Tutsi, some of whom are being tried or have already been convicted by the International Criminal Tribunal. Merelles uses documents provided by theses small circles to legitimise his indictment, and this justifies the questioning of both the authenticity of the alleged facts and the reliability of such evidence.

5.1 Using documents of ICTR prisoners responsible for the genocide of the Tutsi

In many pages of his indictment, Merelles mentions massacres allegedly committed in the prefectures of Ruhengeri and Byumba, repeating at length the figures, the facts and the allegations mentioned in such documents as the one published in January 2000 by the prisoners in Arusha bearing the title: *"Crimes committed by the Rwandese Patriotic Front: crime of genocide, crimes against humanity and violation of Article 3 common to the Geneva Conventions and the Additional Protocol II".* In this document, the accused of ICTR attempt to exculpate themselves by giving their version of the facts, where they impute the entire responsibility of the *"Rwandan tragedy"* on RPF. It is not surprising that they are doing so because since their defeat, they have turned the negation of genocide into the argument for their defence by diluting the killings into some kind of anger of the Hutu population who were disgusted by the brutal death of President Habyarimana, as if he was the president of only one ethnic group. It is thus amazing to see Merelles use the allegations of individuals being prosecuted for the crime of genocide or who have been convicted for this crime by an international jurisdiction to indict their opponents from RPF, who are in this case the victims of this same genocide. He should have realised that these accused of ICTR are not in a position of neutrality, even moral integrity, for him to use the charges they level concerning the acts for which they are responsible.

Some illustrative examples :

On pages 62-63 of the indictment, Merelles claims that the RPF had a military, political, diplomatic and media strategy which consisted in *"carrying out planned terrorist acts against the civilian population, (...) provoking the anger of the Hutu by killing their fellows, (...) demonising the government of Habyarimana [via] radio Muhabura",* etc. The same is found in the document of the accused of Arusha where RPF's methods are summarized as follows: *"to sow terror among the population through massacres in the areas close to the front and terrorism elsewhere in the country; to make the country ungovernable and undermine the internal cohesion through subversive and propaganda activities by infiltrators and through radio Muhabura: to provoke violence and internal upheavals of an ethnic and regional nature (...)".* There is no doubt as to the similarity of these two accounts.

The bill of indictment by Merelles mentions the massacre of 40,000 people in February 1993 in Byumba (p. 5). The document of the accused of ICTR speaks of 40,200 people (p. 7). In his indictment, Merelles accuses RPF of having committed *"since July 1991 to September 1992, 45 terrorist attacks in the whole country. A second campaign of*

terrorist acts was carried out between March and May 1993, most of which were carried out in the markets, post offices, minibuses, taxis, hotels and bars, all this with the aim of causing the greatest harm to the civilian population" (p. 6). The document of the accused of ICTR increases the number which is estimated at 62 over the same period (pp. 6-11). The similarity is obvious with regard to the period referred to. None of the two documents mentions the period before July 1991, and yet there were grenade attacks well before this date, and this shows that Merelles' document, which was published at a later date, was influenced by that of the accused of Arusha. Both documents are also similar in the presentation of the events relating to the murder of Gatabazi, Bucyana, Gapyisi and Rwambuka, which is attributed to RPF, by putting the responsibility on General Karake-Karenzi[14]

5.2 Using documents published by authors openly hostile to RPF

The other document with similarities with the indictment by Merelles is the one published on 8th December 1995 by a political dissident in exile, Mr. Sixbert Musangamfura entitled: *"I accuse RPF of the genocide of the Hutu population, of ethnic cleansing and call for an urgent international investigation".* The number of people whose death is imputed on RPF in Byumba and Ruhengeri is exactly the same in the two documents. On page 11 of the indictment, the judge writes that from July 1994 to July 1995, RPF killed a total of 312,726 people, and he gives a breakdown per prefecture. The same data are given by Musangamfura in the above mentioned document, which proves that Merelles copied them as they are. It is the same story with the other facts mentioned by Musangamfura such as the cremation of bodies in Akagera Park, the alleged massacres in the stadium of Byumba, etc.

The other visible sources of information used by Merelles are the documents of Filip Reyntjens and White Father Serge Desouter, particularly the document they published together in June 1995 entitled: *"Rwanda: Human Rights Violations by RPF/RPA".* This document repeats the charges for alleged massacres attributed to RPA, without the authors bothering to carry out investigations on the ground with a view to verifying the accuracy of the allegations. Father Desouter repeated the same accusations in a deeply revisionist book entitled: *"Rwanda: The Trial of RPF. Historical Review",* in which he clearly rejects the genocide of the Tutsi and qualifies it, saying that if this genocide took place, RPF is the sole responsible: *"the widespread and tragic massacres of 1994 were not the result of a plan orchestrated by the government or by FAR as a whole. (...) If there has been any planning and organisation of genocide, they have to be found within RPF who are the ultimate perpetrators[15]".*

The various communiqués by the Centre for the fight against impunity and injustice in Rwanda headed by Joseph Matata in Brussels, one of the greatest revisionists of the

[14] Document of the accused of ICTR, pp. 12-13; Bill of indictment by Merelles, pp. 6-8

[15] S. Desouter, Rwanda : le procès du FPR. Mise au point historique, Paris, L'Harmattan, 2007, pp.195-196. Desouter is a Belgian White Father who lived in Rwanda for 18 years and who defends the ideas of *Hutu power*.

genocide of the Tutsi and a man who does not hide his hatred of RPF and President Kagame, have also been extensively used as a source of information by judge Merelles. Many facts used by Merelles have clearly been lifted from Matata's communiqués.

In addition, Merelles has used other documents published by Tutsi deserters from RPA who left Rwanda for several reasons, which did not necessarily have to do with security, and those among Hutu exiles who went to Europe on political and ideological grounds. Many of them failed to accept the mode of government of a new Rwanda where all the citizens enjoy the same rights. Having been used to the selfish management of the affairs of the State since the regime of Kayibanda, the defeat of FAR and the loss of the advantages of a monopolistic power did not go down well with them. Some of them did not necessarily participate in the genocide, but they did not accept that the Tutsi occupy high level positions of responsibility and were frustrated after some years. Unable to accept this mode of government of a new Rwanda which is based on competence and not on ethnic groups, they preferred to go into exile abroad and have since spread false accusations against RPF so as to be granted political asylum easily. Their documents are the ones which are held high today by Bruguière and Merelles to support their indictments. We can mention documents by Jean-Pierre Mugabe, Joseph Ruyenzi, Alype Nkundiyaremye, Félicien Kanyamibwa, etc... They are all available on Internet. Admittedly, they can be used profitably by ideologists, but for them to be admitted in court as incriminating evidence, there is a gulf to cross.

The other important sources of information used by Merelles consist of documents by missionaries. These include faxes by White Fathers in Rwanda published periodically since 1st October 1990 to July 1994 by Guy Theunis, Jef Vleugels and Henri Blanchard, as well as the communiqués issued by the Xaverian and Combonian Fathers of Bukavu and Goma. From the beginning of the conflict in 1990, these missionaries positioned themselves clearly on the side of the government of Habyarimana and openly against RPF[16]. How can they pretend today to give objective information when all along the history of Rwanda, they never showed a spirit of independence and neutrality? It can even be said that they were stakeholders in the conflict in terms of bias in their statements.

5.3 Obtaining illegally UN documents and their inadmissibility

In criminal proceedings, the way the evidence is obtained does not depend entirely on the freedom of the judge. Evidence must be obtained through a well defined procedure in order to protect their effectiveness and avoid abuses which may tarnish their validity. Thus, UN documents are protected by professional secrecy and can only be obtained following the formal decision of the Secretary General. Similarly, individuals working or having worked for UN cannot testify as witnesses, except with the authorisation of the Secretary General. This rule is valid for both officers still in office and those who have ceased to work for UN. The duty of discretion remains applicable with regard to all the actions carried out in the service of UN.

[16] Cf Bizimana Jean Damascène, *« L'Eglise et le génocide au Rwanda. De l'idéologie à la négation* », Revue La Nuit Rwandaise n°2, avril 2008.

In the case of judge Bruguière and judge Merelles, it should be admitted that they have breached the procedure of obtaining UN documents by asking their authors who had no competence to issue them legally. This is the case with the memorandum written in March 1997 by Michael Hourigan, an Australian former investigator who worked for ICTR prosecution in Kigali. In the course of his duties, this investigator, with two of his colleagues, was allegedly contacted by three RPA soldiers who were certainly looking for an escape route to leave Rwanda. The soldiers were telling them that they knew who was responsible for the attack against the plane of Habyarimana, underlining that they were members of the commando that shot it down. After analysing these testimonies, the team of investigators and the chief prosecutor, Louise Arbour, concluded that the revelations obtained had no substance and did not deserve acceptability. But then we see Hourigan who is not satisfied with the decision of his immediate supervisor and who subsequently breaches several rules of procedure applicable at UN.

In fact, when he left his post at ICTR, he was appointed at the UN headquarters in New York in the internal control system department. During this period, out of his own initiative and based on the information obtained when he was working with ICTR, he wrote a memorandum on the attack[17]. He gave the document to UN which classified it in its archives. One wonders what was the motivation of Hourigan which prompted him to write a document relating to the duties he no longer exercised. But Hourigan committed the greatest abuse in February 2000 when he organised the leakage of his document, which belonged totally to UN, by giving it to a Canadian paper, The National Post, which published the main part of its contents on 1st March 2000. After its publication, Hourigan's former colleagues who were members of the same team of investigators contested the legitimacy of the document.

Mohamed Othman, who was the officer-in charge in the office of the prosecutor in Kigali between February and May 1997 when Hourigan was working in Kigali, declared officially that the so-called witnesses they had met had no credibility at all, thus singling out the absence of seriousness in Hourigan's revelations. Talking about these witnesses, another former investigator added more firmly: *"As far as we were concerned, it was over; we were no longer talking about it. It made us laugh. (…) some other crooks again who (…)* [wanted] *to earn some money. They were not even credible[18]".* Hourigan's informers had not been considered credible by ICTR and their evidence was therefore rejected. The fact that Hourigan took into consideration this information contrary to the orders of his institution appears then to have been influenced by other intentions than those of judicial truth. It is certainly for this reason that he gave his document to the press and to the French and Spanish judges in breach of his duty of discretion.

In addition to this illegal act committed by Hourigan, which alone is sufficient to lead to the rejection of using his document as judicial evidence, the method used by Bruguière and Merelles to obtain it is also illegal, and documents obtained in this way are inadmissible in court. In fact, after the existence of Hourigan's document became

[17] Cf UBUTABERA newspaper of 9th May 2000
[18] Ibid.

publicly known, Bruguière asked for it from ICTR and the Tribunal refused. Then Bruguière turned to Hourigan himself to ask for the document and his hearing on 29th December 2000. Merelles applied the same method. What should be said ultimately is that this evidence of a former UN employee involving a period when he was in office is inadmissible in court, as long as he has not obtained prior authorisation of the UN Secretary General. In addition, Hourigan is not entitled to possess and communicate UN documents to any individual or institution whatsoever without the approval of UN. These documents are the sole property of UN, and it is this organisation alone that is entitled to decide on its communication and utilisation for whatever end.

6. Disregarding compulsory expertise in this instance

Within the framework of a criminal investigation concerning facts of important seriousness such as murder, the judge must not disregard the use of specialists in order to enlist the technical expertise which would validate the material findings about the offence. Their investigations are necessary, useful, and even compulsory in the case of flagrant offence[19]. Considering the complexity of the alleged crimes in Merelles' indictment, the designation of experts was inevitable with a view to determining the accuracy of the allegations contained in the testimonies he had collected. His indictment contains extremely serious allegations which can only be confirmed on the basis of investigations carried out by specialists. The same goes with the accusations concerning the cremation of bodies or the hiding of bodies, to mention just this example. In order to be certified, such an accusation should be submitted to the technical expertise of forensic pathologists operating in the alleged places of the offence.

7. Errors in the legal characterisation of the principal adduced facts

It is usual in an indictment that the judge states the facts on which are based the legal proceedings, and then to indicate in which ways these facts constitute a criminal offence. While carrying out this exercise of characterisation, Merelles committed various errors, the most important of which are summarized below.

7.1. Invention of a genocide suffered by the Hutu, negation of the genocide of the Tutsi

From the beginning of his indictment, Merelles writes that RPF had the intention of *"carrying out the operations of systematically eliminating the ethnic Hutu, Hutu intellectuals and leaders, as well as monks/nuns and missionaries considered as collaborators of the Hutu"* (pp. 4-5). By so doing, the judge implies that RPF allegedly committed a genocide of the Hutu, but he does not produce any serious proof of the existence of this intention, less still any proof of the effectiveness of the alleged crimes. He merely reproduced without any verification the figures and charges made by individuals opposed to RPF which may be motivated by hatred, lies and revenge. This kind of proof is very poor to conclude to the existence of a genocide and indict the highest authorities of a Government. Let us recall that in its conclusions, the Commission

[19] Code of French Criminal Procedure, Art. 60 and 74

of Experts put in place by the UN Security Council on 1st July 1994 by Resolution 935 to investigate the events that had taken place in Rwanda in 1994, reported that it had not found *"evidence indicating that Tutsi elements had carried out acts with the intention of destroying the Hutu ethnic group as such in terms of the 1948 Convention on the prevention and punishment of the crime of genocide. It did not either find signs showing that the massacres of the Hutu committed by RPF soldiers were systematic, sponsored or approved by Government leaders or army commanders[20]".*

Revisionism is also the crux of the bill of indictment by judge Merelles and is characterised by two aspects. Firstly, Merelles admits that "*the massacre of the Tutsi who had not left the country in 1959 was foreseeable"* (p. 10). By so saying, he accepts that there was the intention of exterminating the Tutsi and that the conditions for the possibility of committing this existed. The problem is that in the same breath, he corrects himself by saying that *"this foreseeable massacre of the Tutsi was going to be committed as a reaction"* to the war prosecuted by RPF. In other words, the genocide of the Tutsi would no longer be a deliberate and intentional act, but a legitimate reaction to the war. Besides the fact that one may question this way of confusing arbitrarily armed conflict and genocide, one may also legitimately wonder in which way the war between two fighters justifies a genocide of non-combatant innocent people. This is one of the arguments used by revisionists. For example, listen to what one of them says. Father Serge Desouter says: *« RPF leaders knew that their actions would inevitably result in large scale massacres[21]".* There is no worse revisionism, no worse cynicism than criminalising the victims.

Secondly, Merelles brings out his revisionism when he writes that one of the objectives of RPF is *"to eliminate the biggest number of the Hutu ethnic group"*. Such a claim would have required that the judge bases his assertion on the founding texts of RPF, its actions or other convincing signs such as speeches or documents by its leaders, to show the existence of this objective of eliminating the Hutu. Merelles' bill of indictment contains no single solid element showing that he is in possession of sufficient and serious evidence proving the reality of this alleged genocide committed by RPF on the Hutu. By so doing, the judge hides the genocide of the Tutsi, the only one recognised internationally by both the UN Resolutions[22] and the ICTR jurisprudence.

7.2 Erroneous qualification of RPF as a terrorist organisation

Right from the first lines in his indictment, Merelles describes RPF as *"a group with a political and military structure, highly armed and organised, which launched a series of activities of a criminal nature on the Rwandan territory from Uganda in October 1990 to date".* Under the international law, terrorism is characterised by three aspects:

- Acts of violence likely to cause death or serious bodily injuries;

[20] Final Report of the Commission of Experts submitted in accordance with Resolution 935 (1994) of the Security Council, S/1994/1405, 9th December 1994, p. 34
[21] S. Desouter, Rwanda : le procès du FPR. Mise au point historique, L'Harmattan, 2007, p. 194
[22] Resolution 925 of 8th June 1994, Security Council; Resolution 935 of 1st July 1994 (S/1994/1125).

- Individual or collective undertaking aimed at the commission of such acts ;
- A declared aim: to create terror among the public[23].

Now, in his description of the facts in support of his view, judge Merelles does not give sufficient and serious proofs which might be convincing with regard to the terrorist nature of RPF in the light of these three elements contained in the law. On the other hand, the judge clearly contradicts himself by describing RPA soldiers as fighters who are *"well trained militarily, well disciplined and well equipped"* (p. 3). How can then an army with a recognised discipline be at the same time characterised by criminality equalling that of a terrorist organisation?

7.2.1 From 1990-1994 : RPF was a national liberation movement in terms of the Public International Law

Considering the customary public international law, there is justification to qualify RPF as a national liberation movement which meets the required legal conditions. In fact, there is an important resolution of the United Nations General Assembly, Resolution 2625-XXV of 4th November 1970 entitled *"Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance to the Charter of the United Nations"*. This resolution supplements another important resolution adopted by the same General Assembly, Resolution 1514 (XV) of 14th December 1960 entitled: *"Declaration on the Granting of Independence to Colonial Countries and Peoples"*. These two resolutions established a very important principle called *"peoples' rights to self-determination"* which was the basis for the granting of independence to the colonised countries.

In this resolution 2625, it is stated that when States use coercive measures to deprive peoples of their right to self-determination, their freedom and their independence, *'these peoples shall be entitled to solicit and receive assistance in accordance with the rights and principles of the Charter of the United Nations"*. Among these rights enshrined in the Charter of the United Nations is the right to nationality. Now, RPF was fighting exactly in order to recover this right to nationality which had been denied to Rwandan refugees for more than thirty years. In this context, the war which was launched on 1st October 1990 is not at all illegal in terms of the public international law and cannot be qualified as a terrorist act.

7.2.2 RPF was a fighter respecting the international humanitarian law

From 1st October 1990 to 6th April 1994, there was an internal armed conflict in Rwanda opposing two forces: FAR and RPF. RPF was party to the conflict in the same way as FAR. On the other hand, from the beginning of the armed conflict, RPF, through the statements and communiqués of its leaders, declared itself as a player who undertook to respect wholly all the provisions of the international humanitarian law in the prosecution

[23] Cf C. Bourgès-Habif, le terrorisme international, in H. Ascensio, E. Decaux et A. Pellet, Droit international pénal, Paris, Pedone, 1999, pp. 457-466

of its military operations. Once a fighter undertakes to apply international rules governing the conflict, it becomes a legal entity which cannot be associated to a terrorist organisation. Indeed, a terrorist organisation operates behind the scene and always uses terror to express its claims. RPF has never worked like that. The proof is that it initiated negotiations right from the first months of the conflict (Gbadolite, Arusha,....) with the aim of finding a peaceful settlement. These negotiations were supervised by the Heads of State of the region, either through regional organisations (OAU), or international organisations (UN). If all these international stakeholders, who were well informed, had discovered the slightest sign of terrorism in RPF, they would never have collaborated with such an organisation.

One of the questions one would legitimately ask is the reason why Merelles qualifies RPF as a terrorist organisation despite the absence and the weakness of proofs in favour of this qualification. It is not difficult to imagine the answer. In Europe, the concept of a terrorist organisation has a strong echo because it reminds of the horrors committed by Nazi groupings during the genocide of the Jews. The Europeans are therefore sensitive to this type of criminal organisations and are easily prepared to hound and punish their members. Similarly, the current international context is still haunted by the still vivid memory of the deadly attacks on the United States on 11th September 2001 which resulted in a strong international commitment to do everything possible to prevent and punish severely terrorist actions. By calling RPF a criminal organisation, judge Merelles, following the example of Bruguière, is trying to harp on this sensitivity with a view to obtaining a universal condemnation of RPF in particular, and of the Government of Rwanda in general, and get them isolated and weakened on the international scene.

7.3. Breach of the respect of the authority of the res judicata

Some acts which Merelles wants prosecuted are no longer likely to be brought before a court, because they are covered by the authority of the res judicata. In fact in criminal law, a well known rule decrees that nobody may be tried twice for the same offence: *Non bis in idem*. This rule was established by the International Covenant on Civil and Political Rights (Art. 14, §7) and by a customary practice recognised internationally. All the States of the world accept this principle. This means that the authority of the final res judicata in a State is binding on a criminal judge of any other State, be it in the case of acquittal or conviction of the concerned person. Now, Merelles is asking for legal proceedings against General Ibingira for the attack on Kibeho camp for the displaced in 1995, when General Ibingira has already been tried by the military tribunal in Rwanda on 30th December 1996 and sentenced to 18 months imprisonment. The case is closed and cannot be subject to proceedings, except if it can be proved that this trial was an enactment aimed at exempting the accused from justice. Merelles has not proved it and as such, he has no right to take legal proceedings against General Ibingira for an act which has been finally decided.

7.4. Violation of the immunity of diplomats from legal proceedings

Under the Vienna Convention of 18th April 1961 relating to diplomatic relations, a diplomatic employee cannot be subjected to any form of arrest or detention. The State where he is accredited, as well as any State he is transiting while on mission, must prevent *"any attack against his person, his freedom or his dignity"* (Art. 29). The diplomatic employee must therefore enjoy his freedom of movement, and this implies immunity from legal proceedings before both civil and administrative jurisdictions and criminal jurisdictions. Judges have no powers to try persons enjoying immunity as long as the latter are in office. Even the rule of universal competence cannot disregard this prohibition. Therefore, the arrest warrant issued against the Ambassador of Rwanda to India, Kayumba Nyamwasa, is in breach of the Vienna Convention governing diplomatic relations.

7.5. Hiding the lawfulness of the armed conflict launched by Rwanda in DRC

Under the public international law, Article 51 of the Charter of the United Nations sanctions self-defence in the case of an armed attack launched by one State against another. A problem arose during the Nuremberg and Tokyo trials concerning the attacks launched by Germany against USSR and Japan against the Pearl Harbour American base. The judges had to rule on whether a State could base its actions on preventive self-defence. The two international tribunals were positive, noting that the right to self-defence *"implies the right of the State threatened with an imminent attack to judge in the first place whether it is entitled to use force*[24] *"*. In short, under the customary international law, a preventive action in a foreign land can be justified if there is a pressing and urgent need of defence. Rwanda was in such a situation before attacking DRC. It should be recalled that since their defeat after committing the genocide of the Tutsi and their settlement in DRC, ex-FAR frequently launched incursions in Rwanda and committed mass crimes on the civilian population. They committed very many terrorist acts such as attacks against buses, government offices, schools, prisons, etc. DRC supported these acts by granting asylum and logistic support (arms, training grounds, ...) to armed elements who attacked the Government of Rwanda. These criminal forces were stationed in camps which were close to the border with Rwanda.

In this case, Rwanda was entitled to defend itself as long as DRC tolerated the fomentation of civil war and genocide against it from its territory. DRC had not shown any concrete initiative to prevent military activities of ex-FAR and the militia who launched armed attacks against Rwanda. On the contrary, the regime of Mobutu helped ex-FAR by organising, arming, training, assisting, financing and encouraging in all possible ways criminal activities against the Government of Rwanda. Rwanda therefore prosecuted a lawful preventive war which was justified by the fact that armed elements, with the support of DRC, violated its national sovereignty and prepared to launch an imminent and large scale attack against it. In such a case, it is not justified to talk of Rwanda's war of aggression against DRC because Rwanda acted within the framework of self-defence.

[24] Procès des Grands criminels de guerre. p.217 and p. 226 ; The Tokyo Judgement, p.377-382

CONCLUSION

The reader of the preceding pages has certainly understood and noticed that the accusations launched by Bruguière and Merelles are not based on tangible facts which constitute international offences. Their occurrence is not sufficiently proved, less still the responsibility of the alleged perpetrators. It is the same with the acts of genocide allegedly suffered by the Hutu and committed by RPA, the crimes against humanity and war crimes which are attributed to RPA, as well as acts of terrorism in which RPF members are implicated. Judge Bruguière and judge Merelles merely repeat allegations made by embittered political opponents or by military deserters from RPA or from Rwandese Defence Forces (RDF), without carrying out the necessary verifications to establish the truthfulness of the facts.

Their investigations were carried out in breach of the rules of procedure applicable not only in France and Spain, but also at the international level, particularly in the inquisitorial systems where Bruguière and Merelles operate as investigating magistrates. It is in this way that the requirement of conducting investigation on incriminating facts and exonerating evidence was disregarded, as was the secrecy of investigation, thus contributing to a serious infringement of the presumption of innocence of the unfairly incriminated Rwandese personalities. The lack of respect of these rules of procedure in criminal proceedings leads naturally to the nullity of the case being investigated.

The great majority of the charges listed by the judges carry an ideological, political, ethnic, racist and revisionist connotation. Thus in justifying the legal proceedings, the judges wrongly lend monarchist and expansionist intentions to RPF. They distort the historical truth about the crimes recognised internationally by negating the evidence of the genocide of the Tutsi in order to absolve its perpetrators and make RPF an actor of genocide in the same way as the proponents of the Hutu Power who were defeated in 1994. The judges sow confusion by masking the criminality of ex-FAR and the Hutu militia in the period 1994-2002, during which they carried out bloody infiltrations in Rwanda with a view to pursuing the genocide and killing the Hutu who collaborated with the Government which was put in place on 19th July 1994, and the civilian population who denied them hospitality and solidarity.

We cannot but recognise that both judges, Bruguière and Merelles, espouse the arguments of the perpetrators of genocide and share their cause by action and omission. On the basis of this evidence, it emerges that the arrest warrants issued by the two judges lack any legal foundation and fall within the province of a fight which should have been part of political disputes and not a matter for the courts. The stakes are eminently political. This assertion of an investigation which is more political than judicial is recognised by the complainants in Bruguière's case, as shown by this statement by Mr. Laurent Curt, lawyer of Mrs Jacqueline Héraud, widow of the captain of the Rwandan president's

Falcon: *"The order issued by Bruguière in November 2006 against Kagame and his close aids is totally remote controlled. It helps to clear France from its responsibilities in Rwanda and weighs down on an ideal culprit. This is an investigation which has nothing legal in it. It is a political case. His accusations are baseless, the case has nothing of substance, No serious element, no serious charges. It is astonishing. My clients and myself, we have never seen a thing like this! For many years, the family of my client preferred to remain in the back seat. This case was too painful. It was necessary to mourn. And then, her children wanted to know. But then, it is worse than anything else. We left ourselves to be manipulated*[25] *".*

Consequently, this way of using justice and the law for political motives is a very recent innovation which is being introduced in international criminal proceedings. There is no doubt that it represents a big danger for international justice and the rules of law which usually guarantee justice to genuine victims. If judges start giving credence without discretion to arguments of political opponents, defectors of an army or individuals in search of conditions for a better life in the West, up to the point of accepting to indict the highest authorities of a poor State, it becomes necessary to act urgently to stop outright this way of conceiving justice. It is necessary to henceforth put in place at the international level, organs of supervision and punishment of judges who overstep and abuse their powers of investigation. It is also necessary to put in place very precise rules of international criminal procedure which fix and determine the competence of national judges in case of international crimes. Otherwise, the drifts affecting Rwanda today will occur tomorrow against another poor State. The French and Spanish scenarios presented here should serve as points of reference to international diplomacy, and African diplomacy in this case, so that the law is not used as a weapon wielded by powerful States to intimidate, harass and humiliate poor States. The security of our States depends on this.

Dr BIZIMANA Jean Damascène
Kigali, 15th May 2008

[25] Statement by Mr Laurent Curt to the writer Sébastien Spitzer, Contre enquête sur le juge Bruguière. Raisons d'Etat. Justice ou politique ?, Paris, Editions Privé, April 2007, pp.237-238. See also Entretien de Me Curt avec Mehdi Ba, Golias Magazine, March/April 2005, n°101, pp.28-40